



Friday, 13 July 2007

Rinker Group Limited 02- Panel Decision

The Takeovers Panel advises that it has made a declaration of unacceptable circumstances and final orders in relation to an application it received on 13 June 2007 from the Australian Securities and Investments Commission (**ASIC**), concerning an off-market takeover bid by CEMEX Australia Pty Ltd (**CEMEX**) for Rinker Group Limited (**Rinker**) and the affairs of Rinker.

The Panel considered that the circumstances of:

- (a) on 10 April 2007, CEMEX making an announcement (**10 April announcement**) that the consideration offered under its bid was its "best and final"¹ (in the absence of a superior proposal); and
- (b) on 7 May CEMEX announcing (**7 May announcement**) that it would allow Rinker shareholders to retain an AU\$0.25 dividend declared by Rinker on 27 April,

gave rise to unacceptable circumstances.

The Panel considered that CEMEX's 10 April announcement did not qualify the terms of CEMEX's offer in respect of any dividends declared on or after 30 October 2006 (other than an AUD0.16 interim dividend of record date 24 November 2006). The Panel considered that CEMEX resiled from its best and final statement in the 7 May announcement. The Panel considered the departure from the best and final statement was inconsistent with "truth in takeovers", which the Panel considers to be a fundamental principle of an efficient competitive and informed securities market.

The Panel has ordered that CEMEX pay shareholders who sold Rinker shares between the two announcements the equivalent of Rinker's dividend (A\$0.25) per share for the net disposal by them of Rinker shares in the relevant period.

CEMEX has indicated to the Panel that it will seek a review of the Panel's decision. If it does, the Panel has indicated that it will stay its orders pending completion of the review.

¹ The Application refers to "best and final"; ASIC's policy refers to "last and final". The Panel considers that nothing turns on the difference in this application.

Jurisdiction

The Application was made under section 657A(2)(a) and sought an order under section 657D. CEMEX submitted that the Panel did not have jurisdiction to consider the Application because it required the Panel to consider whether there had been a breach of the Corporations Act. As a preliminary matter, the Panel considered that it had jurisdiction to consider the Application.

CEMEX also submitted that section 657D does not empower the Panel to make orders requiring it to pay compensation. Under section 657D the Panel may make any order (including a remedial order but not an order directing a person to comply with chapters 6, 6A, 6B or 6C). The Panel considered that it had the power to make the order sought by ASIC.

Announcements

The 10 April announcement included the following:

*"CEMEX announced today that it had reached and signed an agreement with Rinker ... under which it would raise its **offer price** to US \$15.85 per share in cash....*

*CEMEX has agreed to make no adjustment to the **offer price** for the [interim] dividend paid by Rinker in December of 2006....*

*The **offer** is CEMEX's best and final **offer**, in the absence of a superior proposal."*
(Emphasis added)

CEMEX also lodged a notice of variation with ASIC and ASX on 10 April 2007 shortly after making the 10 April announcement. The notice issued pursuant to sections 630(4), 650D and 650F provided in section 2, under the heading "Increase in Offer Price":

"[CEMEX] gives notice that it varies the Offer by increasing the price payable for each Rinker Share from US\$13.00 to US\$15.85 ...

[CEMEX] will not exercise its rights under clause 8.8(e) of the Offer terms in respect of the interim dividend of A\$0.16 per Rinker Share declared by Rinker with a record date of 24 November 2006 but may exercise those rights in respect of any subsequent dividend."

On 27 April 2007, Rinker released its preliminary final report to ASX, which included a statement to the effect that Rinker had declared a fully franked final dividend for 2006-07 of A\$0.25 per Rinker share. The record date was 8 June 2007.

The 7 May announcement included the following:

"CEMEX also announced that Rinker shareholders who are entitled to the final dividend of A \$0.25 per share (announced by Rinker on 27 April 2007) will retain that dividend, irrespective of when they accept the Rinker offer. CEMEX has confirmed it will not exercise its right to deduct that dividend from its offer price of US \$15.85 per share.*

The CEMEX offer has been declared final as to price, in the absence of a superior offer"

(Emphasis added)

*There was a footnote to the 7 May announcement (which was not included in the 10 April announcement):

"However, CEMEX reserves the right to reduce the Offer price for any subsequent dividends or distributions by Rinker."

Best and final statement

The Panel considers truth in takeovers to be a fundamental principle in the Australian takeovers landscape. The Panel considers the 10 April announcement was a best and final statement, qualified only by reference to a superior offer.

Qualified?

The Panel considers that the terms of the 10 April announcement would leave shareholders to conclude that the bid consideration would not be improved further.

Between 10 April and 7 May 2007, CEMEX filed with ASX the following documents:

- (a) 10 April 2007, a copy of the Bid Agreement;
- (b) 10 April 2007, a notice of variation regarding the increased offer;
- (c) 17 April 2007, a fourth supplementary bidder's statement; and
- (d) 18 April 2007, a fifth supplementary bidder's statement.

