



**In the matter of Rinker Group Limited 02  
[2007] ATP 17**

**Catchwords:**

*declaration of unacceptable circumstances – final orders – best and final statement and departure from that statement – increase offer by allowing shareholders to retain final dividend – truth in takeovers – payment order to affected shareholders– off-market takeover bid – efficient and informed market – variation of Offer – jurisdiction – timing of application – terms of the Offer – franking credits – clear, express and proximate qualification to best and final statement – compliance with original statement- consideration payable under Offer not reduced by the amount of final dividend – heightened on-market trading activity – loss of opportunity to share in the benefits flowing from the Offer- not against the public interest to make a declaration – principle of compensation – creation of new rights – evidentiary issues – probative material – beneficial holder – registered holder*

*Australian Securities and Investments Commission – CEMEX, S.A.B. de C.V – CEMEX Australia Pty Ltd – Rinker Group Limited*

*Corporations Act 2001 – sections 602, 630(4), 650B(1)(g), 650D, 650F, 657A(2)(a), 657A(2)(b), 657C(3), 657D, 657D(3), 1478*

*Corporations Amendment (Takeovers) Act 2007*

*Citect Corporation Ltd [2005] ATP 6 – Austral Coal 02(RR) [2005] ATP 20 – Novus Petroleum Limited No. 2 [2004] ATP 09 – Summit Resources Limited [2007] ATP 09 – BreakFree Limited [2003] ATP 42 – Taipan Resources NL 06 [2000] ATP 15*

*Australian Pipeline Ltd v Alinta Ltd [2007] FCAFC 55 – Glencore International AG v Takeovers Panel [2006] FCA 274*

*Guidance Note 4, ASIC Policy Statement PS 25 Truth in Takeovers*

**SUMMARY**

1. The Panel declared circumstances unacceptable in relation to the affairs of Rinker.
2. CEMEX, bidding for Rinker, announced on 10 April 2007 that its offer was its “best and final” offer in the absence of a superior proposal, then resiled from it by announcing on 7 May 2007 that it would allow accepting Rinker shareholders to retain the final dividend that Rinker declared on 27 April 2007.
3. The Panel ordered that CEMEX pay Rinker shareholders who sold Rinker shares on market between the two announcements the equivalent of Rinker’s dividend (A\$0.25) per share for net Rinker shares disposed of during the Relevant Period.

**INTRODUCTION**

4. In these reasons the following definitions apply.

<b>Term</b>	<b>Meaning</b>
Affected Shareholders	Rinker shareholders who sold Rinker shares in the Relevant Period
Application	application by ASIC dated 13 June 2007 to the Takeovers Panel concerning the affairs of Rinker
ASIC	Australian Securities and Investments Commission
Bidder's Statement	CEMEX’s bidder's statement dated 30 October 2006 in

## Takeovers Panel

### Reasons for Decision – Rinker Group Limited 02

Term	Meaning
	relation to the Offer
CEMEX	CEMEX, S.A.B. de C.V and a wholly owned indirect subsidiary, CEMEX Australia Pty Ltd.
Offer	off-market takeover bid by CEMEX for all the ordinary shares of Rinker at (originally) US \$13.00 per Rinker share, as varied
Proceedings	proceedings by the Panel on the Application
Relevant Period	The period after the 10 April announcement and before the 7 May announcement
Rinker	Rinker Group Limited
10 April announcement	announcement by CEMEX to ASX Ltd released to the market at 10.59 am on 10 April 2007 titled “CEMEX announces increased recommended offer for Rinker”
7 May announcement	announcement by CEMEX to ASX Ltd released to the market at 9.07 am on 7 May 2007 titled “CEMEX extends its offer to acquire Rinker; Rinker shareholders to retain final dividend; Perpetual to accept CEMEX offer”

5. For this Application Michael Ashforth (Deputy President), John Fast and Kevin McCann (President) were appointed as the sitting Panel.
6. For these Proceedings, the Panel:
  - (a) adopted the Panel's published procedural rules and
  - (b) consented to parties being legally represented by their commercial lawyers.

