



In the matter of Rinker Group Limited 02R

[2007] ATP 19

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 - terms of the Offer - 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 - creation of new rights - 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

CLERP Act 1998 – Explanatory Memorandum

Corporations Amendment (Takeovers) Act 2007 – Explanatory Memorandum

Citect Corporation Ltd [2005] ATP 6 - Austral Coal 02(RR) [2005] ATP - Summit Resources Ltd [2007] ATP 9 - Pivot Nutrition Pty Ltd (1999)

Australian Pipeline Ltd v Alinta Ltd [2007] FCAFC 55 - Albarron v Company Auditors and Liquidators Disciplinary Board [2007] HCA 23 - Visnic v Australian Securities & Investments Commission [2007] HCA 24 - Glencore International AG v Takeovers Panel [2006] FCA 274.

Guidance Notes: 1, 2, ASIC Regulatory Guide RG 25 ‘Takeovers: False and Misleading Statements’

SUMMARY

1. Our detailed reasons are in the Discussion section. This summary gives an overview.
2. This is a review of the Panel’s decision to declare unacceptable circumstances in relation to the affairs of Rinker and order that CEMEX pay \$0.25 per Rinker share (net of any acquisitions) to shareholders who sold Rinker shares during the relevant period otherwise than into CEMEX’s bid.
3. CEMEX made an off market takeover bid for Rinker. On 10 April 2007 CEMEX announced an improved Offer and stated that its Offer was its “best and final” offer in the absence of a superior proposal. On 7 May 2007 CEMEX announced (among other things) that it would allow accepting Rinker shareholders to retain a A\$0.25 final dividend Rinker had declared on 27 April 2007. ASIC sought a declaration and orders, submitting that the 7 May announcement departed from the best and final statement. The Panel made a declaration of unacceptable circumstances and orders. CEMEX sought a review. The review Panel, like the initial Panel, found that on 7 May 2007 CEMEX departed from its best and final statement.
4. The review Panel considered that the 10 April announcement included a best and final statement. CEMEX did not clearly, unambiguously and proximately reserve the right to improve the Offer consideration (other than in the event of a superior proposal). An aspect of the best and final statement was that CEMEX was assuring the market that it would not improve its Offer consideration in the absence of a superior proposal. Allowing shareholders to retain the dividend was an

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improvement in the Offer consideration. There was no superior proposal. The 7 May announcement departed from and was inconsistent with the assurance in the 10 April announcement.

5. The market for Rinker shares between the 10 April announcement and the 7 May announcement reflected (among other things) CEMEX's best and final statement. Sellers sold on the basis of that market. After the 7 May announcement the market reflected (among other things) the improved Offer consideration.
6. The review Panel was satisfied that the departure from the 10 April announcement was unacceptable having regard to the effect it had on:
 - (a) the control or potential control of Rinker,
 - (b) the acquisition of a substantial interest in Rinker by CEMEX,
 - (c) the acquisition of control over voting shares in Rinker taking place in an efficient and informed market, or
 - (d) holders of the relevant class having a reasonable and equal opportunity to participate in any benefits.
7. It made a declaration of unacceptable circumstances and ordered that CEMEX pay an amount equivalent to the final dividend (A\$0.25) to shareholders who sold shares otherwise than into CEMEX's bid (net of any acquisitions during the period).

INTRODUCTION

8. In these reasons the following definitions apply.

Term	Meaning
Initial 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 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 review Panel
Relevant period	The period after the 10 April announcement and before the 7 May announcement
Review application	Application dated 16 July 2007 by CEMEX for a review of the initial Panel's decision made on 12 July 2007
Rinker	Rinker Group Limited

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Term	Meaning
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”

9. For this review application, Elizabeth Alexander AM (Deputy President), Simon McKeon (President) and John O’Sullivan were appointed as the review Panel.
10. For these Proceedings, the review Panel:
 - (a) adopted the Panel's published procedural rules and
 - (b) consented to parties being legally represented by their commercial lawyers.

DISCUSSION

Facts

Offer

11. Under a bidder's statement dated 30 October 2006, CEMEX made an off-market takeover bid for all the ordinary shares of Rinker. The Offer was US\$13.00 per Rinker Share and was subject (among other things) to a 90% minimum acceptance condition. Clause 8.8(e) of the Bidder’s Statement set out a mechanism for dealing with adjustments to the bid consideration for “Rights” (defined in section 9 of the Offer terms to include dividends). Clause 8.8(e) stated:

“If Bidder [CEMEX] 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.”
 12. Rinker’s directors recommended that shareholders reject the Offer.
- 10 April announcement*
13. On 10 April 2007, CEMEX increased its Offer price to US \$15.85 and allowed Rinker shareholders to retain an interim dividend of A\$0.16. It also waived all conditions except the 90% minimum acceptance condition.
 14. Rinker’s directors recommended that shareholders accept the Offer in the absence of a superior proposal. Rinker directors also discussed in their recommendation their efforts to find an alternative that would exceed the value of CEMEX’s Offer. They said they had been unable to find one.

