Takeovers Panel

Reasons for Decision
Rinker Group Limited

In the matter of Rinker Group Limited
[2006] ATP 35

Catchwords:
Review of ASIC decision - AAT - equality of opportunity – bid consideration – cash sum– cash versus non-cash bid consideration – conversion of foreign currency – correct and preferable decision - country of residence of shareholders - currency election option – currency exchange rate risk- default currency mechanism – current value of offer - disclosure in bidder's statement - foreign currency consideration – minimum bid price rule – modification - on-market acquisitions – power of Panel to vary ASIC decision –question of law – subject matter of ASIC decision – subsequent events to ASIC decision -US dollar consideration – variation of ASIC instrument – variation of offer terms – withdrawal rights

Corporations Act 2001 (Cth): sections 602(c), 619, 621, 637, 650A - D, 651A, 655A, 656A, 657A, 657C, 659A

Administrative Appeals Tribunal Act 1975: section 43(1) ,In the matter of Goodman Fielder [2003] ATP 1; *Comcare v Burton* (1998) 157 ALR 522; *Fletcher v FCT* (1988) 19 FCR 442 *ASIC v Donald* (2003) 203 ALR 566; *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Commissioner of Taxation* [2005] FCAFC 244

Rinker Group Limited, CEMEX Australia Pty Ltd, CEMEX, S.A.B. de C.V. UUNET Holdings Australia Pty Ltd, Ozemail Limited, USFC Acquisition Inc., Memtec Limited

These are the Panel's reasons for declining to make a declaration of unacceptable circumstances on an application by Rinker Group Limited dated 6 November 2006 in relation to the off-market takeover bid by CEMEX Australia Pty Ltd. The Panel decided not to make a declaration of unacceptable circumstances having received supplementary disclosure by CEMEX which addressed its concerns in relation to the mechanism for conversion of US dollars provided as consideration under the bid into Australian dollars, and associated risks.

THE PROCEEDINGS

1. These reasons relate to an application (the **Application**) to the Panel from Rinker Group Limited (**Rinker**) on 6 November 2006 in relation to an off-market takeover bid by CEMEX Australia Pty Ltd (Bidder), a wholly owned subsidiary of CEMEX, S.A.B. de C.V. (**CEMEX**) for all of the shares in Rinker. The Application was made under sections 656A and 657C of the Corporations Act 2001 (*Cth*) (**Act**) [1].

SUMMARY

2. CEMEX's takeover offer was formally made in US dollars, but was structured such that Rinker shareholders who accepted the offer could elect to receive the bid consideration in US dollars or the value of the consideration converted into Australia dollars (**Currency Election**). The offer included a "default mechanism" pursuant to which securityholders who accepted CEMEX's takeover offer and who failed to make a Currency Election, would receive US dollars unless they held Rinker shares and their address in Rinker's share registry was in Australia (**Default Mechanism**).

3. The Application concerned certain relief granted by the Australian Securities and Investments Commission (**ASIC**) which Rinker submitted had the effect that CEMEX was permitted to pay Rinker securityholders different Australian dollar amounts

[1] Unless otherwise specified, statutory references are to provisions of the Corporations Act (2001) *Cth.*

depending upon the date on which CEMEX converted the US dollar bid consideration to Australian dollars.

4. The Application sought review of ASIC's decision to grant the modification described above and also sought a declaration of unacceptable circumstances and final orders that CEMEX must amend its offer to ensure that all Rinker shareholders who elected to receive bid consideration in Australian dollars (or who would receive Australian dollars as a result of the Default Mechanism) would receive the same Australian dollar amount.

5. CEMEX and ASIC submitted that the purpose of the relief was to facilitate CEMEX's offer structure only to the extent that it provided for the Default Mechanism. CEMEX submitted that any difference in Australian dollar amounts paid to shareholders who elected to receive (or who received as a result of the Default Mechanism) Australian dollars was not otherwise unacceptable.

6. The Panel decided that:

   (a) the CEMEX offer (in offering US dollars to all shareholders with a currency conversion option to Australian dollars provided by CEMEX) did not offend the principle in section 602(c) and was not otherwise unacceptable;

   (b) it did not need to decide (and did not make a finding) whether CEMEX's offer in US dollars offered a "cash sum" for the purposes of Chapter 6[2] on the basis that CEMEX gave an undertaking to the Panel that it would not, purchase or arrange to purchase Rinker securities for Australian dollars outside the bid during the bid period;

   (c) in the absence of the supplementary disclosure proposed by CEMEX in its draft supplementary bidder's statement submitted to the Panel on 7 December 2006, the Panel would have been minded to make a declaration of unacceptable circumstances in relation CEMEX's disclosure relating to:

      (i) the mechanism for conversion of the US dollars provided as consideration under the CEMEX offer into Australian dollars;

      (ii) the exchange rate risk to which Rinker shareholders (who elected to receive Australian dollars) were likely to be exposed;

      (iii) the currency risk management strategies CEMEX proposed to implement to limit the effect of decisions it made concerning the offer going unconditional, the termination of US withdrawal rights and the timing of payments (within the maximum period required by the Act) on US dollar – Australian dollar exchange rates;

      (iv) costs and other factors involved in processing foreign currency cheques in Australia to which Rinker shareholders (who elect to receive US dollars) may have been exposed; and

      (v) the use of withdrawal rights as an exchange rate risk management tool (and the limitations of using such withdrawal rights as an exchange rate risk management tool).

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[2] Specifically section 651A.

However, the Panel considered that CEMEX's proposed supplementary disclosure addressed its concerns and accordingly, considered that it was not against the public interest to decline to make a declaration;

(d) On reviewing the original conversion mechanism under the Default Mechanism the Panel had concerns about its operation and the potential risks which could arise for Rinker shareholders. The Panel was concerned about the possibility that the original conversion mechanism could have been commercially flawed in some circumstances.

The Panel considered that CEMEX's proposed changes to the conversion mechanism addressed its concerns. It also considered that the proposed changes to the conversion mechanism involved a variation of CEMEX's offer. The Panel considered that it had the power to grant a modification to allow CEMEX to modify its offer as the conversion mechanism was integral to, and interconnected with, the Default Mechanism.

The Panel considered that the variation to the terms of the CEMEX's Offer would not make the terms of CEMEX's Offer substantially less favourable than those set out in the offers made to Rinker shareholders in the original Bidder's Statement. In fact the Panel considered that the revised conversion mechanism exposed Rinker shareholders to lower exchange rate risk and was more transparent for Rinker shareholders than the original conversion mechanism

(e) in relation to the ASIC modification, the Panel:

(i) varied the instrument to make it clear that the relief granted in respect of section 619 applied only to the Default Mechanism; and

(ii) varied the instrument to include a modification of section 650B to allow the proposed variation of the terms of the US dollar to Australian dollar conversion mechanism described in CEMEX's draft supplementary bidder's statement, provided to the Panel on 7 December 2006.

THE PANEL & PROCESS

7. The President of the Panel appointed Stephen Creese, Hamish Douglass (sitting Deputy President) and Marie McDonald (sitting President) as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.

8. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.

9. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

APPLICATION

Background

10. Rinker is an Australian Stock Exchange Limited (**ASX**) listed building materials company, incorporated in Australia. It was formed upon a demerger from CSR Limited in March 2003. Rinker currently has 895,059,958 fully paid ordinary shares

on issue, including 22,479,905 shares which underlie 4,495,961 American Depository Shares (**ADSs**) traded in the USA.

11. The registered address of more than 99% of Rinker's shareholders is in Australia.

12. The domicile of the beneficial owners of its shares/ADSs is approximately:

Shareholder domicile	% of shares held
Australia	65%
United States	20%
Other	15%

13. On 27 October 2006, CEMEX announced its intention to make a takeover offer for Rinker, for:

> *"US$13.00 per share, equivalent to A$17.00 per share."*

14. A footnote to the "A$17.00", at the bottom of the page of the announcement, said: "Based on an exchange rate of A$1.00 to US $0.7645, as published by the Reserve Bank of Australia, as of October 27, 2006".

