IN THE MATTER OF EMAIL LIMITED

An application under sections 657A, 657D and 657E of the Corporations Law by Email Limited for declaration and orders concerning a takeover bid by Smorgon Distribution Limited for ordinary shares in Email Limited

REASONS FOR DECISION

INTRODUCTION

1. The Panel in this matter is made up of Annabelle Bennett (sitting President), Michael Tilley (sitting Deputy President) and Karen Wood.

2. The matter concerns an off-market takeover bid for all of the ordinary shares in Email Limited (***Email***), by Smorgon Distribution Limited (***Smorgon***), in relation to which Smorgon lodged and served a bidder's statement and offer on 2 May 2000. Email applied for a declaration under section 657A of the Corporations Law (the ***Law***) that unacceptable circumstances exist in relation to the bid and for orders under sections 657E (interim) and 657D (final) in relation to the bid.

3. On 1 June 2000, we accepted certain undertakings from Smorgon and revoked an order under section 657E of the Law which prevented Smorgon from dispatching offers under the bid. On performance of the undertakings we dismissed Email's application. These are our reasons for those decisions.

BACKGROUND

The parties

Email Limited

4. The following paragraphs are taken from the report prepared by SG Hambros Australia Limited dated 17 May which forms part of the bidder's statement (the ***Hambros report***):

> *"Email is a diversified industrial company with interests in metals, household appliances, security products and meters. It is listed on the ASX and based on the closing share price on 16 May 2000 has a market capitalisation of $788 million.*[1]
>
> *In 1998, Email announced a major restructure and has subsequently sold or closed several businesses.*
>
> *Following the restructure in 1998, Email operates with four divisions:*

[1] Almost entirely made up of 272 million ordinary shares, but 100,000 $2.00 preference shares are also quoted, and there are executive options over ordinary shares.

- *Email Metals;*
- *Major Appliances;*
- *Lockwood Security Products; and*
- *Metering.*

The Appliances Division manufactures a range of whitegoods including refrigerators, freezers, cookers, ranges, washing machines, dryers, dishwashers and air conditioners.

Operations have historically been conducted by three subsidiaries:

- *Kelvinator Australia Pty Ltd;*
- *Westinghouse Roseberry Pty Ltd; and*
- *Simpson Holdings Pty Ltd.*

Major acquisitions by the Appliances Division have included … in 1999, Southcorp's CDH whitegoods operations for $107 million. CDH had sales for the year ended 30 June 1998 of approximately $350 million and was reportedly making annual losses of $5 million to $10 million. The acquisition added the "Chef", "Dishlex" and "Hoover" brands.

Email is currently integrating CDH into the Appliances Division with management expecting significant savings from integrating sales and marketing, production, distribution and administration functions. In addition, the increase in volumes should improve raw material purchasing prices and production efficiency."

Smorgon Group

5. The bidder, Smorgon Distribution Limited, is a wholly owned subsidiary of Smorgon Steel Group Limited (***SSGL***). SSGL produces, markets and distributes a broad range of steel and steel products. SSGL was listed on the Australian Stock Exchange on 3 February 1999, prior to which it was a private company owned by the Smorgon family. SSGL is Australia's second largest producer of steel with a production capacity of 850,000 tonnes per annum. It is vertically integrated from scrap collection to steel manufacture and distribution. SSGL employs more than 7,000 employees and has over 50,000 customers within Australia. At 26 May 2000, the market capitalisation of its ordinary shares was $1,057 million.[2]

[2] This information is taken from SSGL's web page: www.smorgonsteel.com.au

THE BID

Off-market full bid

6. Smorgon's bid is an off-market offer for all of the ordinary shares in Email. It is subject to the following conditions:

    a. that Smorgon receive acceptances for enough shares to allow it to compulsorily acquire the remaining ordinary shares in Email;

    b. that no insolvency, external administration, change of capital structure or major change of assets occurs in relation to Email;

    c. that ASX's All Industrials index not fall below 4800; and

    d. that the takeover not trigger a right to terminate any licence held by Email to use intellectual property.

7. If Smorgon is able to acquire all of the ordinary shares in Email, it will be able to seek to acquire the executive options and the Email preference shares, pursuant to Chapter 6A of the Law.

Consideration

8. The consideration offered by Smorgon for each ordinary share in Email is $1.85 cash and a convertible redeemable appliance preference share (a ***CAP***) in Smorgon.

Funding

9. As noted above, funds for the bid are being provided by SSGL which is in turn borrowing from the National Australia Bank. The obligation to provide funding is conditional upon SSGL receiving those funds (or funds from other sources acceptable to SSGL).[3]

CAPs – terms and conversion

10. Email Metals is a steel products distribution business. Smorgon wishes to merge that business with its own similar operations. It proposes to sell Email's security products and metering businesses.

11. Smorgon would prefer to return the Appliances business to Email shareholders. It proposes to do this by means of the CAPs, which are intended to convert into equity in a company to hold the Appliances business (the ***Appliances Company***). At present, Smorgon is unable to say which company would be used to hold the Appliances business or

[3] Paragraph 19.3 of the bidder's statement.

quite how it would effect the conversion of the CAPs into equity in that company.[4]

12. In paragraph 5.13A of its bidder's statement Smorgon states that it must:

"use all reasonable efforts to do all things necessary to bring about the conversion or exchange of the CAPs as contemplated in paragraphs 5.11 and 5.12 in accordance with the statements contained in this Bidder's Statement as soon as reasonably practicable after the CAPs have been issued under this Bidder's Statement."

13. Smorgon's obligations under paragraph 5.13A only cease if:

"an independent person appointed for this purpose by the Corporations and Securities Panel is satisfied, on reasonable grounds, that, despite the Bidder investigating alternatives to achieve the main objective which overcome any difficulties

(f) it will not be practicable or feasible to establish or list on the ASX a company which owns, directly or through a wholly owned subsidiary, the Appliance business; or

(g) that this would result in undue expenses or tax for the Bidder or any subsidiary."

In these circumstances Smorgon must use reasonable endeavours to sell the Appliances business. If the price it receives for the business exceeds $1.04, the higher amount becomes the nominal value of the CAPs for preference dividends and redemption. Conversion or redemption can only be initiated by Smorgon, and not by a holder of a CAP. Those obligations are also incorporated into the terms of issue of the CAPs, parts of which are set out in Annexure A to these reasons.[5]

HISTORY OF THE BID

The pre-bid purchase

13. On 30 April 2000, Smorgon purchased 5.4% of Email's ordinary shares on market for prices up to $2.89. After this purchase, for the bid to comply with subsection 621(3), the total consideration at the time the offer is made must equal or exceed $2.89 and accordingly the CAPs must be valued at $1.04 or more.

[4] If the bidder is used as the Appliances Company, the CAPs will be converted into ordinary shares. If another company is used as the Appliances Company, the CAPs will be exchanged for ordinary shares in that other company. When we refer to conversion of the CAPs, we mean conversion or exchange.
[5] These terms reflect changes made after Email's application was made, as narrated below.