## DISCUSSION

### Application

7. ASIC made an application to the Panel on 13 June 2007. ASIC's Application sought a declaration of unacceptable circumstances under section 657A(2)(a) of the Corporations Act<sup>1</sup> in relation to CEMEX stating, in its 10 April announcement, that the Offer was its “best and final” offer in the absence of a superior proposal, then resiling from that statement in its 7 May announcement by stating that Rinker shareholders could retain the final dividend<sup>2</sup> without any adjustment to the Offer price.
8. ASIC submitted that the circumstances:
  - (a) meant that the acquisition of control of Rinker did not take place in an efficient and informed market between the 10 April announcement and the 7 May

---

<sup>1</sup> Unless otherwise expressed, all references are to the Corporations Act 2001 (Cth).

<sup>2</sup> The final dividend was A\$0.25 per Rinker share.

## Takeovers Panel

### Reasons for Decision – Rinker Group Limited 02

announcement and that Rinker shareholders who sold on-market between those announcements did so in an inefficient and uninformed market;

- (b) meant that Rinker shareholders were not given sufficient information to enable them to assess the merits of the Offer between 10 April 2007 and 7 May 2007;
  - (c) had the potential to cause Rinker shareholders to accept the Offer in the belief that the offer contained in the 10 April announcement was CEMEX's "best and final offer" when, in fact, the Offer was increased as in the 7 May announcement; and
  - (d) had the potential to result in Rinker shareholders selling their shares on-market in the belief that any final dividend would not be available to them under the bid.
9. CEMEX submitted that it:
- (a) had not varied its Offer; and
  - (b) had clearly reserved its right to allow Rinker shareholders to retain future dividends in the 10 April announcement and later announcements.
10. ASIC sought orders under section 657D that CEMEX:
- (a) be required to compensate each Rinker shareholder, whose name appeared on the Rinker share register on 10 April 2007, an amount equivalent to the final dividend of A\$0.25, for each Rinker share (if any) the shareholder sold during the period to 7 May 2007.
  - (b) not further improve its Offer.
  - (c) publicly announce the entitlement of Affected Shareholders to the payment.

### Jurisdiction

11. The Application was made under section 657A(2)(a) and sought an order under section 657D. CEMEX, citing *Australian Pipeline Ltd v Alinta Ltd* [2007] FCAFC 55, submitted that the Panel did not have jurisdiction to consider the Application because the Application required the Panel to consider whether there had been a breach of the Corporations Act, or at least "*dealt with matters so integrally entwined with the provisions of the Act as to render any purported exercise of powers by the Panel under section 657A invalid.*" CEMEX also submitted that section 657D does not empower the Panel to make orders requiring it to pay compensation.
12. As a preliminary matter, the Panel considered whether it had jurisdiction to consider the Application and, if appropriate, make the orders sought. The Panel concluded that it had jurisdiction in this matter. The Application was clearly framed in terms of the purposes of Chapter 6. It did not require the Panel to find a contravention of the Corporations Act. The Panel has not considered whether a contravention of the Act has occurred in coming to its decision that unacceptable circumstances did arise.
13. Section 657D provides that 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 has taken the view that the order sought by ASIC was one it could make. See also *Citect Corporation Ltd* [2005] ATP 6 and *Austral Coal 02(RR)* [2005] ATP 20. In *Citect* the basis for the decision - a contravention - was not determinative of the

## Takeovers Panel

### Reasons for Decision – Rinker Group Limited 02

power to order compensation. In *Austral Coal*, while the declaration on which the proposed order was based was quashed by the Federal Court, it was not suggested that the compensation order was not within the Panel's power.

14. Moreover Guidance Note 4 at [4.11] says that, by its remedies, the Panel will be seeking to achieve one or more of the following outcomes:

*"(c) correcting any misinformation or omission and reversing any mischief to investors (including compensation) or the market;" (Footnote omitted)*

15. CEMEX also submitted that the Application should be dealt with under section 657A(2)(a) as the section existed before 13 May 2007. However, the Corporations Amendment (Takeovers) Act 2007, which amended section 657A to its current form, inserts new section 1478 into the Transitional Provisions of the Corporations Act. That section requires the Act as amended to apply in relation to an application made on or after 13 May. It also requires the Act as amended to apply to an application not finally disposed of before 13 May *"even if the circumstances to which the application relates arose before the commencement of... the Corporations Amendment (Takeovers) Act 2007"*.