The Panel did not consider that any of the statements in those documents clearly and unambiguously qualified the best and final statement. In addition, some of them were made many days after the best and final statement, in a period of heightened trading activity.

The Panel also did not consider any of the statements to be sufficiently proximate to the best and final statement, if they were intended to qualify it.

CEMEX's "discretion"

Clause 8.1(c) of the Offer provides:

"If Bidder² acquires your Rinker Securities under this Offer, it will also be entitled to all Rights in respect of your Rinker Securities."

Clause 8.8(e) provides:

*"If Bidder becomes entitled to any Rights as a result of your acceptance of this Offer, it may require you to give to Bidder all documents necessary to vest title to those Rights in Bidder, or otherwise give Bidder the benefit or value of those Rights. If you do not do so, or if you have received or are entitled to receive ... the benefit of those Rights, Bidder will be entitled to deduct the amount ... of those Rights from any consideration otherwise payable to you under this Offer. **If Bidder, does not, or cannot, make such***

² "Bidder" is CEMEX Australia Pty Ltd

a deduction, you must pay that amount to Bidder."

Emphasis added.

Section 9 of the Offer defined "Rights" as:

"all accretions, rights and benefits of whatever kind attaching to or arising from the Rinker Securities directly or indirectly at or after the date of this Bidder's Statement (including all dividends, and all rights to receive them and rights to receive or subscribe for shares, notes, bonds, options or other securities or entitlements declared, paid or issued by Rinker or any subsidiary of Rinker)"

CEMEX submitted that the discretion it had under clause 8.8(e) of its Offer allowed it to decide whether it would, or would not, take the benefit of (for example) a dividend if one was declared. In the Panel's view, the discretion was not of the type asserted by CEMEX. The discretion operated to determine the way in which CEMEX could take the benefit of the Rights it was entitled to, and was not, as CEMEX submitted, a discretion whether or not to deduct Rights (e.g., such as dividends) from the Offer price.

DECISION

The Panel considers that the 7 May announcement resiles from the 10 April announcement, by CEMEX stating on 10 April that its Offer was its best and final, and on 7 May, announcing that it would not exercise its right to deduct the final dividend from its offer price of \$US15.85 per share. In so doing, in the period between the 10 April and 7 May announcements:

- (a) the acquisition of control over Rinker shares did not take place in an efficient, competitive and informed market;
- (b) Rinker shareholders and the market were entitled to assume that there would be no other improvements to the Offer after 10 April;
- (c) Rinker shareholders and the directors of Rinker were not given enough information to enable them to assess the merits of the Offer; and
- (d) Rinker shareholders who sold shares on market after the 10 April announcement and before the 7 May announcement did not have an equal opportunity to share in the benefits flowing from the Offer (ie, the increase in the Offer coming from CEMEX not deducting the amount of the final dividend from the Offer price).

Orders

The Panel made the orders in Annexure B.

The Panel considered what orders would be appropriate to address the unacceptable circumstances and provided parties with a draft of the orders.

CEMEX submitted that unless the Panel considered expert and other evidence on such orders there was a risk that the orders would over-compensate some shareholders and under-compensate others.

The Panel considered that while the types of evidentiary issues raised by CEMEX might be appropriate for a court to consider in determining compensation payable, they were inconsistent with the Panel's orders which create new rights based on issues such as policy considerations and the existence and nature of unacceptable circumstances.

Compliance with original statement?

In its application, ASIC said it was not asking the Panel to order CEMEX not to allow Rinker shareholders to retain the benefit of the final Rinker dividend (**Compliance Order**). ASIC submitted that it did not wish to pursue the approach set out in ASIC Policy Statement 25.23, but did not set out its reasons for considering that payment rather than a Compliance Order would constitute a more appropriate remedy.

A Compliance Order would be closer to the philosophy of the "truth in takeovers" policy than the type of payment order which the Panel has ultimately made. In other circumstances, the Panel may have considered making a Compliance Order. However, in these circumstances approximately a month passed between the 7 May announcement and the application, by which time close to 70% of Rinker shareholders had accepted the CEMEX offer, apparently in large part in response to the improvement of the CEMEX offer. The Panel therefore considered that, in a practical sense, it was not appropriate for it to make a Compliance Order in this case.

Beneficial changes of ownership

The Panel accepted CEMEX's submissions on issues regarding the calculation of net shares where changes in beneficial ownership might not be reflected in the register (for example, where a beneficial holder had moved shares from one custodian to another or where a beneficial holder had sold shares to another person who uses the same nominee), and the Panel has inserted provisions in its orders designed to address these issues.