The $1.04 midpoint

14. At the time of the on-market purchase, Hambros had given Smorgon a report which gave a range from 87c to $1.21 for the value of the CAPs, but did not cite a particular value for the CAPs . In oral evidence, Mr Hatfield of Hambros stated that after the terms of the CAPs had been settled and the valuation range had been worked out, he met with Smorgon and its advisers and they discussed what value would be selected if a single point in the range had to be chosen. Smorgon and its advisers said that they would choose the mid-point, which is $1.04. Mr Hatfield agreed with this assessment and was comforted because his view is that the valuation is conservative and the range appears to him to be distributed in the form of a symmetrical bell-shaped curve. Hambros included the $1.04 mid-point in the version of their report which was served with the bidder's statement.

The bidder's statement and the Hambros report

15. Smorgon lodged and served its bidder's statement on Tuesday 2 May. The bidder's statement proper is accompanied by the Hambros report, which values Email's Appliance business. The bidder's statement sets out in some detail the possible outcomes in relation to the CAPs. The Hambros report values the CAPs principally as equity in the Appliance Company, but it also values them on the basis that they are not converted. Smorgon is not required to provide an independent expert's report, and does not hold out that the Hambros report is independent in accordance with ASIC Practice Note 42.

The Email preference shares

16. The bidder's statement notes that Smorgon has not yet decided whether it will make offers to acquire the Email preference shares currently on issue and that it intends to compulsorily acquire the preference shares pursuant to the Law, if possible.[6]

PROCESS

Email's application

17. Email's application was received on Friday 12 May. Email sought various interim and final orders, as well as a declaration of unacceptable circumstances. Email alleged that certain aspects of the structure of the bid did not comply with the Law and that the disclosure in the bidder's statement was inadequate. In particular, Email submitted that the bid would not comply with subsection 621(3) of the Law. Email also argued

[6] Paragraph 4.2(a)(2) of the Bidder's Statement and subsections 664A(2) and (3).

that the bidder's statement did not comply with section 710 and contained misleading statements.

18. A report by PricewaterhouseCoopers (the ***PwC report***) accompanied the application. That report valued the CAPs much lower than Hambros had done, partly because (according to PwC) the terms of the CAPs appeared to give Smorgon complete discretion whether to convert the CAPs, pay them off at face value or leave them as continuing preference shares. PwC argued that the existence of this option, combined with wide valuation ranges for the CAPs as equity or as continuing preference shares, leads to a much lower valuation for the CAPs themselves.

Attempts to resolve dispute

19. In the days leading up to Email's application, and for several days following lodgment of the application, the parties attempted to resolve Email's complaints in relation to the bidder's statement. Several letters between the bidder and target detailing this process accompanied Email's application, and a number of changes were made to the bidder's statement by agreement. However, the parties did not resolve all of their differences.

Submissions

20. On Monday 15 May, in accordance with our instructions, the executive circulated a brief to the parties inviting written submissions in respect of Email's application for interim relief which included:

    a. an order under section 194 of the Australian Securities and Investments Commission Act 1989 (Cth) ***(ASIC Act)*** granting leave to the 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;

    c. an order under section 659A of the Law and Rule 9.10 of the Corporations and Securities Panel Draft Rules that certain questions of law be referred to a Court for decision before the final hearing of the application before the Panel;

    d. an interim order under section 657E of the Law restraining Smorgon from sending its bidder's statement to holders of Email ordinary shares 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; and

e. such further or other orders or directions as to the conduct of the proceedings relating to the application as the Panel sees fit.

21. On the same day, we conducted a preliminary review of the application via teleconference. As a result, we requested that the parties provide additional submissions on a number of issues by close of business the following day, Tuesday 16 May, as we had resolved to meet at midday on Wednesday 17 May to determine the interim application. Although most of the submissions were received on time, the parties continued to make submissions in response to each other's submissions. In addition, Hambros sent in a revised valuation report at the commencement of the teleconference to decide the interim application. Accordingly, we stood the meeting over for several hours to enable Email to respond to the report and to allow us time to review the changes.

Amendment of terms of CAPs

22. Smorgon, in its submission on 16 May, undertook to amend the bidder's statement to include the changes previously agreed with Email. In response to the PwC report, it also undertook to:

a. give firmer form to the expression of intention to convert the CAPs (ie Smorgon must use all reasonable endeavours to achieve the conversion);

b. provide for the Appliance business to be sold, if it could not be spun off;

c. provide for the redemption price to reflect the price for which the Appliance business had been sold, if it exceeded the equivalent of $1.04 per CAP; and

d. state that it is Smorgon's intention to redeem the CAPs, if they cannot be converted by 30 September 2002.

DETERMINATION OF THE INTERIM ISSUES

23. We decided on Wednesday 17 May, that Smorgon should be allowed to post the bidder's statement and offers, although we had not decided the substantive issues as to whether the statement was defective, because:

"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." [7]

24. In relation to the other orders sought by Email, we decided that:

    a. it was premature to consent to legal representation regarding the determination of the final issues when written submissions on those issues had not been received, and it had not been resolved that a conference was necessary to finalise this aspect of the application;

    b. there was no need to refer the legal issues raised by Smorgon's proposal to distribute shares in the Appliance Company to a court for a ruling. Whether the bid contravenes subsection 621(3) is a question of fact for determination by the Panel; and

    c. all the information it required to reach its decision had been volunteered by the parties and so it was not necessary to issue summonses.

25. Email immediately indicated that it would appeal the decision. Reasons for the decision were provided to the parties on Thursday 18 May.

REVIEW OF THE DETERMINATION OF THE INTERIM ISSUES

26. A differently constituted Panel (the ***review Panel***) was appointed on Friday 19 May. On Monday 22 May, the review Panel made an interim order restraining Smorgon from posting its offers. The reasons included the following paragraphs:

    45. In our view, the additional information provided by Hambros does not entirely overcome the deficiencies in the original report. It still contains no pro forma balance sheet or profit and loss statement for the bidder or for Smorgon Steel Group Limited, and only indirect information about the creditworthiness of Smorgon Steel.

    46. There is much information in the public domain about Smorgon Steel, which is a disclosing entity, but not about the additional debt which the Smorgon Steel group would undertake in taking over Email, and there is no previous information about the bidder.

[7] *In the matter of Email Limited: an Application under section 657E of the Corporations Law by Email Limited for interim orders*: 18 May 2000.

47. In addition, PwC's criticism of Hambros' valuation of the CAPs as ongoing preference shares is telling. A CAP is a complex security of uncertain value. Hambros make the most of it, if not more; PwC make the least of it, if not less. The truth is likely to lie somewhere between.