15. On 30 October 2006 CEMEX received an Exemption and Declaration from ASIC under section 655A(1) which modified the Act as it applied to the Bidder in a number of ways. For the purposes of the Application it was modified as if:

> *subsection 619(2) of the Act were modified or varied by deleting the full stop at the end of paragraph (e) and inserting the following words:*
>
> *(f) any differences in the offers attributable to the fact that consideration under the bid may be paid in either Australian or US dollars.*

(the **Modification**)

16. On 30 October 2006 CEMEX lodged and served its bidder's statement (**Bidder's Statement**). The Bidder's Statement contained an offer (**Offer**) which was a US dollar bid fixed at US $13.00 per share. Shareholders were able to elect on the acceptance form whether they wished to receive the consideration in US dollars or to take up CEMEX's offer to convert the US dollar consideration into its equivalent value in Australian dollars. If a shareholder did not make a valid election, the shareholder would receive payment of the consideration in US dollars unless they held Rinker shares (as opposed to American Depository Shares (**ADSs**)) and their address in Rinker's share registry was in Australia.

17. Section 8.8(d) of the Bidder's Statement set out how the US dollar consideration would be converted into Australian dollars. It provided that:

> *Conversion of US dollars to Australian dollars will be made on the following basis: the consideration under this Offer payable in US dollars to which you would otherwise be entitled will be converted from US dollars to Australian dollars at the exchange rate obtainable by the Australian Registry, in the case of Rinker Shares, or the US Depositary, in the case of Rinker ADSs, on the spot market in Sydney , in the case of the Australian Registry, and in New York, in the case of the US Depositary, at approximately noon (Sydney or New York time, as applicable) on the date consideration under this Offer is*

*made available by Bidder to the Australian Registry or the US Depositary, as applicable (each a **payment agent**) for delivery in respect of the relevant Rinker Securities.*

18. Accordingly, the Australian dollar amount payable to the shareholder depended on the US dollar and Australian dollar rates on a date when CEMEX paid funds to its share registry to pay the relevant shareholder. The share registry would then convert the US dollar consideration to Australian dollar at the obtainable spot rate in Sydney at approximately noon on the day of receipt.

Declaration and orders sought in the Application

19. Under section 656A, Rinker sought review of ASIC's decision to grant the Modification and an order that the Modification be set aside.

20. Rinker also sought a declaration of unacceptable circumstances under section 657A in relation to the structure of the Offer (specifically due to the potential for a Rinker shareholder, who elects, or is deemed to elect, to receive bid consideration in Australian dollars, to receive an amount different from another Rinker shareholder).

DISCUSSION

21. The Panel considered the following issues:

    (a) whether the fact that Rinker shareholders, who elected to receive Australian dollar consideration (or who received Australian dollar consideration as a result of the operation of the Default Mechanism) may have received different Australian dollar amounts as a result of the conversion mechanism under the Offer, infringed the equality of opportunity principle in section 602(c);

    (b) whether CEMEX's US $13 cash bid was to be considered a "cash" or a "non-cash" bid for the purposes of Chapter 6; and

    (c) whether CEMEX's Bidder's Statement contained adequate disclosure,

    in deciding whether there were unacceptable circumstances.

22. The Panel also considered whether ASIC's decision to grant the Modification should be affirmed, varied, set aside and substituted, or set aside and remitted to ASIC for reconsideration, under section 656A(3).

Section 602(c) – Equality of opportunity

23. Rinker submitted to the Panel that CEMEX's offer breached the equality of opportunity principle of Australian takeovers regulation (found in section 602(c)). Rinker submitted that Rinker shareholders who accepted CEMEX's Offer at different times, and who elected to receive the bid consideration converted into Australian dollars, could receive different amounts of Australian dollars because of changes in the exchange rate between Australian and US dollars. Rinker argued that this was unacceptable.

24. The Panel did not consider that the Offer (in offering US dollars to all shareholders with a conversion option to Australian dollars provided by CEMEX and open to all shareholders) in itself offended the principle in section 602(c).

25. The Panel drew an analogy with the variable value offered to target shareholders in a scrip offer where the value of the shares offered as consideration may vary during the course of the offer, even though the number of shares offered does not vary.

26. The Panel considered that Rinker shareholders would not be treated unequally and that as long as the disclosure of the risks and other issues associated with the consideration offered and the conversion facility was adequate, the consideration CEMEX was offering, and the conversion facility, did not give rise to unacceptable circumstances.

27. However, the Panel did consider that further disclosure was required in relation to the mechanism for currency conversion proposed by CEMEX and the risk to which Rinker shareholders would be exposed either in accepting US dollar consideration or electing to have it converted to Australian dollars (see paragraphs 51 to 57 below).

Foreign currency bid as "cash" or "non-cash" bid under Act

28. Rinker submitted that foreign currency offered as consideration under a takeover bid was not a "cash sum" for the purposes of Chapter 6. Therefore the minimum bid price rule (section 621(3)) and on-market purchase rule (section 651A) apply to a foreign currency offer on the basis that the foreign currency is "non-cash" consideration.

Minimum bid price rule – s621

29. Rinker submitted that the minimum bid price rule and the on-market purchase rule had been drafted on the basis that an offer of a "cash sum" had a certain value which did not fluctuate and that since those sections had specific provisions which applied to "non-cash" bids (recognising that "non-cash" bids may have a fluctuating value) the US dollar bid was a "non-cash" bid as a result of the variable Australian dollar amount that it represented.

30. Accordingly, in Rinker's view:

    (a) the minimum bid price rule in section 621 contained a mechanism for valuing non-cash consideration – subsection (4) provides that "*the value of consideration that is not a cash sum is to be ascertained as at the time of the relevant offer, purchase or agreement is made*". Therefore Rinker submitted that as the consideration offered under a takeover bid is strictly offered each day during the offer period it was necessary to continually compare the price paid by CEMEX in Australian dollars for its pre-bid acquisition of 1000 Rinker shares with the Australian dollar value of the bid consideration under the offer (since the Australian dollar equivalent of CEMEX's US$13 "non cash" consideration was required to be valued under section 621(4)); and

    (b) the effect of any on-market purchases made by CEMEX during the offer period would trigger an obligation, under section 651A, to provide a fixed Australian dollar cash alternative, in accordance with section 651A(4).

31. Rinker submitted that if a foreign currency offer was viewed as a "cash" offer, the on-market purchase rule and the minimum bid price rule did not work as:

(a) the minimum bid price rule did not provide a means of valuing a US dollar "cash" sum (as against an Australian dollar sum paid in the 4 months before the date of the bid); and

(b) the on-market purchase rule did not work because no valuation mechanism is provided to compare the Australian dollar on-market purchase price to the currency offered under the bid.

32. The Panel considered that Rinker's analysis of section 621 was incorrect. The time for assessing compliance with section 621(3) is at the time of dispatch of the offers (or earlier on the basis of ASIC class order relief) and it was clear that there had been no breach of the minimum bid price rule at the time offers were first made under the bid (regardless of whether $US consideration was regarded as "cash" or not).

On-market acquisitions in Australian dollars – s651A

33. The Panel considered that the only issue relevant to the cash/non-cash distinction which may warrant consideration by it[3] related to how section 651A (on-market purchase rule) applied in the context of CEMEX's US dollar offer and whether, if CEMEX made on-market acquisitions of Rinker shares during the bid period, it would be required to provide a fixed Australian dollar cash alternative. The Panel considered that, although CEMEX had not made on-market purchases (and accordingly, the relevant circumstances in relation to on-market acquisitions were not yet before it) the issue was currently relevant because CEMEX's Bidder's Statement stated that "*Bidder reserves the right to purchase, or cause an affiliate to purchase, Rinker Shares outside the Offer at any time during the Offer Period, subject to applicable laws and it obtaining a grant of exemptive relief by SEC.*".