#### *Time for Application*

16. ASIC sought to have the circumstances between the 10 April announcement and the 7 May announcement declared unacceptable. Section 657C(3) provides that an application can be made within two months after the circumstances have occurred or a longer period determined by the Panel. On one view, the circumstances did not occur until (as ASIC submits) CEMEX resiled from its 10 April announcement in its 7 May announcement. If so, the application was within time. If not, in any event, the Panel considered it appropriate to extend the time for ASIC to make the Application until 13 June 2007.

#### **Terms of the Offer**

17. The terms of the Offer were set out in section 8 of the Bidder's Statement. Clause 8.1(c) of the terms provides:

*"If Bidder<sup>3</sup> acquires your Rinker Securities under this Offer, it will also be entitled to all Rights in respect of your Rinker Securities."*

18. Clause 8.8(e) of the terms 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 a deduction, you must pay that amount to Bidder."*

19. 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*

---

<sup>3</sup> "Bidder" is CEMEX Australia Pty Ltd

## Takeovers Panel

### Reasons for Decision – Rinker Group Limited 02

*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)”*

#### Announcements

20. 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)

21. 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 stated 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.”*

22. 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.

23. 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)

24. There was a footnote (marked “\*”) 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.”*

25. The 7 May announcement included statements that CEMEX had extended the closing date of its offer to 8 June 2007, the record date for the Rinker final dividend, and that if it declared the Offer to be unconditional before 8 June 2007, it would not register transfers of Rinker shares under the Offer until after 8 June 2007 so that all Rinker shareholders who accepted the Offer would be entitled to receive the final dividend.

26. Allowing Rinker shareholders to receive the final dividend also allowed them to receive, and retain, the franking credits attached to the final dividend (the final

## Takeovers Panel

### Reasons for Decision – Rinker Group Limited 02

dividend was 50% franked). Rinker stated that *“The unfranked portion of the dividend will be paid from Rinker’s conduit foreign income amount, thus eliminating Australian withholding tax for all overseas shareholders.”*

#### Truth in takeovers

27. ASIC Policy Statement “PS 25 *Truth in Takeovers*” provides that a person who makes a last and final statement in relation to a takeover bid should be held to that statement and cannot depart from the statement unless the person clearly and expressly qualifies it at the time of making it.
28. In PS 25.2, ASIC says a last and final statement is a statement by a market participant that *“they will or will not do something in the course of the bid. If a market participant intends to reserve the right to depart from its statement on the happening of an event, it must clearly qualify its statement.”*
29. PS 25.6 makes it clear that, whatever language is used, if the participant wishes to reserve a right, the statement must clearly convey the message to all holders of securities. PS 25.7 gives examples of the manner in which a statement might be qualified and the proximity of any qualification to the statement.
30. The Panel has supported the principles behind PS 25 in a number of decisions, for example *Novus Petroleum Limited No. 2* [2004] ATP 09, and *Summit Resources Limited* [2007] ATP 09. In *Novus* the Panel supported the approach of PS 25 although the matter did not proceed. In *Summit* the Panel said it considered *“the truth in takeovers policy to be a fundamental tenet of the Australian takeovers regime....”*
31. Reference should also be made to *BreakFree Limited* [2003] ATP 42 at [64], where the review Panel said:

*“Like the Initial Panel, we consider that PS 25 is a soundly-based policy. It properly requires those who make definitive statements to the market as to their intentions to adhere to those intentions by reminding these market actors that an apparently definitive statement of intention will cause market disruption if it is not fulfilled.”*

And *Taipan Resources NL 06* [2000] ATP 15 at [23] where the Panel said:

*“The truth in takeovers policy can also be based on the legislative policy of section 631, that of paragraph 602(b) that offerees and directors of a target should have adequate information on which to make their decisions and a reasonable time in which to make them, and that of paragraph 602(a) that the acquisition of control over...the voting shares in a listed body...takes place in an efficient, competitive and informed market.”*

#### *Payment or compliance with original statement*

32. In its application, ASIC advised the Panel that it was not asking the Panel to order CEMEX not to allow Rinker shareholders to retain the benefit of the final Rinker dividend. In this, ASIC submitted to the Panel that it did not wish to pursue the approach set out in PS 25.23. ASIC did not set out the reasons for considering that compensation would constitute an adequate remedy in the circumstances before it.
33. In other circumstances, the Panel may have considered making an order for compliance with the original statement. However, the 7 May announcement had been made over a month before the matter came before the Panel. At the date of the Application (13 June 2007), close to 70% of Rinker shareholders had accepted the

## Takeovers Panel

### Reasons for Decision – Rinker Group Limited 02

Offer, apparently in large part in response to the improvement of the Offer. The Panel therefore considered that, in a practical sense, it was not appropriate for it to make such an order.