48. We are satisfied, however, that PwC have raised a serious concern that the Hambros report values the CAPs too high, particularly as ongoing preference shares. If the Hambros report is wrong in that respect, its publication will propagate an erroneous view as to the value of the CAPs. The propagation of that error, and the difficulty of removing it, would give rise to unacceptable circumstances. Accordingly, the report should not be dispatched, until it has been reviewed by the sitting Panel.[8]

PANEL'S ROLE

27. A function of the Panel is to determine whether unacceptable circumstances exist in relation to a bid and, if they do, to take action by way of declaration and orders to remove those unacceptable circumstances (subsections 657A(1) and 657D(1) and (2)). Section 657A sets out the matters which must be taken into account in determining whether the Panel may declare that circumstances are unacceptable.

28. Unacceptable circumstances may arise from a contravention of Chapter 6 (paragraph 657A(2)(b)), but they can arise without a contravention (subsection 657A(1)). Not every breach of Chapter 6 constitutes unacceptable circumstances and the Panel cannot enforce compliance with the Chapter (opening words of subsection 657D(2)). In every case, the Panel must concern itself with the mischief in that case, and not with illegality, as such. It is also clear that the Panel must have regard to the policies and purposes of Chapter 6 which are set out in section 602.

29. Before the Panel can make a declaration or a final order concerning affairs of a company, it must be satisfied that unacceptable circumstances exist in relation to the relevant company, whether or not Chapter 6 has been, or will be, contravened.

PANEL'S CONSIDERATION OF THE SUBSTANTIVE ISSUES

30. Email applied for the following final declarations and orders:

    a. a declaration under section 657A of the Law that dispatch of the Smorgon bidder's statement would give rise to unacceptable circumstances;

[8] *In the matter of Email Limited: an Application under Section 657EA of the Corporations Law for review of a decision to refuse an interim order*. 3 July 2000

b. an order under subsection 657D(2) of the Law restraining Smorgon from dispatching its bidder's statement to the holders of ordinary shares issued by Email;

c. an order under subsection 657D(2) of the Law restraining Smorgon from acquiring ordinary shares in Email pursuant to acceptances of offers proposed to be made under the takeover bid to which the bidder's statement relates;

d. such further or other declarations or orders as the Panel sees fit.

31. Following the decision of the review Panel on Monday 22 May, we directed the executive to dispatch a brief on Tuesday 23 May inviting the parties to make further submissions on the substantive issues by close of business on Thursday 25 May. Again the parties made further submissions after the deadline in response to each other's submissions. We reviewed the materials over the weekend and a conference was held the following Monday and Tuesday (29 and 30 May).

32. Both parties submitted detailed valuation reports which dealt in some detail with the relevant issues. The Panel formed the view that it was not appropriate for it to appoint an independent expert to conduct a third valuation of the CAPs, as it would cause a significant delay. Accordingly, on Friday 26 May we appointed Stephen Cooper, of Grant Samuel & Associates to assist us in assessing the assumptions and methodology of the valuation reports and the submissions regarding the valuation reports, which were proffered by the respective parties. We thank Mr Cooper for his assistance in this respect. Relevant questions or comments raised by Mr Cooper were immediately put to the parties for a response.

33. The standard for a valuation report upon which a bidder can rely with confidence is high.[9] We note that it would have speeded up the process considerably if Hambros' method had been more fully set out and had their valuation been avowedly independent, in accordance with ASIC Practice Note 42. The Hambros report was assessed taking into account the PwC report and the various comments made by both parties and the matters discussed at the conference. Ultimately, having regard to all relevant factors, we determined that the conclusions of the Hambros report withstood critical evaluation.

[9] Pancontinental Mining Ltd v Goldfields Ltd (1995) 13 ACLC 577 at 593 – 595.

THE EQUALITY PRINCIPLE

Equal access policy generally

34. The equal access policy of paragraph 602(c) (the ***equal access policy***) will be defeated, if some bid class shareholders are offered more for their shares than others. The equal access policy does not require that all shareholders receive cash. It does require that the bid consideration be of equal value to considerations given in the four months preceding the bid. As can be seen from sections 621 and 622, the equal access policy extends to dealings with shareholders in the period immediately preceding a bid. In the circumstances of this bid, the requirements of paragraph 602(c) and those of subsection 621(3) are much the same.

Subsection 621(3)

35. Subsection 621(3) provides as follows:

> *"The consideration offered for securities in the bid class under a takeover bid must equal or exceed the maximum consideration that the bidder or an associate provided, or agreed to provide, for a security in the bid class under any purchase or agreement during the 4 months before the date of the bid."*

36. Subsection 621(4) provides that a reference in subsection 621(3) to "consideration" is to the value of that consideration. Subsection 621(3) does not require the bid consideration to be of the same kind as the consideration given in the 4 months before the bid, but it does require that it be of equal value. The intention includes allowing a bidder to buy shares for cash before a scrip bid, provided the scrip it offers under the bid is worth as much as the cash it paid before the bid.

37. Subsection 621(3) extends the application of the equal access policy to the period immediately before the bid. It replaces former subsections 641(1), 676(1), 698(2) and 698(4).

38. Subsections 698(2) and (4) gave rise to numerous difficulties in practice,[10] and the Legal Subcommittee of CASAC recommended their repeal in their Anomalies Report.[11] The Government retained those subsections until it replaced them with subsection 621(3), because their removal would have weakened the equal access policy.[12] The history of those provisions and the authorities on them are set out and discussed in the judgement of Santow J in *Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd* (1998) 43 NSWLR 638 at 660 – 664.

---

[10] See particularly *Aberfoyle Ltd v Western Metals Ltd* [1998] 744 FCA and *Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd* (1998) 28 ACSR 1.
[11] *Anomalies in the Takeovers Provisions of the Corporations Law* March 1994, Recommendation 39
[12] See proposed subsection 623(2) in the *Corporate Law Economic Reform Program Bill 1998*.

39. Subsection 621(3) is fundamental to the policy and operation of Chapter 6. An acquisition of shares under a takeover bid is generally exempt from the prohibition in section 606 (item 1 in section 611), but not if the bid contravenes subsection 621(3) (paragraph 612(c)).

Valuing the CAPs

40. In order to make the comparison required by subsection 621(3), we need to adopt a valuation of the CAPs. In their first report, PwC defined fair market value, for present purposes, as:

"the price that might be negotiated in an open and unrestricted market between a knowledgeable, willing but not anxious buyer and a knowledgeable, willing but not anxious seller acting at arm's length."[13]

41. We adopt this definition, which was not disputed, and which is both conventional and relevant.

42. Applied to the facts as set out above, this definition requires the Panel members to consider whether we are satisfied that had the CAPs been issued and had there been an open and unrestricted market in them, the price that might have been negotiated in that market on the day the first offer was posted, between a knowledgeable, willing but not anxious buyer and a knowledgeable, willing but not anxious seller acting at arm's length would have been less than $1.04.