34. In relation to section 651A, Rinker provided an example, in support of its contention that the regime was unworkable if a US dollar sum was considered "cash":

> Assume CEMEX buys shares on-market on 3 different dates during the bid for A$17.00, A$17.25 and A$17.50. On each purchase date, the exchange rate was such that this was approximately equivalent to US $12.50– a lesser value than the CEMEX bid price on that day.
>
> The Australian dollar then strengthens. By the time a shareholder (who elects to receive Australian dollars) accepts under the bid and is paid, the Australian dollar equivalent of US $13.00 is then only A$16.50.

35. The Panel considered that the example did illustrate that there would be difficulties in the application of the section, if the US dollar bid was considered a "cash" bid for the purposes of section 651A including:

(a) the circumstances (if any) in which CEMEX would be required to provide a fixed Australian dollar cash alternative under its Offer;

(b) the time at which the on-market purchase rule applies (i.e. whether the comparison between the on-market purchase price and the Australian dollar equivalent of US $13.00 is made on the date of the on-market purchase) and

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[3] CEMEX advised that the bidder's statement was approved by a unanimous resolution of directors of the bidder, satisfying section 637(1), regardless of whether the offer was a "cash" offer.

therefore the exchange rate to be applied in making a comparison of Australian dollar on-market purchases and US dollar bid consideration.

36. On the other hand, CEMEX submitted that its US dollar Offer should have been considered a "cash" offer for the purposes of section 651A. CEMEX argued that the Australian dollar could readily be compared with the US dollar as there was significant world-wide demand for the exchange of the currencies and the price at which they could be converted at a particular time was readily ascertainable. However, CEMEX acknowledged that there may have been differences of opinion as to the reference rate that should have been applied in making a value comparison between the Australian and US dollars (where no actual conversion occurred).

37. CEMEX submitted that if it was to acquire shares outside the bid, it would have simply been necessary to choose an appropriate reference rate for the purpose of calculating whether section 651A was triggered. CEMEX submitted that an appropriate exchange rate for it to use would have been the Reserve Bank Mid-Point Exchange Rate, determined by the Reserve Bank of Australia on the basis of quotations in the interbank foreign exchange market at 4pm each day. CEMEX noted that it had used this rate as a consistent basis for comparison throughout the Bidder's Statement. In CEMEX's view, if an outside purchase of shares by CEMEX did not trigger section 651A at the time of purchase then a subsequent movement in the exchange rate could not give rise to unacceptable circumstances.

38. CEMEX argued that the calculation must be made only at the time of the on-market acquisition, otherwise there would be no certainty as to whether section 651A applied. The application of section 651A at any time other than the time of purchase would not advance the purposes of section 602, because shareholders considering whether to hold their shares, sell on-market or accept the Offer would not know whether and (if so) when the Offer may need to be increased under section 651A. This would be contrary to an efficient, competitive and informed market because, in particular, shareholders who decided to sell their shares on-market would miss out on the opportunity to receive an improved offer price should section 651A be applied subsequent to their decision to sell.

39. Rinker submitted further that the Panel should decide that on-market purchases of Rinker shares by CEMEX, if they occurred in circumstances where CEMEX did not offer an equivalent fixed Australian dollar cash alternative, would be unacceptable (notwithstanding that such acquisitions had not yet occurred).

40. Whilst the Panel was mindful not to pre-judge the issue, given that CEMEX had not yet made any on-market purchases (and was still seeking US Securities Exchange Commission (**SEC**) relief to do so), it also noted that CEMEX had expressly reserved its right to do so (see paragraph 33 above).

41. Rinker submitted that the issue was a "live" issue before the Panel and should be considered by it notwithstanding that CEMEX had not yet acquired any Rinker shares on-market. Rinker argued that:

    (a) a Rinker shareholder considering selling shares on-market would not know whether, if CEMEX bought shares on-market, they would be offered the

same amount in Australian dollar as CEMEX paid on-market for Rinker shares;

(b) Rinker shareholders and the market needed to know the consequences of on-market purchases for the sake of market integrity;

(c) CEMEX had signalled in its Bidder's Statement that it may purchase Rinker shares on-market (and had not disavowed an intention to do so in Panel proceedings); and

(d) Rinker needed to tell its shareholders the consequences of on-market purchases by CEMEX in its target's statement.

42. Rinker said that if CEMEX bought Rinker shares on-market, it would result in confusion in the market about the prevailing Offer price. Rinker submitted that, notwithstanding that actual circumstances relating to on-market purchases did not currently exist, nothing prevented the Panel from resolving the issue now. Rinker cited *Goodman Fielder 01*[4] in support of the proposition that the Panel has previously been prepared to make prospective orders preventing a person from engaging in conduct that would result in unacceptable conduct (in that decision, conduct that would have amounted to frustrating action).

43. The Panel asked the parties their views regarding whether it should refer a question of law to the Court[5] in relation to the issue of whether a US dollar amount constitutes a "cash sum" for the purposes of section 651A.

44. Rinker submitted that the Panel could consider the issue of unacceptability without making a finding regarding whether the US dollar offer constituted a cash sum, and even if the court found that "cash sum" for the purposes of section 651A included a US dollar amount, such circumstances[6] (if they were to exist) should nevertheless be declared to be unacceptable.

45. CEMEX submitted that the issue should not be referred to the Court because the question, at that stage, was a theoretical one (since CEMEX did not have the necessary relief to effect on-market purchases and did not have a present intention to do so). Further, CEMEX considered that following a decision of the Court on whether "cash" in section 651A could include a foreign currency amount, it would still be up to the Panel to determine how Australian dollar purchases should be compared to the US dollar Offer price or whether it was acceptable for CEMEX to purchase Rinker shares on-market for Australian dollar but not provide a fixed Australian dollar offer price option under the Offer.

46. Ultimately, CEMEX offered to undertake to the Panel not to purchase Rinker securities for Australian dollars outside the Offer. The Panel accepted the undertaking proposed by CEMEX (see Annexure A) (**Undertaking**) on the basis that it addressed the only potential issue relating to the question that was properly before the Panel in these proceedings as to whether the Offer was to be considered a "cash"

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[4] [2003] ATP 1

[5] Section 659A of the Act

[6] The "circumstances" being CEMEX paying a fixed sum in Australian dollars on market but not offering Rinker shareholders a fixed Australian dollar alternative under the Offer.

or a "non-cash" bid. This issue was whether, under section 651A and section 657A(2)(b) or under section 657A(2)(a) alone, unacceptable circumstances would arise if CEMEX acquired Rinker shares on-market in Australia and accordingly, gave some Rinker shareholders a fixed Australian dollar amount (on-market) and offered all other Rinker shareholders (who elected to receive their bid consideration in Australian dollars) an Australian dollar amount which depended on the Australian dollar – US dollar exchange rate that applied in converting their US dollar consideration to Australian dollars.

47. In considering the undertaking that CEMEX offered, the Panel advised the parties that it assumed that any acquisition of Rinker securities it made outside its takeover Offer (but in compliance with the Undertaking) would comply with other relevant provisions of the Corporations Act. CEMEX confirmed that this assumption was correct.

48. Accordingly, the Panel accepted the undertaking offered by CEMEX and determined that it did not need to decide (and did not made a finding) regarding whether CEMEX's Offer in US dollars was of a "cash sum" for the purposes of Chapter 6.