#### *Best and final statement*

34. The Panel considers the 10 April announcement was a best and final statement<sup>4</sup>, qualified only by reference to a superior offer. There are two bases for the Panel's view:
- (a) any references to a discretion to allow Rinker shareholders to retain the benefit of the final dividend did not clearly and unambiguously qualify the best and final statement. Nor were the references sufficiently proximate to that statement if intended to qualify it; and
  - (b) the discretion that CEMEX submitted that it had reserved in its statements did not appear to the Panel to operate to allow CEMEX to decide whether or not it would take the benefit of a Right.

#### *Best and final statement not qualified*

35. 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. The US \$15.85 amount is referred to as "offer price", CEMEX said it was not adjusting the "offer price" for the interim dividend, but the best and final statement refers simply to this "offer" being its best and final. It cannot be contended that a dividend adjustment is not part of the 'offer'.
36. The 10 April announcement annexed a summary of a bid agreement between CEMEX and Rinker and on page 6 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."*
37. 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.
38. Each of these documents included statements relating to clause 8.8(e) and CEMEX's rights in respect of any subsequent dividend declared by Rinker. CEMEX submitted that:

---

<sup>4</sup> The Application refers to "best and final"; ASIC's policy refers to "last and final". The Panel considers that nothing turns on the difference here.

## Takeovers Panel

### Reasons for Decision – Rinker Group Limited 02

- (a) each of these documents set out that CEMEX had reserved its right to allow Rinker shareholders to retain the benefit of some or any future dividends that Rinker declared during the Offer (if any); and
  - (b) the statements were sufficiently proximate to, or adequately referred to in, the best and final statement for Rinker shareholders to understand that they did, in fact, qualify the best and final statement.
39. The Panel did not consider that any of the statements clearly and unambiguously qualified the best and final statement.
40. For example, the Panel did not consider that it was a sufficient qualification to state on page 2 of the 10 April announcement that:
- “A Supplementary Bidders Statement reflecting the full extent of the agreement with Rinker, and the resulting Revised Offer, will be filed in the coming days.”*
41. The Panel does not consider the statements were sufficiently proximate. In addition, some of them were made many days after the best and final statement, in a period of heightened trading activity. As PS 25 makes clear, a bidder who wishes to reserve the right to depart from a statement on the happening of an event must clearly convey the message to all holders of securities in the target that it is reserving the right to change its mind. The examples given at PS 25.27 suggest that the qualification should immediately follow the last and final statement. The Panel accepts that, in appropriate circumstances, a qualification that is more remote might still sufficiently qualify an otherwise last and final statement. This was not the case here. In the Panel's view, in this instance there was a lack of a clear, unambiguous and proximate qualification to the last and final statement.
- CEMEX's “discretion” not available*
42. CEMEX submitted that the discretion it had under clause 8.8(e) allowed it to decide whether it would, or would not, take the benefit of (for example) a dividend if one was declared. Presumably in reliance on this view, CEMEX did not lodge a notice of variation in respect of the final dividend because the exercise of the discretion to allow a shareholder to keep a dividend would not require a notice of variation. This contrasts with the notice of variation CEMEX lodged in respect of its decision to permit Rinker shareholders to retain the interim dividend.
43. In the Panel's view, the discretion conferred by clause 8.8(e) 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 to elect whether or not to deduct Rights (such as dividends) from the Offer price.
44. The Panel did not consider that clauses 8.1(c), 8.8(e) and the definition of “Right” distinguish between an existing accrued Right and a subsequent future Right. In the Panel's opinion, all Rights, whether existing or future, are to be treated in the same way.
45. The statements by Rinker as to CEMEX's discretion in its first supplementary target's statement and in its annual results are consistent with the Panel's interpretation. In announcing its preliminary final report on 27 April 2007, Rinker stated (page 2 of the news release):