43. If we adopted a valuation of the CAPS which could be represented by a simple ,[14] symmetrical bell curve, we would be entitled to take the mid-point of a valuation range based by the valuer on that curve. By adopting such a valuation, we would be adopting the valuer's conclusion that it was most probable that the value lay at the peak of that curve, and that it was no more likely to lie below that peak than above it. Accordingly, it would no longer be open to us to conclude that it was more likely than not that the value lay below that peak.[15]

Complexity of the CAPs

44. Valuing the CAPs is complicated by the fact that different rights may be attached to them (or to replacement securities) in the future. They could:

    a. become equity in the Appliance Company by conversion or substitution,

    b. be redeemed in 2002, or

[13] Paragraph 4 of report dated 12 May 2000.
[14] i.e with one peak.
[15] See also ASIC's PPP on section 621.

c. continue indefinitely as 8.5% preference shares in Smorgon, redeemable at the option of Smorgon but not at that of the holder.

45. In effect, three outcomes are possible, and there are different techniques for valuing them in each eventuality.

46. One approach to valuing a security of this kind is to add up all of the expectations of benefit associated with it: take each alternative value it might have, multiply that value by the probability that the security will have that value, and add up all the products. This was neatly put and illustrated by Freehills in a submission on behalf of Smorgon:

To correctly value the CAPs, each outcome should be probability weighted, and a weighted average valuation derived. In this case, a precise probability of each outcome occurring is impossible to determine. … Arbitrarily assigning probability of, say, 80%, 15% and 5% would yield a valuation of the CAPs as follows:

Possible outcomes	***Probability***	***Valuation***
Appliance shares	*80.0%*	*$1.04*
Cash $1.04	*15.0%*	*$1.055*
Perpetual debt $1.04	*5.0%*	*$1.055*
Expected value	***100.0%***	***$1.04***

47. This example uses Hambros' values for the CAPs and assumes that the weighted values are independent (so that they can be simply added together). PwC disputed both assumptions, but not the underlying logic.

48. To set out both parties' submissions, we will deal in turn with their respective valuations of equity in the Appliance Company and of perpetual preference shares in Smorgon, and then with how those two components enter into the valuation of the CAPs.

Valuing the Appliance Company

49. Hambros valued the equity in the Appliance Company at between 87c and $1.21 per share. They arrived at this range by capitalizing the Appliance Company's sustainable earnings from public figures and applying a multiple. The figures used pre-dated the announcement by Email of its results to 31 March 2000 and were therefore acknowledged by Hambros as unreliable. The range of multiples which Hambros applied was also acknowledged by Hambros as unreliable given the difficulty of identifying businesses of similar size and nature. For these reasons, Hambros gave each as a range (maintainable EBITDA of $76.5 million to $87 million, and a multiple of 7 to 8). Multiplying the lower earnings figure by the lower multiple gives one figure, which they used

as the bottom of their valuation range, and multiplying the higher figures together, they obtained the top of their range.

50. The uncertainty in this valuation is as to the value of one number. In that respect, it is different from the uncertainty in the valuation of the CAPs, which also reflects uncertainty as to how to weight two different valuations.

Alternative presentation

51. The approach adopted by Hambros simplifies the theoretical approach described above in paragraph 46. Hambros were of the view that in a simple case, a graph of the probability of each possible value being correct is a simple, symmetrical bell curve. (As mentioned above, Mr Hatfield of Hambros said in oral evidence that this was how he understood this valuation.) The two end points of the range would be two values equidistant from the peak of the curve. The peak, and the most probable value, would be half way between them. The curve would, however, extend well beyond the end points of the range – indefinitely far to the right, in fact.

52. To better reflect this concept, each figure would be given as most probable value (the peak of the curve) and an allowance for error (distance from the peak to the end of the quoted range):

    a. maintainable EBITDA of $81.75 million, plus or minus $5.25 million;

    b. multiple of 7.5, plus or minus 0.5;

    c. product of $613.1 million plus or minus $81.3 million.

53. This means precisely the same as the range quoted by Hambros, but better displays the logic. In particular, it emerges that the mid-point is their best estimate of the value, and that the allowance for error is an arbitrary number, which is set higher or lower, depending on the degree of confidence required that the true value is within the allowance for error.

54. By parity of reasoning, the end points of the range quoted by Hambros are artificially derived[16] to bracket the true value. They are chosen according to the desired degree of probability that the true value be bracketed by the quoted range: the wider the range, the higher the probability that the true value lies within it.

[16] This is not meant as criticism, but refers to the statistical nature of the valuation. Hambros used these concepts in conference, although not in their report.

PwC's valuation of the Appliance Company

55. Using a method comparable with Hambros', PwC valued equity in the Appliance Company at 86c to $1.03 per share. The earnings figure used by PwC is the *average of brokers' estimates* of the Appliance business' earnings before interest and tax. These data are even less reliable than the earnings figures used by Hambros and since neither valuation is precise, PwC's valuation is broadly consistent with the Hambros valuation.

Values for the preference shares

56. Both Hambros and PwC give alternative valuations of the CAPs as ongoing preference shares. Both valuations are based on applying an appropriate multiple to the preference dividends, and PwC discount for several features of the preference shares. Hambros considered that the value should not be discounted for these factors, or that they were compensated for because the CAPs will pay a 600 basis point premium over the "risk free rate".

57. Hambros' range is $1.02 to $1.09, with a mid-point of $1.055. PwC value the CAPs as preference shares at 90c to $1.02, but do not give a mid-point.

58. We adopt Hambros' valuation of the CAPs as ongoing preference shares. The coupon is 8.5% of the redemption amount, if fully franked, grossed up to about 11.5% to take account of the franking credit value.[17] Taking into account comparable issues in other markets, we have seen no evidence to suggest that the 600 basis point premium which the CAPs appear to pay over investment grade debt securities is too small to value the CAPs at their face value of $1.04.[18]

59. Hambros value the CAPs as ongoing preference shares a little higher than they value them as equity in the Appliance Company. Accordingly, their view is that the value of the CAPs as a weighted average of the two valuations is at least equal to their value as equity in the Appliance Company. It is also fairly insensitive to the probability of conversion.[19]

PwC's attack on probability weighting

60. If PwC had applied the simple weighted average approach to mid-points of 96c for pure preference shares and 94.5c for equity in the

[17] If the dividend is not fully franked, the cash amount of the dividend is grossed up, although this would not fully compensate for the loss of the franking credits.
[18] See also paragraph 110. Hambros did not provide these data on comparable securities.
[19] The extract from Freehills' letter at paragraph 46 above seems to faithfully reflect Hambros' views on both of these issues.

Appliance Company, their valuation would also have been fairly insensitive to the probability of conversion. They took a very different approach.

61. As mentioned above, if the probabilities that the CAPs will take different forms are independent variables, the value of the CAPs on each outcome can be simply weighted for the respective probabilities of those outcomes, and added together. This is, in effect, the approach taken by Hambros, although their report was not explicit about it.

62. If, however, Smorgon has an option to choose the outcome most favourable to it, the variables are not independent. PwC argued that the terms of issue of the CAPs gave Smorgon just such an option: if the Appliance Company was worth more than $1.04 per share, Smorgon could sell it, redeem the CAPs for $1.04, and keep the difference. On that argument, the probability distribution for the value of the CAPs as equity is highly asymmetrical, the ends of the range have very different probabilities, the median of the curve does not coincide with the mode and the mid-point of Hambros' range could not be used.