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15. The 10 April announcement included the following statements:

“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.”¹

16. CEMEX also filed with ASX:

(a) on 10 April 2007, a copy of the Bid Agreement with Rinker, which included a statement:

“... 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);

(b) on 10 April 2007, a notice of variation for its increased Offer, which included a statement:

“[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.”;

(c) on 17 April 2007, a fourth supplementary bidder’s statement; and

(d) on 18 April 2007, a fifth supplementary bidder’s statement, which included a statement:

“CEMEX has agreed not to reduce the higher US\$15.85 offer by the amount of the interim dividend which was paid on 11 December 2006. CEMEX has retained the right to reduce the consideration paid under its offer for any subsequent distributions by Rinker.”

Trading after the 10 April announcement

17. Following the 10 April announcement the number of trades, and number of shares traded, was approximately twice the level of before the 10 April announcement when comparing the 18 trading days on each side of the announcement.²

Rinker’s final dividend

18. On 27 April 2007 Rinker declared a final dividend of A\$0.25 in respect of its 31 March 2007 year end, payable to shareholders on the register on 8 June 2007.

¹ Like the initial Panel, we do not draw a distinction between "best and final", used in ASIC’s initial application, and "last and final", used in ASIC’s Regulatory Guide 25.

² According to ASIC, there were 166,142,109 shares traded in the 18 days after the 10 April announcement (ie, until the 7 May announcement) compared to 78,838,013 shares traded in the 18 days before the 10 April announcement.

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7 May announcement

19. On 7 May 2007 CEMEX announced that it would allow Rinker shareholders to retain the final dividend. The 7 May announcement include the following statements:

“CEMEX will extend the Offer until 7.00 p.m. (Sydney time) ... on 8 June 2007.”

“CEMEX will waive the 90% minimum acceptance condition if its aggregate interest in Rinker shares exceeds 50% on or before 8 June 2007.”

“CEMEX understands that Rinker’s largest shareholder, Perpetual Group ...will accept the CEMEX Offer for all its Rinker shares on Monday May 7, 2007 (Sydney time).”

“CEMEX also announced that Rinker shareholders who are entitled to the final dividend of A\$0.25 ... will retain that dividend, irrespective of when they accept the CEMEX Offer. CEMEX has confirmed it will not exercise its right to deduct the Final Dividend from its offer price of \$US15.85 per share (with a footnote stating ‘However, CEMEX reserves the right to reduce the Offer price by any subsequent dividends or distributions by Rinker’).”

“The CEMEX Offer has been declared final as to price, in the absence of a superior offer.”

20. In addition CEMEX said it would register share transfers after 8 June. Therefore accepting shareholders retained the final dividend irrespective of when they accepted the Offer.

Trading after the 7 May announcement

21. Following the 7 May announcement:

- (a) the closing price of Rinker shares on ASX was A\$0.34 (on 7 May) above the closing price on 4 May (the previous trading day).
- (b) acceptances of the Offer went from approximately 3.24% on 7 May to 95.66% when the Offer closed. After the 10 April announcement, acceptances went from approximately 0.03% to 3.24% before the 7 May announcement.

22. The Offer closed on 16 July 2007. CEMEX ended with 95.66% of Rinker (being 795,530,900 shares and 12,063,098 Rinker ADS’s representing another approximately 60,315,490 shares). CEMEX announced it intended to proceed to compulsory acquisition of the remaining shares.

23. On 7 August 2007 Rinker was removed from the Official List of ASX.

Initial application

24. ASIC made the initial application to the Panel under section 657A(2)(a) of the Act³ on 13 June 2007. The initial Panel extended time, if that had been necessary. ASIC submitted that the 7 May announcement departed from the best and final statement in the 10 April announcement.⁴

25. ASIC submitted in the initial application 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

³ Unless otherwise expressed, all statutory references are to the Corporations Act 2001 (Cth).

⁴ ASIC was not opposed to the best and final statement, only that, having made it CEMEX departed from it.

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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 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 Offer.

26. On 12 July 2007 the initial Panel made a declaration of unacceptable circumstances and ordered CEMEX to pay each Rinker shareholder who reduced their aggregate shareholding between the two announcements an amount equivalent to the final dividend (A\$0.25).

Review application

27. On 16 July 2007 CEMEX sought a review of the initial Panel's decision.

28. The Panel treats applications for review as hearings *de novo*: Guidance Note 2, paragraph 2.24. The review Panel has reconsidered the matter on its merits on the facts as they stood at the time of the review. The review Panel has considered:

- (a) the initial application, submissions and rebuttals, including in respect of orders;
- (b) the review application, further submissions and rebuttals; and
- (c) the reasons for decision, declaration and orders of the initial Panel.