Disclosure

49. The Panel had concerns with a number of disclosure issues in CEMEX's Bidder's Statement. The Panel advised CEMEX that it was minded to make a declaration of unacceptable circumstances in relation to CEMEX's disclosure relating to:

    (a) the mechanism for conversion of the US dollars provided as consideration under the CEMEX Offer into Australian dollars;

    (b) the exchange rate risk to which Rinker shareholders (who elected to receive, or who received under the Default Mechanism, Australian dollars) were likely to be exposed;

    (c) the currency risk management strategies CEMEX proposed to implement to limit the effect of decisions it made concerning the Offer going unconditional, the termination of US withdrawal rights and the timing of payments (within the maximum period required by the Act) on US dollar / Australian dollar exchange rates;

    (d) costs and other factors involved in processing foreign currency cheques in Australia to which Rinker shareholders (who elected to receive US dollars) may have been exposed; and

    (e) the use of withdrawal rights as an exchange rate risk management tool (and the limitations of using such withdrawal rights as an exchange rate risk management tool).

50. However, the Panel advised CEMEX that it would be willing to review any supplementary disclosure that CEMEX was prepared to provide, in order to avoid the need to make a declaration of unacceptable circumstances.

Conversion mechanism

51. As noted in paragraph 17 above, the Offer described a mechanism under which shareholders who elected to have their bid consideration converted to Australian

dollars (or who received Australian dollars as a result of the Default Mechanism) would have their US dollar bid consideration converted into Australian dollars.

52. In its submissions Rinker highlighted the potential risks associated with the operation of the conversion mechanism. The Panel shared a number of Rinker's concerns about the structure of CEMEX's original conversion mechanism.

53. The Panel sought clarification from CEMEX as to the operation of the conversion mechanism. In particular, the Panel was concerned that the possible effect of the conversion of US dollars as payment of consideration may have had a material effect on the spot exchange rate between Australian and US dollars when CEMEX provided funds to its Australian payment agent, and that this had not been adequately disclosed in the Bidder's Statement.

54. In its submissions CEMEX stated that it:

    (a) had a broad range of foreign exchange execution strategies available to it to limit the effect of decisions it made concerning the offer going unconditional, the termination of US withdrawal rights and the timing of payments (within the maximum period required by the Act) on US dollar - Australian dollar exchange rates; and

    (b) would "c*onduct the exchange of the necessary amount of US dollars through the use of the most appropriate combination of [foreign exchange execution] strategies taking into account all relevant circumstances*",

55. The Panel considered that CEMEX's submissions indicated that the conversion mechanism was likely to have changed materially. Accordingly, the Panel advised CEMEX that it should make further disclosure in relation to the proposed changes to the conversion mechanism.

56. CEMEX provided draft supplementary disclosure to the Panel which disclosed that CEMEX would convert the US dollar bid consideration into Australian dollars by reference to the WM/Reuters Intraday Mid Spot Rates during the period (**Exchange Rate Reference Period**):

    (a) if the shareholder accepted the Offer (and did not withdraw their acceptance) before the date it was declared unconditional, commencing on the date the Offer was declared unconditional and ending three business days prior to the date the shareholder was paid under the Offer; or

    (b) if the shareholder accepted the Offer (and did not withdraw their acceptance) after the date it was declared unconditional, commencing on the date the acceptance was received by the Australian Registry (for Rinker Shares) or the US Depositary (for Rinker ADSs) and ending three business days prior to the date the shareholder was paid under the Offer.

57. Subject to the Panel's decision regarding the ASIC Modification and changes to the Offer terms (see paragraphs 104 to 120 below) the Panel considered that the additional disclosure and proposed changes to the conversion mechanism addressed the Panel's concerns.

Risks

58. The Panel also considered that the risks to which Rinker shareholders were likely to be exposed by electing to receive their bid consideration in Australian dollars, had not been adequately disclosed in the Bidder's Statement.

59. The Panel also warned that any supplementary disclosure should not refer to the "*certainty provided by receiving cash*", or similar references, unless the risks of exchange rate conversion on the amount of Australian dollars Rinker shareholders were likely to receive were prominently and clearly referred to at the same place (the Panel noted that mere footnoting would be inadequate) and with the same prominence as the "*certainty*" references.

60. The Panel accepted supplementary disclosure by CEMEX, which satisfied its concerns. The disclosure clarified:

    (a) the risk that the exchange rate prevailing on the day a particular shareholder accepted the Offer may differ from the rate prevailing for the purposes of the Exchange Rate Reference Period;

    (b) the risk that there may be a significant shift in the value of the US dollar compared to the Australian dollar, which may affect the value of the Offer in Australian dollar terms;

    (c) the risk that different shareholders who accept the Offer on different days may receive different Australian dollar amounts (because different Exchange Rate Reference Periods would apply);

    (d) the risk that the exchange rate calculated under a shorter Exchange Rate Reference Period may be affected more greatly by exchange rate fluctuations on a particular day within that period, noting that the bidder may elect to pay Rinker shareholders earlier than the last day on which payment is required to be made under the Act; and

    (e) the risk that CEMEX's own trading in Australian dollars may contribute to exchange rate fluctuations.

Foreign Exchange Strategies

61. As noted in paragraph 54 above CEMEX made submissions to the Panel that it would use a broad range of "foreign exchange execution strategies" available to it to limit the effect of decisions it made concerning declaring the offer free from defeating conditions, the termination of US withdrawal rights and the timing of payments (within the maximum period required by the Act) on US dollar - Australian dollar exchange rates.

62. The Panel considered that there was inadequate disclosure in the Bidder's Statement relating to the relevance of the currency risk management strategies (which CEMEX set out in its Panel submissions to the Panel) to CEMEX's Offer. The Panel required CEMEX to make further disclosure concerning these strategies.

63. The Panel accepted the further supplementary disclosure provided by CEMEX in relation to its foreign exchange strategies.

Processing foreign currency cheques

64. The Panel was concerned that the Bidder's Statement did not contain sufficient information for Rinker shareholders who might consider accepting US dollars as consideration, in relation to the costs and other factors involved in processing foreign currency cheques in Australia.

65. Supplementary disclosure was provided by CEMEX which provided more information to Rinker shareholders about the consequences of making their own arrangements to convert US dollar bid consideration into Australian dollars. The additional disclosure warned Rinker shareholders who were considering accepting US dollar consideration to seek information from their own bank as to whether:

    (a) the conversion rate used by their bank may be different to that applied by CEMEX under its conversion mechanism;

    (b) banks may charge fees for such a transaction; and

    (c) banks may take different times to clear cheques and provide Australian dollar proceeds.

66. The Panel accepted this supplementary disclosure as satisfying its concerns regarding information for Rinker shareholders in relation to processing US dollar cheques.

67. The Panel noted that to the extent that Rinker did not consider the risks and processes to be adequately disclosed, it was open to Rinker to set out in a supplementary target's statement any further procedures or information which it considered were necessary for Rinker shareholders to more fully appreciate the costs or risks associated with such conversion arrangements.

Use of withdrawal rights

68. CEMEX's submissions to the Panel suggested that the withdrawal rights provided by CEMEX as a term of the Offer (set out in section 8.9 of the Bidder's Statement) could be used by Rinker shareholders, who accepted the Offer, as an exchange rate risk management tool.

69. The Panel considered that, if this was the case and such rights could be effectively used by Rinker shareholders to manage exchange rate risk, then this was not adequately disclosed in the Bidder's Statement.

70. The Panel noted however, that section 7.3 of the Bidder's Statement stated that if CEMEX obtained certain SEC relief then withdrawal rights would terminate "*upon the later of 20 US Business Days following the date of commencement of the Offer and the day on which the Offer becomes wholly unconditional ... subject to Bidder giving at least five US Business Days' notice of its intention to do so*."

71. The Panel considered that a Rinker shareholder's use of withdrawal rights to manage exchange rate risk after acceptance of the Offer would be considerably limited in the event that the SEC granted the relief sought. That is, if the SEC granted the necessary relief, and CEMEX gave the requisite five US Business Days notice, the withdrawal rights may terminate on and from the date the offer becomes unconditional (assuming that date was later than 12 December, being 20 US Business Days after commencement of the Offer).