63. PwC's way of putting this was that the CAPs should be valued as preference shares, and then an amount subtracted for the value of a put option which Smorgon has over the equity in the Appliance Company. PwC value that put option at 14c to 16c.[20]

64. Whether the CAPs should be valued on the basis that they incorporate such an option depends on the terms of issue, the constitution of the bidder, the effect of representations in the bidder's statement and other commercial and legal considerations. We will consider these issues in the following paragraphs.

65. Smorgon immediately responded to PwC's first analysis of Hambros' valuation by giving further assurances that the CAP holders would in fact realise the value of the Appliance business, whether as equity or in the redemption price of the CAPs.

Specific valuation issues

66. PwC submitted that the value of the CAPs should be discounted for several reasons. Those submissions, individually and collectively, had some force, but ultimately we were not persuaded that Smorgon could not rely on the Hambros valuation, for reasons which are set out below.

[20] In addition, they would discount the CAPs further for a number of features they regard as unattractive. These are assessed under the heading *Specific Valuation Issues*.

Quotation

67. The bidder's statement stated that Smorgon was seeking to arrange quotation of the CAPs on the Australian Stock Exchange. Evidence at the conference was that these negotiations were fairly far advanced. However, there is no certainty that the CAPs will be quoted. In order to avoid implication by subsection 625(3) of a non-excludable condition that quotation of the CAPs be arranged, the bidder's statement is very clear that it does not represent that they will be quoted.

68. The evidence of Mr Lonergan of PwC was that the value of shares in the Appliances Company should be discounted by 10% to 30% if it were certain that they would not be quoted. Since he accepted it is very likely that they will be quoted and that a lower discount is applied to quasi-debt securities, he agreed that the discount applied to the CAPs should be reduced to less than 5% perhaps as low as 1%.

Complexity

69. The CAPs are complex securities, and we asked both valuers whether they should be expected to trade below valuation for that reason. Neither of them expected a material discount.

Change of control

70. PwC also suggested that the value of the CAPs as preference shares should be discounted because they do not carry voting rights, in most circumstances. But that is normal for preference shares, and is assumed in standard valuation techniques. If the CAPs convert into equity in the Appliance Company, they will be ordinary shares, with the usual voting rights.

Commercial considerations

71. Smorgon stated at the conference that it was unlikely to want to retain the Appliance business, which is a poor fit with the rest of Smorgon Steel Group's operations and skills. If the business is sold, the benefit of the price flows through to CAPs holders. Smorgon also asserted that the CAPs are not an attractive form of funding, from its point of view, because the effective coupon is higher than Smorgon's cost of borrowing.

72. Mr Facioni of Macquarie Bank submitted on behalf of Smorgon that there would be a commercial imperative on Smorgon to ensure that the preference dividend on the CAPs is paid in full. The market will view the CAPs as a Smorgon security and if Smorgon does not fulfil its perceived obligations in respect of them, the market will simply assume that the Smorgon Group is in trouble.

73. Mr Myers QC pointed out that the terms of issue of the CAPs (which are part of Smorgon's constitution) incorporate Smorgon's obligations to use all reasonable efforts to secure conversion of the CAPs, or to sell the Appliances business in such a way that CAPs holders benefit from the sale. He submitted that any breach would give CAPs holders enforceable rights.

74. These submissions and the evidence support the conclusion that Smorgon is unlikely to exploit the imperfection in its obligation to convert the CAPs into equity in the Appliance Company to the detriment of CAPs holders.

75. Taking all of these matters together, we reject PwC's approach to the valuation of the CAPs, incorporating the put option, in favour of a more standard weighted average approach.

Conservative valuation

76. A number of these issues suggest that small discounts should be applied to Hambros' valuation. These might be material in aggregate. However, Hambros claim that this is offset by the fact that its valuation is conservative in that it makes no allowance for the benefits flowing from the rationalization of the CDH businesses.

77. Six brokers' valuations of the Appliances business provided by Macquarie Bank (who advised they could find no others) were all higher than Hambros' valuation. During the course of the proceedings, Email wrote to its shareholders, stating that it expected rationalisation benefits of $30 million per annum from the integration of the CDH businesses.[21]

Applying subsection 621(3) to a range

78. At face value, the Hambros valuation implies that there is an even chance that the CAPs are worth at least $1.04. If it accepts that valuation, the Panel cannot also find that it is more likely than not that the alleged unacceptable circumstance exists (namely that the bid consideration is worth less than $2.89). Email, however, advanced several arguments (or perhaps, several versions of one argument) to the effect that the Smorgon bid does not comply with subsection 621(3), even accepting the Hambros valuation. Email did not abandon these submissions, but declined an invitation to elaborate on them in oral submissions. Those arguments, and our evaluation of them, follow:

    a. When a bidder offers scrip which is valued in a range, the bidder only complies with subsection 621(3) if it would comply, using the

[21] In oral evidence, it was pointed out that this is relative to the assumed $10 million p.a. losses of the CDH business i.e. it represents an increase in the profits of the Appliance business of about $20 million p.a.

lowest point in that range as a point valuation. Every point in Hambros' range was a 'valid value point' and Smorgon contravenes subsection 621(3) because some of those points are below $1.04.

This argument is entirely inconsistent with the notion of a valuation range which is set out above and which was shared by all who spoke on the issue at the conference.

b. Subsection 621(3) requires Smorgon to *ensure* that the value of the CAPs is not less than $1.04, the CAPs are valued in a range part of which is below $1.04, and their being valued in this range is consistent with the CAPs being worth less than $1.04. Accordingly, Smorgon contravenes subsection 621(3), because the CAPs *may* be worth less than $1.04.

Like the preceding argument, this overlooks the probabilistic nature of all valuations, and the agreement of expert witnesses on the probabilistic nature of this valuation in particular.

c. The Panel cannot use the Hambros valuation for this purpose, because it is consistent with that valuation that the CAPs may later prove to have been worth materially less than $1.04.

This argument invites us to imagine the value of the CAPs in the future. Subsection 621(3), however, requires us to determine the value when the first offers are posted. It is perfectly possible that the CAPs will later prove to have a value of 50c or $5.00, but that is not the point: we have to base our decision on our best estimate of what an informed buyer would pay for them now.[22]

Our conclusion on the equality principle

79. Neither Email's challenge to the valuation of the CAPs at $1.04 nor its objection to the use of this figure for the purposes of subsection 621(3) is sustained. Accordingly, we make no finding of unacceptable circumstances flowing from a breach of subsection 621(3) or from a lack of reasonable and equal access to benefits arising in connection with the bid.