The Panel assumes that custodians who are aware that they held Rinker shares for a client who sold Rinker shares during the relevant period will be able to alert the client if they need to advise CEMEX that the proposed method of calculations may overlook their net sales.

Process

The President of the Panel appointed Michael Ashforth (Deputy President), John Fast and Kevin McCann (President) as the sitting Panel to consider the application.

The Panel will publish its reasons for its decision on its website in due course.

The Panel's declaration and orders are attached at Annexures A and B to this Media Release.

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

**Corporations Act
Section 657A
Declaration of Unacceptable Circumstances**

In the matter of RINKER GROUP LIMITED

WHEREAS

Background

1. Rinker Group Ltd (**Rinker**) is a listed public company. It is the subject of an off market takeover bid (**Offer**) by CEMEX Australia Pty Ltd (**CEMEX**), an indirect wholly owned subsidiary of CEMEX, S.A.B. de C.V.
2. CEMEX lodged its bidder's statement on 30 October 2006 in respect of the Offer (**Bidder's Statement**).
3. Clause 8.1(c) of the Bidder's Statement states:
"If Bidder acquires your Rinker Securities under this Offer, it will also be entitled to all Rights in respect of your Rinker Securities."
4. Section 9 of the Bidder's Statement defines "Rights" as including all rights attaching to or arising from the Rinker shares directly or indirectly at or after 30 October 2006, including all dividends.
5. Clause 8.8(e) of the Bidder's Statement sets out a mechanism for dealing with adjustments to the bid consideration for "Rights". Clause 8.8(e) states:
"If Bidder becomes entitled to any Rights as a result of your acceptance of this Offer, it may require you to give to Bidder all documents necessary to vest title to those Rights in Bidder, or otherwise give Bidder the benefit or value of those Rights. If you do not do so, or if you have received or are entitled to receive ... the benefit of those Rights, Bidder will be entitled to deduct the amount ... of those Rights from any consideration otherwise payable to you under this Offer. If Bidder, does not, or cannot, make such a deduction, you must pay that amount to Bidder."
6. At 10.22 a.m. AEST, on 10 April 2007, CEMEX made an announcement to ASX Limited (ASX) (**10 April Announcement**) stating that:
 - (a) the offer price under the Offer would be increased to US\$15.85 per Rinker share;
 - (b) the consideration payable under the Offer would not be reduced by the amount of an interim dividend paid by Rinker in December 2006³ ; and

³ The interim dividend was A\$0.16 per Rinker share.

- (c) the offer was CEMEX's "best and final offer, in the absence of a superior proposal" (**Best and Final Statement**).
7. The 10 April Announcement included a summary of an agreement between CEMEX and Rinker (**Bid Agreement**). The last page (page 6) of the 10 April Announcement stated:
- "... during the Restriction Period, Rinker must not pay a dividend, other than annual and half yearly dividends consistent with past practice, (provided that this does not prejudice the Bidder's rights under clause 8.8(e) of the Bidder's Statement to adjust the revised offer price in respect of any such dividend) or undertake a buy-back, capital return or other payment to shareholders without the consent of the Bidder and without prejudice to the Bidder's rights under clause 8.8(e) to make adjustments to the revised offer price as appropriate."* (**Dividend Adjustment Statement**).
8. Between making the Best and Final Statement on 10 April 2007 and 7 May 2007, CEMEX filed a number of documents with ASX which included statements relating to clause 8.8(e) and CEMEX's rights in respect of any subsequent dividend declared by Rinker (**Subsequent Statements**), including:
- (a) 10 April 2007, a copy of the Bid Agreement;
 - (b) 10 April 2007, a notice of variation regarding the increased offer;
 - (c) 17 April 2007, a fourth supplementary bidder's statement; and
 - (d) 18 April 2007, a fifth supplementary bidder's statement.
9. On 27 April 2007, Rinker released its preliminary final report to ASX, which included a statement to the effect that Rinker had declared a fully franked final dividend for 2006-07 of A\$0.25 per Rinker share (**Final Dividend**).
10. On 7 May 2007, CEMEX made an announcement to ASX (**7 May Announcement**) stating that:
- (a) the Offer had been "declared final as to price, in the absence of a superior offer";
 - (b) CEMEX would not transfer Rinker shares to its name, pursuant to acceptances of its Offer, until after the record date for the Final Dividend;
 - (c) Rinker shareholders who were entitled to the Final Dividend would retain that dividend, irrespective of when they accepted the Offer;
 - (d) CEMEX would not exercise its right to deduct the Final Dividend from its offer price of \$US15.85 per share; and
 - (e) Perpetual Investments Limited, Rinker's largest shareholder, would accept the Offer as soon as practicable.