72. In the Panel's experience the vast majority of acceptances were likely to be received by CEMEX after the Offer was declared unconditional. Accordingly, if the SEC relief sought by CEMEX was granted (and CEMEX availed itself of the right to terminate), the withdrawal rights would likely be of little or no use to Rinker shareholders who accepted the Offer after it became unconditional i.e. during the Exchange Rate Reference Period which would determine the amount of Australian dollars they would receive. The Panel considered that this required further disclosure in the Bidder's Statement.

73. The Panel considered that as the clarifications which were required were so extensive, it would be desirable for CEMEX to restate the clarified withdrawal rights in its supplementary Bidder's Statement.

74. The Panel accepted CEMEX's further disclosure which provided this clarification in its supplementary bidder's statement.

Additional disclosure matters

75. In the course of reviewing successive drafts of CEMEX's proposed supplementary bidder's statement (to determine whether it dealt with the Panel's concerns set out in paragraph 49 above), a number of additional disclosure issues were raised by the Panel, which the Panel considered should be dealt with by CEMEX in its supplementary bidder's statement. These issues are set out below.

Current Australian dollar value

76. The Panel considered that CEMEX should use the most current Australian dollar comparative value of the US$13 Offer price that was practicable in any supplementary disclosure.

77. CEMEX accepted this, and in the supplementary bidder's statement dated 8 December 2006 which was dispatched in response to the Proceedings, the US$13 consideration was described as being equivalent to A$16.53 based on the WM/Reuters Intraday Mid Spot Rates on 6 December 2006.

Exchange Rate Reference Period

78. The Panel considered that CEMEX's disclosure in relation to the Exchange Rate Reference Period required further clarification in relation to whether the Rinker shareholders who accepted the Offer on the same day, and who elected to receive bid consideration in Australian dollars, would be paid that amount on the same day and the same exchange rate would be used in determining the Australian dollar amount (resulting in those shareholders receiving the same Australian dollar amount).

79. This matter was confirmed by CEMEX and set out in its supplementary bidder's statement.

Replacement of sections of the Bidder's Statement and acceptance forms

80. The Panel considered that, in the light of the revised conversion mechanism, the term of the Offer set out in section 8.8(d) of the Bidder's Statement concerning the currency election and conversion mechanism had been altered so significantly that a new section 8.8(d) should be included in the supplementary bidder's statement, replacing the former section. CEMEX made these necessary amendments.

81. Consistently, the Panel considered that section 7.1 (which contained a discussion about currency exchange rates) also required replacement with a version which clearly reflected the changes made to the currency conversion mechanism. As that section of the original Bidder's Statement included a graph based on the Reserve Bank Mid Point Exchange Rates and a sensitivity analysis using those rates, the Panel considered that the graph should be repeated / replaced referring to the WM/Reuters Intraday Midpoint Spot Rate (calculated on a daily basis) consistent with the rate used for the new conversion mechanism. CEMEX agreed to these changes. However, CEMEX provided a comparison in its graph of the Reserve Bank Mid Point Exchange Rates and the WM/Reuters Intraday Midpoint Spot Rate so that readers would be able to appreciate the extent to which these rates had varied on an historical basis.

82. Furthermore, the Panel considered that CEMEX should provide Rinker shareholders with new acceptance forms (both in respect of Rinker shares and ADSs), which set out the new conversion mechanism that would apply, in the event that Rinker securityholders elected to receive their bid consideration paid to them in Australian dollars.

Clear statement of change to conversion mechanism

83. The Panel considered that the supplementary bidder's statement should:

    (a) commence with a clear and prominent statement that the terms relating to the currency conversion mechanism of the Offer had been amended, with a very brief description of the changes made. This was addressed by CEMEX in the Chairman's letter accompanying the supplementary bidder's statement; and

    (b) refer Rinker shareholders to the sections of the original Bidder's Statement that had been changed and advise Rinker shareholders that they should disregard the information in those sections of the original Bidder's Statement. This was also addressed by CEMEX in its supplementary bidder's statement.

Comparison of WM/Reuters rate and Reserve Bank Mid Point

84. The Panel considered that if the reference rate of A$0.7645 (which was used as the basis for making comparison of US$13 to A$17 in the original Bidder's Statement) would be different if the WM/Reuters Intraday Midpoint Spot Rate (proposed under the revised conversion mechanism) for the same period were used, then the WM/Reuters rate should be used throughout the bidder's statement and any values based on the Reserve Bank Mid Point Rate should be amended.

85. CEMEX submitted that the differences between these rates on the relevant date were minor (the Reserve Bank Mid-Point Rate was 0.7645 while the average of the WM/Reuters Intraday Mid Spot Rates was 0.7664) and accordingly, CEMEX did not consider it necessary to amend all values in the Bidder's Statement to reflect this minor variation.

86. In response, the Panel required a clear statement at the commencement of the supplementary bidder's statement that although the Reserve Bank Mid Point Exchange Rate has been used for illustrative and comparative purposes throughout the Bidder's Statement, shareholders who elected to Australian dollars would be

paid on the basis of the WM/Reuters Rate. CEMEX agreed to set out this statement in the supplementary bidder's statement.

Disclosure of average daily spot rate

87. The Panel noted CEMEX's proposal, in a draft of its supplementary bidder's statement, that it would publish an average of the WM/Reuters Intraday Mid Spot Rates for each day on its website, "from the date for giving notice on the status of the Defeating Conditions".

88. The Panel considered that the average daily spot rates should be published from the *date on which CEMEX gave notice of its intention to terminate withdrawal rights* (since this would be the first date which would be relevant to the Exchange Rate Reference Period for any Rinker shareholder who accepted the Offer and for any Rinker shareholder who may consider exercising any withdrawal rights).

Compulsory acquisition

89. The Panel sought clarification by CEMEX in its supplementary bidder's statement about how any Australian dollar consideration payable for compulsory acquisition under Part 6A.1 would be determined using the new currency conversion mechanism.

90. CEMEX included in its supplementary bidder's statement a section describing the exchange rate at which consideration would be converted into Australian dollars, being the average of the WM Reuters Intraday Mid Spot Rates during the period commencing on:

    (a) the last day of the Offer Period; and

    (b) if compulsory acquisition notices are given before the last day of the Offer Period, on the date they are given,

    and ending 3 business days prior to the date CEMEX makes payment in accordance with the compulsory acquisition provisions of the Act.

91. The Panel advised the parties that it did not consider that the conversion rate calculation mechanism proposed by CEMEX for Rinker shareholders who were subject to compulsory acquisition would be likely to give rise to unacceptable circumstances. The Panel noted that it appeared to it that the mechanism was a reasonable and sensible mechanism for calculating the exchange conversion rate for Rinker shareholders who may become subject to compulsory acquisition (and who elect to receive, or who receive by virtue of the Default Mechanism, Australian dollars). The Panel considered that it was a matter for CEMEX to determine whether it needed a modification of Chapter 6A.

Chairman's letter

92. The Panel sought a number of drafting changes to the Chairman's letter which, in its view, more appropriately reflected its decision including requiring CEMEX to:

    (a) make a clear statement that the Panel required further disclosure because it considered that CEMEX's original disclosure was inadequate and that the Panel was minded to make a declaration of unacceptable circumstances and orders if its concerns were not adequately addressed by CEMEX; and

(b) state that the terms of CEMEX's offer have been amended (at least in relation to the conversion mechanism), as part of the resolution of the Panel's concerns.

ASIC Modification

93. The other major part of the Application was Rinker's request for the Panel to review, under section 656A, ASIC's decision to grant the modification of section 619, granted by ASIC on 30 October. The issue specifically in contention before the Panel was the insertion of a new paragraph (f) into section 619(2) such that the Act required all offers to be the same but disregarded "*any differences in the offers attributable to the fact that consideration under the bid may be paid in either Australian or US dollars*" (the "**Modification**").