MISLEADING STATEMENTS IN THE BIDDER'S STATEMENT

80. Email contended that the bidder's statement contained misleading statements concerning the conversion of the CAPs and the value of synergies from merging the Email and Smorgon metals businesses. In

[22] Compare *Boral Energy v TU Australia* at pages 667 and 672 (on the wisdom of hindsight) and numbered conclusion 8 on page 680.

particular, Email said that the bidder's statement was misleading, in that it claimed that the CAPs would be converted into equity in the Appliances Company, without paying sufficient attention to the risks that this would not happen.

81. Although Smorgon reinforced its obligation to bring about conversion by the amendment to the terms of issue of the CAPs, Email submitted that there are a number of difficulties over Smorgon's ability to secure conversion.

82. We took the view that it was important that relevant information be included in the bidder's statement to alert offerees to the potential legal and commercial issues and risks associated with this bid. We also formed the view that, if those issues and risks were adequately disclosed, it was not necessary for the Panel to resolve the legal and commercial issues or to ensure that those issues were resolved prior to the dispatch of the bidder's statement.

Commercial risks to conversion

83. The first risk is Smorgon's option to appropriate the value of the Appliances business, to the extent that it exceeds $1.04, by keeping the Appliances business and paying off the CAPs or keeping them as preference shares. That issue was largely resolved by the additions to the bidder's statement and terms of issue which have already been mentioned, and by the submissions set out above under *Commercial Considerations*.

Conversion and section 231

84. Smorgon's intention is to convert the CAPs into equity in the Appliance Company. This process could take any of a number of quite different forms. In particular, it may involve distributing shares in the Appliance Company to the holders of the CAPs. The terms of the takeover offers and the terms of issue of the CAPs authorize Smorgon to transfer shares in the Appliance Company to the holders of the CAPs.

85. If Smorgon does not acquire all of the ordinary shares in Email, however, it will also need to transfer shares in the Appliance Company to the remaining ordinary shareholders in Email. In this case, Smorgon proposes to use a reduction of the capital of Email to distribute shares in the Appliance Company to all ordinary shareholders in Email.

86. To do so, it will have to comply with section 231 of the Law, which requires a person's agreement to become a member of a company. This agreement can be provided through an agent freely appointed, or it can be compelled under a scheme of arrangement under section 411 or compulsory acquisition under Chapter 6A. But it cannot be compelled

by a reduction of capital.[23] Email's constitution contains a provision which purports to confer the necessary agency on Email itself, but that provision was incorporated only in 1999, and may not bind previous shareholders. We took no view on whether it is effective.[24]

87. If this problem arises, Smorgon may need to address it by having Email propose a scheme of arrangement with its members under section 411 of the Law. Clause 4.4(f) of the bidder's statement[25] refers to the possibility that shareholder approval may be required, if shares in the Appliance Company need to be distributed by means other than a reduction of capital. It is idle to speculate on the commercial and legal context in which the problem might arise. For our purposes, it is enough that there are effective legal means of obtaining members' agreement, and that they have now been adverted to in the bidder's statement.[26]

The Email preference shares

88. Email has on issue 100,000 preference shares of nominal value $2, which have priority over ordinary shares on a return of capital. In paragraph 16.3 of the bidder's statement Smorgon states that it has not yet decided whether it will make offers to acquire the preference shares in Email, and that if no offers to acquire the preference shares are made, it intends to compulsorily acquire the preference shares, if possible.

89. Email submitted that the necessary reduction could not be carried out while the preference shares remain on issue. It relied on section 256B of the Law and on *Re Fowlers Vacola Manufacturing Co. Ltd* [1966] VR 97. Neither section 256B nor *Re Fowlers Vacola* supports Email's contention. Preference shareholders must be treated fairly when the ordinary capital is reduced (see paragraph 256B(1)(a)), but the preference shareholders do not have an arbitrary veto over a reduction.

90. Fairness may require that the preference shareholders be offered some form of participation in the return of capital,[27] but their rights are proportionate to their investment and the face value of all of the preference shares is $200,000. They could be redeemed from small change in these transactions.

91. The bidder's statement does not mention how Smorgon would deal with the rights of preference shareholders. However, means exist to accommodate their rights, and the amounts involved are not material in the scale of this bid. Accordingly, the omission is not misleading.

---

[23] *Re Hunter Resources Ltd* (1992) 10 ACLC 538 at 544 to 545, per Lockhart J.
[24] See paragraph 3.11(c) of Email's constitution, and subsection 140(2) of the Law.
[25] Which was added by Smorgon in response to Email's application and is mentioned in the Supplementary Statement mentioned below.
[26] Compare *Pancontinental Mining Ltd v Goldfields Ltd* (1995) 13 ACLC 577 at 591, per Tamberlin J.
[27] See *Re Fowlers Vacola* at page 106.

Synergies

92. Email complained that paragraph 4.2(c)(1) of the bidder's statement was misleading. That paragraph is as follows:

"The Bidder intends to:

a. conduct an immediate review of Email's Metals business to identify business opportunities generated by the acquisition, areas of cost savings, and businesses which may provide overall strategic and operational benefits. Any operations that are determined to not have the appropriate level of strategic value will be divested in an orderly and price-maximising fashion;

b. review Email's and Smorgon Steel's metal distribution sites with a view to rationalising surplus sites;

c. review the employment and staffing requirements of the combined operations of Smorgon Steel and the Email Metals business. Appointments for new or revised positions will be based upon an assessment of the requirements of the position, taking account of all relevant factors. It is expected that some redundancies will arise following the assumption of control by the Bidder as a consequence of the review of the Metals business, decisions which may have already been taken by the Metals business and the review of individual positions by Smorgon Steel. Where possible, natural attrition and/or voluntary early retirements may account for some part of these changes;

d. review the contractual, licensing, distribution and supply arrangements where the terms of those arrangements would or may be infringed by the acquisition or conduct of the Email Metals businesses by Smorgon Steel; and

e. seek to transfer, to the extent feasible, Email's existing supply arrangements to Smorgon Steel.

93. It needs to be read with paragraph 22.2, which sets out information about a report prepared in September 1999 by a consultant engaged by both Smorgon and Email, to advise on the savings which might result from combining their metal distribution businesses. After setting out the consultant's conclusions, and pointing out that the report is now 6 months out of date and that Email has made changes during that time, Smorgon went on to say that:

"Smorgon Steel considers that some synergies will be available through combining the Email and Smorgon Steel metal distribution businesses. Smorgon Steel does not consider that it is in a position to quantify the synergies itself, or identify precisely how the synergies will be achieved, until it has conducted a full review of Email's metal distribution business.

Smorgon Steel believes that the consideration it is offering Email shareholders under the takeover bid recognises and places appropriate value on the potential synergies that may be achieved by combining Email's and Smorgon Steel's metal distribution businesses."

94. Email alleged that paragraph 4.2(c)(1) is misleading and deceptive, in effect because it implies that Smorgon is not in possession of the material set out in paragraph 22.2. But it is clear from paragraph 22.2 itself that the exercise mentioned in paragraph 4.2(c)(1) would have to be done afresh, as Smorgon's only information is now stale. Accordingly, we reject Email's submission.