## Takeovers Panel

### Reasons for Decision – Rinker Group Limited 02

*“Shareholders should note that under the terms of CEMEX's takeover offer for Rinker, CEMEX has the right to deduct the amount of the dividend (or an amount equal to its value, as are reasonably assessed by CEMEX) from the offer price payable to accepting shareholders who have or will receive that dividend.”*

46. When CEMEX amended its bid by (among other things) allowing shareholders to retain the interim dividend, it lodged a notice of variation with ASIC that specifically addressed the interim dividend paid by Rinker in December 2006<sup>5</sup>. It stated that the consideration payable under the Offer would not be reduced by the amount of that dividend. Section 650B(1)(g) makes it clear that giving shareholders a right to retain a dividend improves the bid consideration<sup>6</sup>. This accords with market practice and common understanding.

#### *Trading period*

47. Between the 10 April announcement (released to the market at 10.59 am on 10 April) and the close of trading on 4 May (the 7 May announcement was released to the market at 9.07 am), there appeared to be a period of heightened trading activity on-market. The number of trades, and number of Rinker shares traded, was approximately twice the level of the 18 trading days immediately prior to the 10 April announcement. The Panel considered that this was strongly suggestive that the 10 April announcement had an effect on Rinker shareholders and the market for Rinker shares.

## DECISION

48. The Panel considered that the 7 May announcement resiles from the 10 April announcement. CEMEX stated on 10 April that its Offer was its best and final, while on 7 May announced 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 resulting from the amount of the Final Dividend not being deducted from the Offer price).

---

<sup>5</sup> The interim dividend was A\$0.16 per Rinker share.

<sup>6</sup> And is a method of varying offers allowed under the Act without a modification by ASIC.

## Takeovers Panel

### Reasons for Decision – Rinker Group Limited 02

#### Declaration

49. It appeared to the Panel that the circumstances, as set out in the declaration in Annexure A, constituted unacceptable circumstances in relation to the affairs of Rinker having regard to:
- (a) the effect that the Panel is satisfied the circumstances have had, are having, will have, 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.
50. The Panel considered that it was not against the public interest to make a declaration of unacceptable circumstances in relation to the circumstances and the affairs of Rinker.
51. The Panel had regard to the matters in section 657A(3), but did not have 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.
52. Under section 657A of the Corporations Act, the Panel declared that the circumstances constitute unacceptable circumstances in relation to the affairs of Rinker.

#### Orders

53. The Panel considered what orders would be appropriate to address the unacceptable circumstances. It provided parties with a draft of the orders that it proposed to make and invited them to make submissions on the proposed orders. Essentially, the proposed orders were that CEMEX pay A\$0.25 each for the net number of Rinker shares that Affected Shareholders sold between the 10 April and 7 May announcements (other than by accepting the CEMEX Offer). The Panel made the orders in Annexure B.
54. The Panel asked parties to make submissions on whether:
- (a) the proposed orders caused any person unfair prejudice;
  - (b) the Panel should select any point other than the 10 April announcement (for example 27 April, being the date of Rinker's announcement of the final Rinker dividend) as the commencement point for calculating net sales; and
  - (c) any amount other than A\$0.25 per share would be more appropriate.
55. CEMEX made a number of submissions concerning the nature of any orders which the Panel might make (CEMEX in fact submitted that no orders were warranted), the nature of the Panel's order making power, and the Panel's jurisdiction to make the proposed orders. CEMEX also submitted that 27 April was more appropriate than 10 April as the commencement point for identifying Affected Shareholders, if any order is made.
56. CEMEX submitted that the proposed order would cause it and its shareholders significant prejudice.

## Takeovers Panel

### Reasons for Decision – Rinker Group Limited 02

57. ASIC submitted that the proposed orders were appropriate, 10 April was an appropriate commencement point and A\$0.25 was the most appropriate amount to be paid by CEMEX.

