



Thursday, 7 December 2006

Rinker Group Limited - Panel Decision

The Takeovers Panel (**Panel**) advises that it has considered the application (**Application**) from Rinker Group Limited (**Rinker**) in relation to an off-market takeover bid by CEMEX, S.A.B. de C.V. (**CEMEX**) for Rinker.

CEMEX agreed to provide a supplementary bidder's statement to address a number of concerns which the Panel had concerning disclosure of the terms of the offer relating to the facility offered by CEMEX to convert its US dollar consideration into Australian dollars and the risks associated with converting the US dollar consideration into Australian dollars. CEMEX also provided the Panel with an undertaking that it would not purchase Rinker shares outside its offer for Australian dollars which addressed a concern raised by Rinker. The Panel had advised CEMEX that, in the absence of additional disclosure, it was minded to make a declaration of unacceptable circumstances. However the Panel considers that CEMEX's proposed supplementary disclosure and undertaking will address its concerns and accordingly, declined to make a declaration of unacceptable circumstances.

CEMEX's offer is structured as a United States dollar offer with a conversion mechanism to allow Rinker shareholders to elect to have the United States dollar consideration converted into Australian dollars. Rinker submitted that the actual effect of CEMEX's offer is that shareholders who elect to receive Australian dollars may receive different amounts depending upon the date on which CEMEX pays funds to its share registry (which would then pay the relevant shareholder).

The Application sought review of certain relief granted by the Australian Securities and Investments Commission (**ASIC**) which was designed to facilitate CEMEX's offer structure, and an order that the ASIC relief be set aside. The Application also sought a declaration of unacceptable circumstances and final orders that CEMEX must amend its offer to ensure that all Rinker shareholders who elect to receive bid consideration in Australian dollars, receive the same Australian dollar amount.

1. CEMEX offer - equality of opportunity (s 602(c))

Rinker submitted to the Panel that CEMEX's offer breached the equality of opportunity principle of Australian takeovers regulation in that Rinker shareholders who accepted at different times could receive differing amounts of Australian dollars because of changes in the exchange rate between Australian and US dollars (where the consideration was paid in US dollars and the shareholders elected to use the conversion facility offered by CEMEX).

The Panel does not consider that the CEMEX offer (in offering US dollars to all shareholders with a conversion option to Australian dollars provided by CEMEX) offends the principle in section 602(c).

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.

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 is offering would not give rise to unacceptable circumstances.

2. Cash vs non-cash

Rinker raised the question of whether the CEMEX consideration of US\$13 is "cash" for the purposes of Chapter 6.

The Panel accepted Rinker's submission that there is uncertainty on this matter. However, the Panel is of the view that the undertaking proposed by CEMEX (See Annexure A to this Media Release) (**Undertaking**) addresses the only potential issue relating to that question that was properly before the Panel in these proceedings. This issue was whether, under s651A and s657A(2)(b) or under s657A(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 dollar) an Australian dollar amount which depended on the A\$ - US\$ exchange rate that applied in converting their US dollar consideration to Australian dollar consideration. (The Panel assumed, and CEMEX confirmed, that any acquisition it made outside its takeover offer would comply with other relevant provisions of the Corporations Act.)

Accordingly, the Panel considers that it does not need to decide (and has not made a finding) regarding whether CEMEX's offer in US dollar is "cash" for the purposes of Chapter 6.

3. Disclosure

The Panel advises that, 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:

- (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 elect to receive Australian dollars) are likely to be exposed;

- (c) the currency risk management strategies CEMEX proposes to implement to limit the effect of decisions it makes 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\$ - A\$ exchange rates;
- (d) costs and other factors involved in processing foreign currency cheques in Australia to which Rinker shareholders (who elect to receive US dollars) may be 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).

However, the Panel considers that CEMEX's proposed supplementary disclosure will address its concerns and accordingly, considers that it is not against the public interest to decline to make a declaration.

The Panel notes that the proposed supplementary bidder's statement addresses a number of other issues which were the subject of submissions in the proceedings and the Panel considers that the proposed supplementary bidder's statement addresses these issues adequately.

4. ASIC Modification

The Panel has considered the modification of section 619, granted by ASIC on 30 October (the issue specifically in contention before the Panel was the insertion of paragraph (f) into section 619 in the following terms "any differences in the offers attributable to the fact that consideration under the bid may be paid in either Australian or US dollars") (**Modification**).

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", namely, the mechanism under which a Rinker shareholder who does not make an election as to whether they wish to receive US or Australian dollars, receives US dollars except if they hold Rinker shares (as opposed to ADSs) and their address in the share register is in Australia.

The Panel considered that it was desirable to amend the instrument to make it clear that the relief granted in respect of section 619 applies only to the Default Mechanism.

When considering the relief to facilitate the Default Mechanism, the Panel had concerns about the operation of the original conversion mechanism under the Default Mechanism, the potential risks which could arise for Rinker shareholders and the possibility that the mechanism could have been commercially flawed in some circumstances. CEMEX's revised proposed mechanism, which applies both under the Default Mechanism and where a Rinker shareholder elects to receive Australian dollars, addressed these concerns.

In light of those concerns, the Panel considered that:

- (a) the conversion mechanism which will apply where the Default Mechanism results in payment in Australian dollars was a matter before ASIC in deciding whether or not to grant the Modification to facilitate the Default Mechanism; and
- (b) it was not appropriate to allow the differing treatment of Rinker shareholders under the Default Mechanism unless the conversion mechanism was changed in the manner proposed by CEMEX.

The Panel considered that the variation to the terms of the CEMEX offer i.e. the conversion mechanism, would not make the terms of the CEMEX offer substantially less favourable than those set out in the offers made to Rinker shareholders in the original CEMEX bidder's statement. In fact the Panel considered that the revised conversion mechanism is lower risk and more transparent for Rinker shareholders than the original conversion mechanism.

The Panel decided that the correct and preferable decision is to maintain relief which facilitates shareholders receiving payment in a currency which is most likely to be convenient for them, should they fail to make an election.

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\$ - A\$ conversion mechanisms described in CEMEX's draft supplementary bidder's statement, provided to the Panel on 7 December. The Panel's decision does not affect any other part of ASIC's instrument, except this and the modification to section 619, and the Panel made no comment concerning the remainder of the instrument.

Attached at Annexure B is an instrument, executed by Ms Marie McDonald (the sitting President), which varies the instrument granted by ASIC on 30 October, and a copy of the original ASIC instrument marked up to show the changes.

The sitting Panel which considered the application is Stephen Creese, Hamish Douglass and Marie McDonald (sitting President).

The Panel will publish its reasons for the decision on its website when they are given to parties.

Nigel Morris
 Director, Takeovers Panel
 Level 47, 80 Collins Street
 Melbourne, VIC 3000
 Ph: +61 3 9655 3501
nigel.morris@takeovers.gov.au

Annexure A

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

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;
 - (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):

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

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

- (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.

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Dated this 30th day of October 2006.

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