Our decision on misleading statements

95. There is some force in Email's submission that the bidder's statement in its original form was misleading in the way it dealt with the conversion of the CAPs. We made no final decision whether it was unsatisfactory, however, because in the course of the proceedings we obtained an undertaking from the bidder to send supplementary documents (the ***Supplementary Statement***) to offerees with its offers.

96. The Supplementary Statement contains the following additional information:

    a. an amendment to the terms of the CAPs clarifying Smorgon's obligations in the event that it is unsuccessful in converting the CAPs into ordinary shares in a company holding Email's Appliances business;

    b. an enhanced discussion of some of the potential legal and commercial risks relating to the CAPs; and

    c. a letter from Hambros discussing the approach it believes is appropriate in assessing the value of the CAPs.

97. The risks to conversion are not negligible, and offerees should be made aware of them. Paragraph 4.4(f) of the bidder's statement deals with those risks, and in our view it discloses them adequately. For completeness, we required Smorgon to refer to paragraph 4.4(f) in the Supplementary Statement.

98. We required Smorgon to state in the risk disclosure that, although Smorgon (in paragraph 4.4(d) of its bidder's statement) states that it can ensure the conversion or exchange of the CAPs into ordinary shares in a company holding the Appliances business once it controls over 50% of Email's shares, this should be read in conjunction with paragraph 4.4(f) of the bidder's statement.

PROSPECTUS ISSUES

Section 710 and 713 disclosure issues

99. Email complained that the bidder's statement did not comply with paragraph 636(1)(g) of the Law, which makes sections 710 to 713 applicable to a bidder's statement for a scrip bid.

100. Section 710(1) of the Law provides that:

> *"A prospectus for a body's securities must contain all the information that investors and their professional advisers would reasonably require to make an informed assessment of the matters set out in the table below. The prospectus must contain this information:*
>
> *a. only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus; and*
>
> *b. only if a person whose knowledge is relevant (see subsection (3)):*
>
> *i. actually knows the information; or*
>
> *ii. in the circumstances ought reasonably to have obtained the information by making enquiries."*

101. The matters that must be disclosed are set out in item 2 of the table in section 710 and include, *inter alia*:

> a. the rights and liabilities attaching to:
>
> i. the interest or option
>
> ii. the underlying securities
>
> b. if the person making the offer is:
>
> i. the body that issued or is to issue the underlying securities; or
>
> ii. a person who controls that body;
>
> the assets and liabilities, financial position and performance, profits and losses and prospects of that body.

102. Further, in deciding what information should be included under subsection 710(1), regard must be had to:

> *"a. the nature of the securities and of the body; and*
>
> *b. …*

c. the matters that likely investors may reasonably be expected to know; and

d. the fact that certain matters may reasonably be expected to be known to their professional advisers."[28]

103. However, section 713 makes special provision for prospectuses for continuously quoted securities. Section 713(2) provides that such a prospectus satisfies section 710 if it contains:

"all the information investors and their professional advisers would reasonably require to make an informed assessment of:

a. the effect of the offer on the body; and

b. …

c. the rights and liabilities attaching to the securities offered;

The prospectus must contain this information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus."

Omission of financial information concerning SSGL and the bidder

104. Mr Facioni stated on behalf of Smorgon that it was considered unnecessary to provide information in relation to SSGL and the bidder because pro forma consolidated figures for these companies are not relevant to the value of the Appliance Company. Mr Facioni also submitted that although such information would typically be included in a prospectus, SSGL is a listed company which is subject to the continuous disclosure requirements of the listing rules. Further, Email is also a listed company and therefore the information is publicly available for shareholders to put together a pro forma balance sheet. Moreover, Mr Facioni noted that broking analysts will also put together this type of information for shareholders and form a view as to the merits of the CAPs as an investment.

105. We do not accept these arguments. In relation to whether *pro forma* consolidated financial statements for SSGL and the bidder post-completion of the bid are relevant, the following issues need to be considered.

106. The future financial position, profits and loss, assets, liabilities and prospects of the bidder are very material to a prospective holder of the CAPs. Under section 710, that is information that investors and their professional advisers would reasonably expect and be entitled to receive in a prospectus for the CAPs. But the bidder's statement contained no

[28] Section 710(2) of the Law.

financial information about the issuer of the CAPs i.e. the merged entity comprising the bidder itself and Email.

107. Further, SSGL is inextricably linked to the future viability of the CAPs, because the bidder has joined in the Deed of Indemnity between SSGL and the bank and because SSGL is borrowing the cash required for the bid. Accordingly, *pro forma* consolidated financial statements for SSGL seem to us to be very relevant information to a potential holder of CAPs. Yet there is no information of consequence about SSGL in the bidder's statement.

108. Smorgon relied on the policy of section 713, maintaining that there was sufficient publicly available information in relation to SSGL and that it was acceptable to have shareholders rely on that information i.e. to prepare their own *pro forma* balance sheets and profit and loss statements for the bidder and SSGL after the bid. We reject this submission:

    a. The letter and policy of section 713 are inapplicable, because Smorgon is not offering the already quoted securities of SSGL: it is offering CAPs, which are unquoted securities of an unlisted company.

    b. Even in relation to SSGL itself, there was no information on the effect of the bid on SSGL's balance sheet, which is material information, and would be required by section 713, if it applied.

    c. It is not normal practice, nor is it reasonable for shareholders to have to compile such information from publicly available information for themselves. The obligation to provide this information rests with the party making the offer, and shareholders should not have to rely on broking analysts to prepare this information for them: indeed, many shareholders may not have access to broking analysts or other financial advisers.

Financial information concerning the Appliance Company

109. A much more problematic issue is what the Appliance Company will look like if conversion occurs and whether it is actually in the interests of prospective shareholders to have such information provided, given that the bidder can only give an estimate (albeit with appropriate qualifications) or whether the estimate is likely to be so inaccurate that it would be misleading.

110. We accept Mr Facioni's submission on behalf of Smorgon that in the current circumstances such information is likely to be so unreliable that it may not be helpful to shareholders.

Section 710 and 713 disclosure issues - Outcome

111. We requested that Hambros:

    a. acknowledge in the Supplementary Statement that debt and quasi-debt securities are valued by reference to their terms and credit rating;

    b. include the ratings of the securities they compare with the CAPs; and

    c. note that the bidder and its parent, SSGL, are not rated and would be unlikely to receive an investment grade rating if they were.

112. We required the bidder to undertake to send to offerees within five business days after the publication of Email's interim financial results for the financial year ending 31 March 2000, *pro forma* consolidated balance sheets and profit and loss statements for SSGL and for the bidder, on the basis that the bidder acquires all of the ordinary shares in Email and, if the Panel requires, on the basis that it acquires 50% of the ordinary shares in Email, subject to and in a form approved by the Panel. We accepted that the recent changes in the composition of both the SSGL group and the Email group would make consolidated cash flow statements based on historical figures unreliable.