#### *Jurisdiction and power*

58. CEMEX submitted that the Panel did not have jurisdiction or power to make an order requiring CEMEX to make a payment compensating Rinker shareholders for any harm the Panel considered that the circumstances may have caused.
59. The Panel considered that CEMEX had misunderstood the nature of the Panel's proposed orders, in the first place, and in the second place was incorrect in its reliance on the absence of a specific provision allowing the Panel to make a payment order.
60. In the first place, the Panel's order making power is not one which orders compensation as a court might. The principle of compensation by a court involves payment in respect of some existing right or interest which has been damaged or destroyed. It requires a court to assess the pre-existing rights of the person, how they have been damaged or destroyed and then to make an appropriate order designed to compensate the persons for their loss in accordance with the law. The Panel's order making power, however, creates new rights, and is used in advancing the policy of the takeovers chapters, as set out in the purposes provisions in section 602. The orders made by the Panel in respect of this Application, although quantifiable in respect of the loss of opportunity to receive the increased Offer, create new rights; they do not represent an exact measure of damages or loss suffered by Affected Shareholders.
61. In the second place, under section 657D the Panel is empowered to make "any order" (other than an order requiring a person to comply with a provision of the takeovers chapters) that it considers appropriate to protect the rights and interests of persons affected by unacceptable circumstances found to exist by the Panel. The fact that the definition of "remedial order" does not contain a reference to a specific payment order provision does not restrict the Panel's power to make such an order.

#### *Reliance, harm, certainty*

62. CEMEX submitted that in any compensation order the Panel should take substantial and considered evidence, analysis and submissions on such issues as a court might in determining compensation.
63. 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 created new rights based on issues such as policy considerations and the existence and nature of unacceptable circumstances.

#### *Probative material*

64. CEMEX submitted that the Panel had no probative material before it which evidenced the harm the Panel's proposed order was intended to address. The Panel considered that the probative material was clear. It is found in the announcements made on 10 April and 7 May and the market price movements following those announcements. In the 10 April announcement CEMEX had stated that the Offer

## Takeovers Panel

### Reasons for Decision – Rinker Group Limited 02

was its best and final offer (in the absence of a superior proposal), on which the market and Rinker shareholders can be assumed to have relied. The best and final statement formed part of the factual matrix for any shareholder deciding whether to buy, sell or hold their shares. Affected Shareholders sold shares in the period. CEMEX resiled from that statement in the 7 May announcement when it stated that accepting Rinker shareholders could retain the benefit of the final Rinker dividend.

65. Between 10 April and 4 May, Rinker's share price closed on ASX between a low of A\$18.56 (on 18 April) and a high of A\$18.89. On 7 May, the price closed at A\$19.23. In the days after 7 May, it closed between A\$19.02 and A\$19.08. The Panel considers that the closing price after the 7 May announcement reflected a range significantly above the range in which the price closed before the 7 May announcement.
66. There are likely to be many reasons why the market price and the Offer price differed but it seems clear that the market price adjusted up after the 7 May announcement. The Panel considered that it was reasonable to conclude that the market responded to (among other things) the announcement that the Offer had been improved and Rinker shareholders were entitled to retain the final dividend.
67. The Panel noted that the closing price increase from 4 May (A\$18.89) to 7 May (A\$19.23) amounted to A\$0.34. The Panel also was cognisant that the 7 May announcement included other information that may have had a price effect on Rinker shares. The Panel also looked at prices before and after the 7 May announcement. All these factors were considered but no one of them alone was determinative
68. On balance (and given that the Panel was creating new rights) it determined that, as the amount of the final dividend that shareholders were entitled to retain (\$0.25) was the amount on which the market would have operated, this was the appropriate amount that should be applied to remedy the effect of the unacceptable circumstances.
69. Additional probative material included the increased volume of trading in the period immediately after the 10 April announcement, which indicated that Rinker shareholders had taken account of the 10 April announcement and had traded in increased numbers assuming that CEMEX would not improve its Offer (in the absence of a superior proposal).

#### *Unfair prejudice*

70. The Panel is required not to make an order if it considers that the order will unfairly prejudice any person. The Panel has consistently stated that mere prejudice is not, in itself, unfair. The fact that an order, in remedying unacceptable circumstances, may cause a person prejudice, for example requiring them to pay money or return shares, is not sufficient to demonstrate unfair prejudice.
71. The Panel considered that Affected Shareholders had not had the opportunity to receive the benefit of the final Rinker dividend because of CEMEX's first making, and then resiling from, its 10 April announcement. They were therefore the persons whose interests were affected by the unacceptable circumstances.