Breadth of Modification – whole conversion mechanism or only default mechanism

94. Rinker submitted that the Modification meant that Rinker shareholders, who elected to receive the Australian dollar value of the consideration (or who received the Australian dollar value of the consideration as a result of the Default Mechanism) would potentially receive different Australian dollar cash sums.

95. However, in ASIC's reasons for its decision to grant the Modification (**ASIC Reasons**), ASIC said that it had granted the Modification only for the purpose of facilitating the Default Mechanism.

96. CEMEX also submitted that the Modification was sought only to permit the differences in treatment between Rinker shareholders that might arise because of the Default Mechanism. CEMEX explained to ASIC in its application for the Modification that its Offer was in US dollars, but included an Australian dollar conversion facility for the convenience of shareholders who preferred to have the US dollar Offer price converted at "wholesale rates of exchange". CEMEX submitted that it sought the Modification to permit the Default Mechanism to operate in a manner which provided increased convenience to the small proportion of shareholders who failed to make a valid currency election, ensuring that shareholders who did not make a currency election received payment of bid consideration in the currency they were likely to find the most convenient.

97. CEMEX submitted that relief was only necessary to the extent that Offers differed in the way the Default Mechanism operated, and that the Offers were the same in all other respects. That is, absent the Default Mechanism, CEMEX submitted that the Modification would not have been needed.

98. ASIC's Reasons and CEMEX's submission highlighted that relief similar to the Modification had been granted in relation to takeover bids by:

(a) UUNET Holdings Australia Pty Ltd for Ozemail Limited in 1998 (**Ozemail bid**); and

(b) USFC Acquisition Inc. for Memtec Limited in 1997 (**Memtec bid**).

99. CEMEX submitted that the Ozemail bid and the Memtec bid were structured in a manner similar to the Offer. In each case, offers were made in US dollars and every shareholder was given the right to elect to receive payment in Australian dollars. As

in the Offer, if no election was made, a default mechanism was applied to determine how payment would be made. CEMEX made one change in the Default Mechanism from the default mechanisms that were applied under these earlier bids:

(a) under the Default Mechanism, shareholders would receive US dollars except to the extent that they held shares (as opposed to ADSs) and their address in the register was in Australia; whereas

(b) under the default mechanisms used in the Ozemail and Memtec bids, shareholders received Australian dollars to the extent they held shares (as opposed to ADSs) regardless of their domicile.

100. The Panel considered that the policy underlying ASIC's decision to grant the Modification was not inconsistent with the principles in section 602, namely, ensuring that shareholders who did not make a valid currency election received payment of bid consideration in the currency that they would generally find most convenient.

101. However, the Panel noted in the ASIC Reasons, that ASIC considered that whilst it intended to provide relief only to the extent that differences in the Offers arose by virtue of the Default Mechanism, "*the exact intent and scope of the relief might not be clear on the face of the instrument as the instrument does not specifically refer to the [D]efault [M]echanism*."

102. The Panel accepted the submissions of CEMEX and ASIC that the purpose of seeking (in the case of CEMEX) and granting (in the case of ASIC) the Modification was to facilitate the Default Mechanism.

103. However, the Panel considered that it was desirable to amend the instrument to make it clear that the relief granted in respect of section 619 applied only to the Default Mechanism (and no further).

Review of conversion mechanism

104. When considering whether or not it was desirable to grant the relief to facilitate the Default Mechanism, the Panel considered that it was essential for it to review the conversion mechanism which the Default Mechanism would cause to be applied. On reviewing the original conversion mechanism under the Default Mechanism, the Panel had concerns about its operation and the potential risks which could arise for Rinker shareholders in some circumstances. CEMEX's revised proposed mechanism addressed these concerns (see paragraphs 51 to 57 above).

105. The Panel considered that CEMEX's revised proposed mechanism for conversion of US dollars to Australian dollars was likely to constitute a variation of the terms of CEMEX's Offer. Accordingly, the Panel decided that a modification of the Act would be required to allow CEMEX to vary its Offer terms as set out in its supplementary bidder's statement.

Power under section 656A to allow a variation of the Offer

106. Rinker submitted that the Panel did not have power, in determining Rinker's application under section 656A of the Corporations Act 2001 (**the Act**), to vary the

Modification so as to allow CEMEX to vary the terms of its offer. Rinker submitted that:

(a) Although the Panel may exercise all the powers conferred on ASIC, this is only for the purposes of determining whether the decision under review was the correct or preferable decision on the material before it.

(b) ASIC had not made a decision to allow CEMEX to vary the terms of the Offer, and the Panel could not exercise ASIC's powers in relation to a decision that was never made.

(c) The Panel could take into account changes in facts and circumstances that had arisen since ASIC granted the Modification, but only in reviewing the decision actually made by ASIC – namely the decision to modify section 619 in relation to the Default Mechanism.

107. Sub-section 656A(3) provides that, for the purpose of reviewing a decision of ASIC, the Panel "may exercise all the powers and discretions conferred on ASIC by this Chapter or Chapter 6C". This sub-section is expressed in similar terms to section 43(1) of the *Administrative Appeals Tribunal Act 1975* (**AAT Act**).[7] Rinker referred the Panel to several decisions in which the courts have indicated that, although s43(1) of AAT Act confers broad powers, it does not empower the AAT to review a totally different decision from the decision under review,[8] and the AAT is obliged to answer the same questions as were before the original decision maker.[9]

Case law on section 43(1) of the AAT Act

108. Rinker referred the Panel to *Comcare v Burton*[10] in which Finn J held that the AAT had no jurisdiction, when reviewing a decision by Comcare to pay compensation for expenses (taxi fares) under section 16 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**), to consider whether compensation for permanent impairment was payable under section 24 of the SRC Act.

109. The decision in *Comcare v Burton* can be compared with the earlier Full Court decision in *Fletcher v FCT*.[11] In *Fletcher*, the AAT affirmed the Commissioner of Taxation's decision to reject taxpayers' claims for allowable deductions and disallowed their subsequent objections, and also cancelled a tax benefit under s 177F(1) of the Income Tax Assessment Act 1936 (Cth). The Commissioner had not made any determination under s 177F(1). The Full Federal Court rejected a submission that the tribunal could not cancel the benefit when reviewing the Commissioner's decision. The Full Court commented that:[12]

> "*By force of s 43 of the Administrative Appeals Tribunal Act, the Tribunal has all the powers and discretions that are conferred by s 186 of the Income Tax Assessment Act*

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[7] However, AAT Act s43(1) provides that the AAT "may exercise all the powers and discretions that are conferred *by any relevant enactment* on the person who made the decision" (emphasis added).
[8] *Secretary to the Department of Social Security v Riley* (1997) 17 FCR 99 at 104-5.
[9] *Hospital Benefit Fund of Western Australia v Minister for Health, Housing and Community Services* (1992) 39 FCR 225 at 234; *Comcare v Burton* (1998) 157 ALR 522 at 528.
[10] (1998) 157 ALR 522.
[11] (1988) 19 FCR 442 ; 84 ALR 295.
[12] (1988) 19 FCR 442 ; 84 ALR 295 at 306–7.

> *upon the Commissioner. In exercising those powers and discretions the Tribunal was bound to consider the facts as they were proved in evidence before the Tribunal, making the decision which, upon that evidence and at that time, was the correct or preferable decision to be made in considering the objection. The Tribunal was not confined either to the material which was before the Commissioner, as primary decision-maker, or the events which had occurred up to that time …*
>
> *Once it is understood that, in exercising his powers under s 186, the Commissioner would have been free to exercise a discretion under s 177F of the Income Tax Assessment Act, it follows that, in reviewing the Commissioner's decision under s 186, the Tribunal is free to exercise that same discretion if, upon the material then before it, it seems proper to take that course*."