113. The bidder is not required to provide *pro forma* financial statements for the Appliance Company, if conversion occurs.

Conclusion on prospectus issues

114. The CAPs are different from any securities which have been issued to the public in this country. There is no law against offering complex securities, but the obligation under section 710 to provide all of the information an offeree might reasonably expect makes unusually high demands when the securities are complex.

115. The bidder's statement as lodged was unmistakably and materially defective in compliance with section 710. That is unacceptable, both under paragraph 602(b)(iii) and because a general disclosure provision was not complied with.

116. These defects were not addressed at all in the first round of amendments.[29] They will be addressed by the supplementary materials covered by Smorgon's undertaking. No unacceptable circumstances will result from this defect, since the undertaking has been given and performed.

[29] See paragraph 19 above.

CONCLUSION

117. We have no basis to conclude that unacceptable circumstances will occur if Smorgon posts the bidder's statement and offers with the covering letter required by the Panel and the changes now proposed, including the additional financial information covered by the undertaking, either because the bid consideration is worth less than $2.89 per share, or because the bidder's statement is misleading or incomplete.

118. Accordingly, we propose to make no declaration or final order. Now that Smorgon's undertaking has been completely carried out, we have dismissed Email's application. In the meantime, we revoked the review Panel's interim order restraining dispatch, which had served its purpose.

FINALLY

119. Smorgon was held up in dispatching its bidder's statement and offers because the review Panel were concerned that the statement should not be posted before being reviewed to decide whether it was misleading. It is apparent from their reasons that this was an "on balance" decision. The deficiencies in the bidder's statement proved to be omissions from the bidder's statement and the Hambros' report of information required to satisfy a positive disclosure obligation. In this case, these omissions were sufficiently resolved by the inclusion of additional information, so as, in our view, not to give rise to misrepresentations.

120. Much of the delay experienced by Smorgon could have been avoided, had it commissioned an independent expert's report on the value of the CAPs, which complied with the ASIC Practice Notes on independence and valuation methodology. In particular, the interim order restraining dispatch may not have been needed, or might have been imposed for a shorter period, if it had been clear that it would be possible to review the Hambros report quickly, or that its main defects were omissions.

121. This matter has been notable because of the way in which parties attempted to have the last word and responded after deadlines to submissions which were lodged at the deadlines. Both parties made further submissions after it was appropriate and this did not assist the cases they sought to present.

122. There is more to natural justice than simply allowing parties to make submissions: it also involves reading them with due attention. That cannot happen in a hubbub of competing noise. At the end of the day, the Panel needs time to assess the submissions that have been made, and for that purpose to treat them as final. The right of the parties to continue to make written submissions must be balanced with the right

of the parties to have a speedy resolution of their dispute, and the obligation of the Panel to provide for a timely resolution of the dispute.

123. Both parties provided commendable assistance in the presentation of evidence and submissions, and by making available their advisers (lawyers and bankers) and management. Senior counsel (present by leave) also provided assistance and helpfully did not attempt to usurp the role of the other advisers. Each party was successful in respect of a number of issues raised, each generally respected time limits, although each filed late submissions, and there were defects in both cases. We have determined to make no order as to costs.

Annabelle Bennett
28 June 2000

ANNEXURE A

EXTRACT FROM THE CONSTITUTION OF SMORGON DISTRIBUTION LTD

CAPs RIGHTS

Reasonable Endeavours

The Company must use all reasonable endeavours to do all things necessary to bring about the conversion or exchange of each Converting Appliance Preference Share as contemplated in paragraphs 11 and 12 in accordance with the statements contained in the Bidder's Statement as soon as reasonably practicable after the Converting Appliance Preference Shares have been issued.

This includes:

a. subject to (b), maintaining the [Appliance] business as set out in paragraph 4.3(d) of the Bidder's Statement;

b. consolidating ownership of the Appliance business in a single company and advising the ASX of the conversion date as contemplated by paragraph 11; and

c. transferring ownership of that company from the Email Limited group of companies to holders of ordinary shares in Email Limited in proportion to their holdings of ordinary shares in Email Limited through the conversion or exchange of the Converting Appliance Preference Shares,

as set out in the Bidder's Statement and seeking any necessary approvals or waivers from any third party (including ASX) to achieve that outcome. In particular, prior to conversion or exchange, the Company must seek to prevent Email Limited from selling the Appliances business to any third party, irrespective of the terms offered. In managing the affairs of the Company to meet these obligations, the directors of the Company must disregard:

a. any contrary wishes expressed or resolution passed by holders of ordinary shares in the Company; and

b. any detriment the Company may suffer by divesting assets upon an exchange under paragraph 13 or preventing Email Limited from selling the Appliances business.

The Company's obligations under this paragraph only cease if an independent person appointed for this purpose by the Corporations and Securities Panel is satisfied, on reasonable grounds, that, despite the Company investigating alternatives to achieve the main objective which overcome any difficulties:

a. it will not be practicable or feasible to establish or list on the ASX a company which owns, directly or through a wholly owned subsidiary, the Appliances business; or

b. that this would result in undue expenses or tax for the Company or any subsidiary.

Redemption

If:

a. a Converting Appliances Preference Share has not been converted or exchanged in accordance with the terms of issue before 30 September 2002; or

b. an independent person appointed for this purpose by the Corporations and Securities Panel is satisfied, on reasonable grounds, that, despite the Company investigating alternatives to achieve the main objectives which overcome any difficulties, it is not practicable or feasible to establish or list on the ASX a company which owns, directly or through a wholly owned subsidiary, the Appliances business or that this would result in undue expenses or tax for the Company or any subsidiary,

the Company will use reasonable endeavours to sell or cause Email Limited to sell the Appliances business using reasonable endeavours to maximise the price received.

Upon receipt of the proceeds by the relevant seller, the face value of each Converting Appliances Preference Share shall be recalculated as the greater of:

a. $1.04; and

b. an amount calculated by the Company in accordance with the following formula:

$$\frac{A - B}{C}$$

where:

A equals the net proceeds of sale received by the relevant seller on the disposal of the Appliances business, after deducting any tax or stamp duty incurred by Email Limited or the Company on the disposal (other

than tax or stamp duty that would have been met by Smorgon Steel under paragraph 4.4(a) of the Bidder's Statement if the disposal had proceeded by way of spin-off) and any reasonable costs associated with the disposal of the Appliances business;

B equals $150 million less the amount of Email Limited corporate debt assumed by the purchaser of the Appliances business; and

C equals the number of Email Limited ordinary shares on issue at the time of the redemption.

After the earlier of 30 September 2002 and receipt of the proceeds of sale of the Appliances business, the directors of the Company may redeem the Converting Appliances Preference Shares for face value on such date as they decide.

ASX Listing

The Company must use all reasonable endeavours and furnish all such documents, information and undertakings as may be reasonably necessary in order to procure, at its own expense, quotation on the ASX of the Converting Appliance Preference Shares and ordinary Shares following conversion.