## Takeovers Panel

### Reasons for Decision – Rinker Group Limited 02

72. The Panel considered that an order that CEMEX pay Affected Shareholders A\$0.25 each for the net number of Rinker shares they sold during the Relevant Period was the most appropriate order to make.
73. In response to the Panel's request for submissions on whether 10 April or another time was the appropriate commencement point (for example 27 April when the final dividend was announced), the Panel considered the submissions and decided that the 10 April announcement was the appropriate commencement point, since certainty of a dividend was not the basis of the unacceptable circumstances or part of the factual matrix.
74. The Panel considered the total amount that its order would require CEMEX to pay (CEMEX submitted it would most likely be about A\$29.8 million) , in light of:
  - (a) the size of the Offer – approximately \$A17 billion;
  - (b) the size of the benefit that CEMEX had agreed to allow Rinker shareholders to retain by its 7 May announcement (CEMEX submitted that the quantum was approximately A\$223.7 million); and
  - (c) the effects of the unacceptable circumstances on Affected Shareholders.
75. The Panel weighed the object of protecting rights or interests affected by the unacceptable circumstances against the prejudice that would flow to any person from the making of an order: *Glencore International AG v Takeovers Panel* [2006] FCA 274 at [124]. It considered the nature and quantum of prejudice which its proposed orders would cause CEMEX (and its shareholders) in light of the nature and quantum of the effects of the unacceptable circumstances on Affected Shareholders. The Panel considered that the proposed orders were measured and appropriate in the circumstances.
76. The Panel considered that applying its orders only to *net* disposals (as opposed to all disposals as in the initial request by ASIC) and only to disposals other than into the Offer would mitigate prejudice to CEMEX. The Panel also considered that the provisions in its orders concerning change, or lack of change of beneficial ownership, would mitigate prejudice to CEMEX and to Affected Shareholders (see below).
77. Having weighed those issues which it considered necessary and desirable to assess any unfair prejudice, the Panel considered that its orders would not unfairly prejudice CEMEX or any other person.
78. ASIC asked for the orders to be made subject to a right to apply should there be a need to amend, supplement or clarify them. Section 657D(3) allows the Panel to revoke, vary or suspend its orders, and the Panel advised parties that it would be prepared to do so if it was provided with further information which indicated that it was desirable to do so.

#### *Franking credits*

79. The Panel did not consider that it was appropriate, in the circumstances, to take account of the value of any franking credits in determining the amount per share that CEMEX should pay.

## Takeovers Panel

### Reasons for Decision – Rinker Group Limited 02

#### *Beneficial changes of ownership*

80. CEMEX submitted that the method of identifying Affected Shareholders and calculating the net disposals in the Panel's proposed order would possibly overstate the actual number of shares disposed of during the period, in transactions with unrelated third parties because (among other reasons) it includes transactions where a change in the registered holding may have occurred but with no underlying change in beneficial ownership.
81. For instance:
- (a) where a beneficial holder had simply moved shares from one custodian to another, that would automatically be counted as a disposal by the first custodian when in fact there had been no change in the underlying holding; or
  - (b) where a registered holder had split its holdings into 2 or more registered holdings, that would automatically be counted as a disposal by the initial registered holder when in fact there had been no change in the underlying holding; or
  - (c) where a registered holder had changed CHESSE sponsors and consequently had a new HIN, this would have been counted as a disposal.
82. CEMEX also submitted that, conversely, the shareholding figures may understate the actual number of shares disposed of during the period, because the calculations would ignore transactions between beneficial holders who happen to have the same custodian.
83. For instance, if a custodian held 1,000 shares on behalf of beneficial holders A (200 shares), B (400 shares) and C (400 shares), and B had disposed of its 400 shares to C, at the end of the period the custodian would still be shown as holding 1,000 shares, whereas beneficial holder B had in fact disposed of 400 shares.
84. The Panel has accepted CEMEX's submissions on these issues and has inserted provisions in its orders designed to address them.
85. The Panel assumes that custodians who are aware that they held Rinker shares for clients who sold Rinker shares during the Relevant Period will be able to alert their clients if they need to advise CEMEX that the proposed method of calculations may overlook their net sales of Rinker shares.

#### *Costs*

86. The Panel did not receive any application for an award of costs, and made no order for costs.

**Kevin McCann**  
**President of the Sitting Panel**  
**Decision dated 12 July 2007**  
**Reasons published 18 July 2007**



## 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 2006<sup>7</sup>; and

---

<sup>7</sup> 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



## Annexure B

### 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