Jurisdiction

29. The review Panel considered that it had jurisdiction to consider the matter. The application does not rely on a contravention but on whether the circumstances were unacceptable circumstances for other reasons. The review Panel is satisfied that the circumstances are unacceptable for reasons that do not include a contravention of the Act.

30. CEMEX made many submissions on the question of jurisdiction, addressed below.

Contravention

31. CEMEX had submitted to the initial Panel that the initial application required the Panel to consider, directly or as a necessary part of deciding the application, whether there had been a contravention of the Act (*Australian Pipeline Ltd v Alinta Ltd*⁵). The initial Panel said:

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

⁵ [2007] FCAFC 55, and perhaps in particular at [426], where the majority said that the lawfulness or otherwise of conduct said to be unacceptable could not be simply a neutral factor.

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considered whether a contravention of the Act has occurred in coming to its decision that unacceptable circumstances did arise.

32. In the review application, CEMEX submitted that the initial Panel was not entitled to adopt that approach. It submitted that section 657A(3)(a)(ii) requires a Panel exercising powers under section 657A to have regard to the other provisions of chapter 6, and the Panel must therefore consider whether a contravention had occurred.
33. Contravention is not a factor in this case. While there may be a question about whether CEMEX varied its Offer without following section 650B, this is not the basis for the Panel's declaration. The declaration is based on CEMEX's departure from its best and final statement.
34. Moreover, the review Panel does not accept CEMEX's submission for two further reasons:

- (a) It does not need to consider whether a contravention has occurred in order to have regard to the other provisions of chapter 6.

In Guidance Note 1, the Panel says: "*Conduct may give rise to unacceptable circumstances as well as contravening the Corporations Act*"⁶.

And the Explanatory Memorandum to the Corporate Law Economic Reform Program Bill, 1998 said: "*... As well as the black letter law, the Eggleston principles - - rules to ensure sufficient information and fairness in takeovers -- give jurisdiction to the Corporations and Securities Panel (the Panel) to declare conduct as unacceptable even if it does not involve a breach of the Law.*"⁷

And the Explanatory Memorandum to the Corporations Amendment (Takeovers) Bill 2007 said: "*A new paragraph 657A(2)(b) is inserted in the Act to give the Panel jurisdiction to declare circumstances unacceptable having regard to the purposes of Chapter 6 of the Act set out in section 602. This is a significant change, designed to ensure the Panel can address circumstances which impair those purposes, without having to also establish either a contravention of the Act or an effect on control or potential control of a company or on the acquisition or proposed acquisition of a substantial interest in a company....*"⁸

- (b) If it needs to form a view about whether a contravention has occurred, it would only be as a step to its conclusion. It would only be one aspect of considering whether the circumstances were unacceptable, others being policy considerations and the effect of the circumstances.

In *Albarron v Company Auditors and Liquidators Disciplinary Board*⁹ the High Court said that forming an opinion as to existing rights was no more than a step to the ultimate conclusion for the Company Auditors and Liquidators Disciplinary Board and it was therefore not exercising judicial power when deciding whether a person had failed to carry out or perform adequately and

⁶ GN 1, "Unacceptable Circumstances", para 1.7.

⁷ Para 2.6.

⁸ Para 3.8. This legislation introduced section 657A in its current form.

⁹ [2007] HCA 23 at [28]

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properly any duties or functions required by an Australian law to be carried out or performed by a registered liquidator.

Effect

35. CEMEX also made submissions that the circumstances did not have any effect on the control or potential control of Rinker or the acquisition of a substantial interest in Rinker. In *Glencore International AG v Takeovers Panel*¹⁰, Emmett J. held that the Panel fell into jurisdictional error by failing to determine the effect of the circumstances under section 657A(2)(a) before deciding that the circumstances were unacceptable. The review Panel considered that there was an effect that the circumstances had on the control or potential control of Rinker and on the acquisition of a substantial interest in Rinker and accordingly does not accept CEMEX's submission on this point. The review Panel has also found the circumstances are otherwise unacceptable under section 657A(2)(b).

13 May amendments

36. CEMEX also submitted that section 657A(2) at the time of the relevant conduct did not include amended paragraph (a) or new paragraph (b) and there is a presumption against legislation having retrospective effect. Accordingly the matter should be dealt with solely under section 657A(2)(a) as the section existed before 13 May 2007.
37. As the initial Panel noted, section 1478¹¹ requires the Act as amended to apply in relation to an application made on or after 13 May, or 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*”.
38. The review Panel agrees with the initial Panel and does not accept CEMEX's submission.