110. The Full Federal Court applied *Fletcher* in *ASIC v Donald*[13] to hold that the AAT had power under section 43(1) of the AAT Act, when deciding an appeal from a decision by ASIC to make a banning order under sections 829 and 830 of the *Corporations Law*, to decide that ASIC should accept an undertaking under section 93AA of the *Australian Securities and Investments Commission Act 1989*. Kenny J (Gray J concurring) stated at [30]:

> "*When the tribunal stands in the stead of the commission, it is no less favourably placed than the commission. The tribunal has all the powers and discretions that are vested in the original decision-maker, provided that their exercise is only for the purpose of reviewing a decision that the tribunal has power to review. For the purpose of reviewing the commission's decision under ss 829 and 830 of the Law, the tribunal had, by virtue of s 43(1) of the AAT Act, the same powers and discretions as the commission. In determining whether the commission made the correct or preferable decision, the tribunal was also bound to consider the powers and discretions that were exercisable by the commission and were relevant to its consideration of the decision that should be made in respect of the respondent as a consequence of the commission's investigation.*"

111. In *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Commissioner of Taxation*[14] the Full Federal Court said:

> "*Section 43 empowers the Tribunal to exercise all the powers and discretions conferred upon the original decision maker, provided it does so for the purpose of reviewing a decision. Provided the necessary purpose is present, the power conferred upon the Tribunal is not otherwise limited. It is neither necessary nor permissible to put a gloss upon s 43 that would permit the Tribunal to exercise the decision maker's powers and discretions only when those powers or discretions are necessarily interdependent with the decision under review, or where the power or discretion to be exercised by the Tribunal is necessarily involved in the making of the decision under review - see Secretary, Department of Social Security v Hodgson (1992) 37 FCR 32 at 39 – 40.*"

Application to the Panel's power under section 656A

112. The cases referred to above on section 43(1) of the AAT Act all involved the exercise of powers other than the power used to make the decision under review. In this case there was no suggestion that the Panel should exercise any power apart from the

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[13] (2003) 203 ALR 566.
[14] [2005] FCAFC 244 at [29].

power relied on by ASIC to grant the Modification (section 655A). Nevertheless, it is clear from the terms of 656A(3) that any exercise by the Panel of powers and discretions conferred on ASIC (including the exercise of the same power) must be for the purpose of reviewing the decision of ASIC which is subject to review. Accordingly it is necessary for the Panel to identify the decision subject to review under section 656A and ensure that any proposed exercise of ASIC's powers under section 656A is for the purpose of reviewing that decision.

113. Rinker sought to characterise the decision subject to review narrowly, as a decision to modify section 619 in relation to the Default Mechanism. However, the Panel considered that the decision should be regarded as whether ASIC should exercise its powers under section 655A to allow a default mechanism in the Offer whereby shareholders receive payment in a currency most likely to be convenient for them, should they fail to make an election. The Panel considered that reviewing the currency conversion mechanism which would apply under the Default Mechanism, and its appropriateness, both by ASIC originally and by the Panel when reviewing ASIC's decision, was integral to deciding whether or not to grant the Modification sought by CEMEX.

114. CEMEX's application to ASIC for the Modification:

    (a) described its proposal that offerees would be able to elect to receive the US dollar Offer consideration converted into Australian dollars at the time of payment;

    (b) proposed that, where no election was made, US dollars would be paid to ADS holders and shareholders whose registered addresses were in the US or elsewhere, however Australian dollars would be paid to shareholders whose registered address were in Australia (i.e. the Default Mechanism);

    (c) stated that this proposal was designed to facilitate shareholders receiving payment in a currency which was most likely to be convenient for them, should they have failed to make an election;

    (d) requested an exemption from section 619 to the extent required to facilitate the acceptance procedure proposal; and

    (e) attached a draft instrument which described (in a condition stated in Schedule C) a conversion mechanism in similar terms to that provided for in the Offer CEMEX subsequently lodged with ASIC.

115. It was open to ASIC, in making its decision, to consider the terms of the Default Mechanism and conversion mechanism set out in the proposed offer and to require changes as a condition of granting relief. The fact that CEMEX can now only change the terms of the Default Mechanism and conversion mechanism if the Panel grants a modification of section 650B is a consequence of the Panel reviewing the ASIC decision after ASIC made its decision and circumstances changing since the original ASIC decision (namely, CEMEX had lodged and dispatched the Offers, in reliance on the Modification). The Panel considers that, consistent with the case law on section

43(1) of the AAT Act,[15] the Panel is not confined, in exercising its power under section 656A, to events which had occurred up to the time ASIC made its decision.

116. Accordingly, the Panel considered that it had power to grant a modification to allow variation of CEMEX's Offer if that was necessary to facilitate what it considered to be the correct and preferable decision as to whether to grant or refuse relief, and the terms on which to grant any relief, which facilitated shareholders who failed to make an election receiving payment in the currency that was most likely to be convenient for them.

Offer terms substantially less favourable?

117. The Panel considered that the variation to the terms of the CEMEX's Offer (i.e. the conversion mechanism) would not make the terms of CEMEX's Offer substantially less favourable than those set out in the offers made to Rinker shareholders in the original Bidder's Statement. In fact the Panel considered that the revised conversion mechanism exposed Rinker shareholders to lower exchange rate risk and was more transparent for Rinker shareholders than the original conversion mechanism.

118. Accordingly, the Panel decided that subject to the change in the conversion mechanism, and the modification of section 619 to limit the Modification to the Default Mechanism (described in paragraph 103 above), the correct and preferable decision was to maintain relief which facilitated shareholders receiving payment in a currency which was most likely to be convenient for them, should they fail to make an election.

119. Accordingly, the Panel decided to vary the instrument granted by ASIC on 30 October to include a modification of section 650B to allow the proposed variation of the terms of the US to Australian dollar conversion mechanisms described generally at paragraph 56 above and to limit the operation of the Modification to the Default Mechanism.

120. Attached at Annexure B is an instrument, executed by Marie McDonald (the sitting president), which varied the instrument granted by ASIC on 30 October, and a copy of the original ASIC instrument is also attached in Annexure B, marked up to show the relevant changes.

DECISION

121. In the light of the supplementary disclosure provided by CEMEX (dealing with the matters described in paragraphs 49 to 92) and the Undertaking offered by CEMEX (and accepted by the Panel), the Panel declined to make a declaration of unacceptable circumstances.

122. The Panel did not consider that it was against the public interest to decline to make a declaration of unacceptable circumstances.

123. Furthermore, in accordance with its power in section 656A(3), the Panel decided to vary the instrument granted by ASIC on 30 October as set out in Annexure B.

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[15] See eg: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; *Fletcher v FCT* (1988) 84 ALR 295 at 306–7; *Carson v Comcare* [2004] FCAFC 204.

124. As the Panel did not make a declaration of unacceptable circumstances, it made no order for costs.

Marie McDonald
President of the Sitting Panel
Decision dated 7 December 2006
Reasons published 8 January 2007

Annexure A – Undertaking

The following is the text of the undertaking given by CEMEX to the Takeovers Panel in relation to acquisitions of Rinker shares for Australian dollars in order to obviate any concerns raised by Rinker as to the operation of section 651A in relation to the CEMEX Offer:

> CEMEX Australia Pty Ltd undertakes, in its own right and for and on behalf of CEMEX, S.A.B. de C.V. and every other associate of CEMEX Australia Pty Ltd, that it, its associates and any other person acting for the account or benefit of CEMEX Australia Pty Ltd or its associates will not purchase or arrange to purchase Rinker Securities (as that term is defined in the bidder's statement dated 30 October 2006) for Australian dollars outside the bid during the bid period.