Best and final statement

11. There was no clear, unambiguous and proximate qualification to the Best and Final Statement in the 10 April Announcement that CEMEX reserved the right to allow Rinker shareholders to retain some or any future "Rights".
12. None of the Subsequent Statements adequately remedied the lack of a clear, unambiguous and proximate qualification to the Best and Final Statement.
13. By making the 7 May Announcement, CEMEX departed from its Best and Final Statement such that in the period between 10 April 2007 and 7 May 2007:

- (a) the acquisition of control over Rinker shares did not take place in an efficient, competitive and informed market;
- (b) Rinker shareholders and the market were entitled to assume that there would be no other improvements to the Offer after 10 April;
- (c) Rinker shareholders and the directors of Rinker were not given enough information to enable them to assess the merits of the Offer; and
- (d) Rinker shareholders who sold shares on market after 10 April and before 7 May did not have an equal opportunity to share in the benefits flowing from the Offer (ie, the increase in the Offer resulting from the amount of the Final Dividend not being deducted from the Offer price).

Circumstances unacceptable

14. It appears to the Panel that the circumstances referred to above (**Circumstances**) are unacceptable having regard to:
 - (a) the effect that the Panel is satisfied that the Circumstances have had, are having, or are likely to have, on :
 - (i) the control or potential control of Rinker; or
 - (ii) the acquisition or proposed acquisition by CEMEX of a substantial interest in Rinker; or
 - (b) the purposes of Chapter 6 of the Corporations Act as set out in section 602.
15. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances in relation to the Circumstances and the affairs of Rinker.
16. The Panel has had regard to the matters in section 657A(3), but has not had regard to whether the Circumstances constitute, will constitute or are likely to constitute or give rise to a contravention of Chapters 6, 6A, 6B or 6C of the Corporations Act.

Under section 657A of the Corporations Act, the Takeovers Panel declares that the Circumstances constitute unacceptable circumstances in relation to the affairs of Rinker.

Kevin McCann

President of the Sitting Panel

Dated 12 July 2007

**Corporations Act
Section 657D
Orders**

In the matter of RINKER GROUP LIMITED

PURSUANT TO:

1. A declaration of unacceptable circumstances in relation to the affairs of Rinker Group Limited (**Rinker**) made by the Takeovers Panel (**Panel**) on 12 July 2007 under section 657A of the Corporations Act; and
2. section 657D of the *Corporations Act 2001* (Cth),

THE PANEL ORDERS THAT

3. Within 10 business days after the date of this order, and subject to Orders 6 and 7, CEMEX Australia Pty Ltd (**CEMEX**) pay to each Affected Shareholder \$A0.25 per share for the net number of Rinker shares sold, where:
 - (a) Affected Shareholder means a person who sold Rinker shares between the Commencement Point and the Completion Point.
 - (b) Commencement Point means the time of the announcement on 10 April 2007 by CEMEX to ASX Limited of the variation of its takeover offer for Rinker shares (**Offer**) increasing the offer price to US\$15.85.
 - (c) Completion Point means the time of the announcement on 7 May 2007 by CEMEX of its intention to allow Rinker shareholders who accepted the Offer to retain the benefit of the final dividend that Rinker announced on 27 April 2007.
 - (d) Net number of Rinker shares sold means:
 - the number of Rinker shares registered in the name of a shareholder at the close of business on 12 April 2007; and
 - the number of Rinker shares registered in the name of a shareholder at the close of business 13 April 2007, only in respect of the number of Rinker shares acquired by that shareholder on 10 April 2007 prior to 10:19 a.m.less:
 - the number of Rinker shares registered in the name of that shareholder at the close of business on 9 May 2007; and
 - the number of Rinker shares (if any) sold by that shareholder on 10 April 2007 prior to 10:19 a.m,provided that the number is greater than zero.

4. CEMEX is to pay the amount specified in paragraph 3 above by sending to each Affected Shareholder, at the address that appears or did appear on the register for the shareholder, the required amount by bank cheque.
5. CEMEX must give to Rinker (to treat as unclaimed monies to be dealt with under Part 9.7 of the *Corporations Act 2001* (Cth)) any cheques returned, or not presented, for which it cannot reasonably establish a forwarding address for the shareholder concerned.
6. CEMEX is, in respect of particular Rinker shares:
 - (a) required to pay any Affected Shareholder who can reasonably establish, within one month after the date of this order, that there was a change in beneficial ownership between the Commencement Point and Completion Point where the shares were registered in the same name at the Completion Point as at the Commencement Point.
 - (b) not required to pay any Affected Shareholder for any shares for which it reasonably establishes (at its cost), within one month after the date of this order, there was no change in beneficial ownership between the Commencement Point and Completion Point where the shares were registered in a different name at the Completion Point compared to the Commencement Point.
7. CEMEX is required to pay the amount required by paragraph 6(a) within 10 business days after the shareholder establishes to CEMEX the change in beneficial ownership .

Kevin McCann

President of the Sitting Panel

Dated 12 July 2007