Annexure B – ASIC modification

Takeovers Panel
Corporations Act 2001 – Subsection 656A –Declaration

Under section 656A of the Corporations Act 2001, the Takeovers Panel varies the instrument set out in Schedule A ("**Instrument**") by:

1. in paragraph 2 of the Instrument, after the words "the case specified in Schedule B", inserting the words "(and, in paragraph (vi), in the case specified in Schedule G)";

2. in paragraph 2(iv) of the Instrument, replacing the words "fact that consideration under the bid may be paid in either Australian or US dollars" with the words:

   "terms on which consideration under the bid may be paid to shareholders who fail to make a valid currency election as to whether they wish to receive the consideration offered in US dollars or converted to Australian dollars, depending on the jurisdiction in which the shareholder is registered as shown in the register of members";

3. after paragraph 2(v) of the Instrument, inserting a new paragraph as paragraph 2(vi) as follows:

   "section 650B were modified or varied by adding the following subsection after subsection (4):

   > "(5) The bidder may vary the offers by varying the terms concerning conversion of the consideration into Australian dollars."; and",

   and renumbering the original paragraph 2(vi) of the Instrument as paragraph 2(vii); and

4. inserting a new Schedule G in the Instrument as follows:

   "The variation of the terms concerning conversion of the consideration into Australian dollars set out in a supplementary bidder's statement relating to the Bid which was given in draft form to the Takeovers Panel by the Bidder on 7 December 2006 and which will be lodged in final form with ASIC on or about 7 December 2006.".

Schedule A

The instrument of exemption and declaration issued by the Australian Securities and Investments Commission dated 30 October 2006 signed by Jerry Pearson in relation to a takeover bid by CEMEX Australia Pty Ltd ACN 122 401 405 for Rinker Group Limited ACN 003 433 118.

Dated 7th of December 2006.

Signed by Marie McDonald
President of the Sitting Panel

Australian Securities and Investments Commission
Corporations Act 2001 – Subsection 655A(1) – Exemption and Declaration

1. Under paragraph 655A(1)(a) of the Corporations Act 2001 (***Act***), the Australian Securities and Investments Commission (***ASIC***) exempts the person specified in Schedule A in the case specified in Schedule B:

   (i) from section 654A of the Act, to the extent that section would prohibit the Bidder disposing of bid class securities during the bid period to effect withdrawals of acceptances by holders of bid class securities in accordance with the terms of the offers;

   (ii) subject to the limitation set out in Schedule C and on the conditions set out in Schedule D, from subsection 633(1) of the Act, to the extent that subsection would require the bidder to prepare a bidder's statement containing the information specified in paragraphs 636(1)(h), 636(1)(k) and 636(1)(l) of the Act in respect of:

      (a) any securities in the Target in which the Bidder has a relevant interest because a person referred to in Schedule F has a relevant interest in those securities; and

      (b) the Bidder's voting power in the Target, to the extent it arises because a person referred to in Schedule F has a relevant interest in securities in the Target,

   where the Bidder does not know about the relevant interest; and

   (iii) subject to the limitation set out in Schedule C and on the conditions set out in Schedule E, from subsection 621(3) of the Act in respect of any purchase of or agreement to purchase bid class securities by a person referred to in Schedule F during the 4 months before the date of the Bid, where the Bidder does not know about the acquisition or agreement.

2. Under paragraph 655A(1)(b) of the Act, ASIC declares that Chapter 6 of the Act applies to the person specified in Schedule A in the case specified in Schedule B (and, in paragraph (vi), in the case specified in Schedule G) as if:

   (i) section 9 of the Act were modified or varied by inserting:

      (a) after the definition of "***agreement***"

      "***American Depositary Shares*** means an ownership interest in securities issued by JP Morgan Chase Bank."; and

      (b) after the definition of "unsecured"

      "***US Business Day*** means any day other than a Saturday, Sunday or federal holiday in the United States of America and consists of the time period from 12.01 am through 12.00 Midnight, New York City time, as calculated in

accordance with Rule 14d-1 under the United States Securities and Exchange Act of 1934.

US dollars means the currency of the United States of America.";

(ii) section 605 of the Act were modified or varied by adding the following subsection after subsection (2):

"(3) For the avoidance of doubt:

(i) American Depositary Shares will be taken to be in the same class of securities as the securities they represent;

(ii) a reference to a security includes a reference to an American Depositary Share which represents such a security; and

(iii) the giving of any offer, notice or document to the holder of an American Depositary Share satisfies the obligation to give the offer, notice or other document, as the case may be, to the holder of the security represented by the American Depositary Share.";

(iii) paragraph 618(1)(a) of the Act were modified or varied by inserting the words "and if that class includes American Depositary Shares representing securities in that class, all of those American Depositary Shares" immediately before the semi-colon;

(iv) subsection 619(2) of the Act were modified or varied by deleting the full stop at the end of paragraph (e) and inserting the following words:

";

(f) any differences in the offers attributable to the terms on which consideration under the bid may be paid to shareholders who fail to make a valid currency election as to whether they wish to receive the consideration offered in US dollars or converted to Australian dollars, depending on the jurisdiction in which the shareholder is registered as shown in the register of members;

Deleted: fact that consideration under the bid may be paid in either Australian or US dollars

(g) any differences in the offers attributable to the fact that the consideration under the bid offered in respect of each American Depositary Share is proportionate to the number of ordinary shares the American Depositary Share represents."

(v) section 624(2) of the Act were modified or varied by inserting the words "the longer of 10 US Business Days and" after the words "the offer period is extended so that it ends"; and

(vi) section 650B were modified or varied by adding the following subsection after subsection (4):

"(5) The bidder may vary the offers by varying the terms concerning conversion of the consideration into Australian dollars."; and

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(vii) subsection 650E(1) of the Act were modified or varied by deleting "accepts" where first appearing and replacing it with the words "has accepted".

Schedule A

CEMEX Australia Pty Ltd ACN 122 401 405 (***Bidder***)

Schedule B

A takeover bid (***Bid***) by the Bidder for all the fully paid ordinary shares and American Depositary Shares representing fully paid ordinary shares in Rinker Group Limited ACN 003 433 118 (***Target***), in respect of which a bidder's statement (***Bidder's Statement***) was lodged on or about the date of this instrument.

Schedule C

The aggregate relevant interests in bid class securities acquired, disposed of or held by the foreign associates referred to in Schedule F are less than 5% of the bid class securities.

Schedule D

The Bidder must:

(a) make reasonable efforts between lodgement of the Bidder's Statement and the end of the offer period to obtain all the information required to be disclosed under paragraphs 636(1)(h), 636(1)(k) and 636(1)(l) of the Act;

(b) if ASIC requires, provide details of its efforts to ascertain the information specified in (a) above, including copies of correspondence sent to its foreign associates; and

(c) disclose any information obtained under paragraph (a) in a replacement bidder's statement or a supplementary bidder's statement.

Schedule E

The Bidder must:

(a) make reasonable efforts to find out whether a price higher than the bid price was paid, or agreed to be paid, for bid class securities during the 4 months preceding the Bid by a foreign associate. This obligation applies after lodging the Bidder's Statement and throughout the offer period;

(b) increase the price to be paid under the Bid as soon as possible after it discovers that a higher price was paid for bid class securities by a foreign associate of the Bidder, during the 4 months preceding the Bid; and

(c) if ASIC requires, provide details of efforts made to obtain the information specified in (a) above, including copies of correspondence sent to its foreign associates.

Schedule F

Foreign associates of the Bidder that meet all of the following requirements:

(a) they operate and are managed outside Australia;

(b) they are associates of the Bidder only because of paragraph 12(2)(a) of the Act;

(c) they are not involved in the planning or progress of the Bid; and

(d) they are not investment companies.

Schedule G

The variation of the terms concerning conversion of the consideration into Australian dollars set out in a supplementary bidder's statement relating to the Bid which was given in draft form to the Takeovers Panel by the Bidder on 7 December 2006 and which will be lodged in final form with ASIC on or about 7 December 2006.

Dated this 30th day of October 2006.

Signed by: Jerry Pearson, as a delegate of ASIC.