Circumstances*Conclusion on unacceptable circumstances*

39. The review Panel has concluded, like the initial Panel, that CEMEX made a best and final statement in its 10 April announcement that it would not improve its Offer consideration (in the absence of a superior proposal). CEMEX's statement was not qualified in a clear, unambiguous and proximate way except as to a superior proposal. There was no superior proposal.
40. CEMEX's best and final statement informed the market that CEMEX would not improve its Offer consideration (in the absence of a superior proposal) and would have been treated by investors as an assurance (upon which they were entitled to rely) that it would not do so. The market expects that best and final statements will be just that and will not be departed from.
41. In its 7 May announcement CEMEX allowed Rinker shareholders to retain the final dividend that Rinker had declared. By doing so, it improved its Offer consideration and departed from and therefore acted in a manner that was inconsistent with the assurance in its best and final statement.

¹⁰ [2005] FCA 1290

¹¹ Inserted by the Corporations Amendment (Takeovers) Act 2007.

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42. The review Panel did not accept CEMEX's submissions (among others) that:
 - (a) under the terms of its Offer it had a discretion whether or not it would deduct the amount of a dividend paid to accepting Rinker shareholders, or,
 - (b) that it had qualified its 10 April announcement by reserving the discretion.
43. CEMEX's many arguments on these issues are discussed in detail below.
44. The market for Rinker shares between the two announcements reflected (among other things) the best and final statement; that is, it was based in part on the information CEMEX had given that it would not further improve its Offer consideration. It also formed the backdrop against which Rinker shareholders made decisions (e.g., sell their shares or accept the Offer).
45. After CEMEX made the 7 May announcement the market reflected (among other things) the improved Offer consideration.
46. As a result of the 7 May announcement:
 - (a) the market between 10 April and 7 May had been misled that there would not be an improved offer in the absence of a superior proposal. Accordingly, it was not efficient, because it was operating on information about CEMEX's intention in that regard that was departed from, having been assured that it would not be departed from;
 - (b) the market was misinformed, because it was told that CEMEX's Offer consideration would not be improved and there was no relevant qualification. The departure from the best and final statement undermined an informed market and resulted in it being misinformed in that the best and final statement was not a best and final statement. It has for many years been the policy in Australia that best and final statements must be complied with and the market practice is well understood;
 - (c) Rinker shareholders were misinformed as to the status of CEMEX's Offer between 10 April and 7 May (i.e., it was CEMEX's best and final offer in the absence of a superior proposal) and to that extent were not given sufficient information to enable them to assess the merits of the Offer when, as it transpired, it was not a best and final offer. This results from the market's understanding of best and final statements, regardless of the intention of the maker of the statement; and
 - (d) shareholders who sold Rinker shares in that market did not have a reasonable and equal opportunity to participate in the benefit of the increased Offer consideration. They sold, at least in part, in the knowledge or on the basis that CEMEX had stated that it would not improve its Offer consideration in the future in the absence of a superior proposal.
47. Moreover, the 7 May announcement appears to have played a critical role in acceptances under CEMEX's Offer increasing from approximately 3.24% of Rinker shares on 7 May to 95.66% at the close of the Offer and was likely to have brought about the acceptance by Perpetual Group referred to in the 7 May announcement.

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48. Accordingly the review Panel was satisfied that the circumstances in which CEMEX departed from and acted inconsistently with the 10 April announcement were unacceptable having regard to the effect it had on:
- (a) the control or potential control of Rinker,
 - (b) the acquisition of a substantial interest in Rinker by CEMEX,
 - (c) Rinker shareholders who were not given sufficient information in relation to the status of CEMEX's Offer to enable them to assess the merits of the Offer.
 - (d) the acquisition of control over voting shares in Rinker taking place in an efficient and informed market, or
 - (e) holders of the relevant class having a reasonable and equal opportunity to participate in any benefits.
49. The review Panel sets out its reasons for reaching these conclusions.

CEMEX's disclosure

50. The review Panel considers that the statement "*The offer is CEMEX's best and final offer...*" in the 10 April announcement is a best and final statement that fits the description of such statements in RG 25. ASIC says:

[RG25.2] These are statements made by market participants 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....

51. CEMEX submitted that the 10 April announcement was not a best and final statement in respect of dividends. The initial Panel considered that the terms of the 10 April announcement would lead shareholders to conclude that the Offer consideration would not be improved further (in the absence of a superior proposal). The review Panel agrees with the initial Panel.
52. Moreover, a best and final statement may be made in many forms. ASIC's policy statement gives examples that extend to "no increase" statements if the bidder says "this is our last offer"; the offer will not be "increased", "amended", "revised" or "changed"; or "we do not have any information that would justify an increase in the offer": [RG 25.21]. It is clear from the examples that there is no formula for making a best and final statement. Any form of words that reasonably conveys the message to shareholders may be a best and final statement.
53. Similarly, any form of clear, unambiguous and proximate words of qualification can qualify a best and final statement. ASIC says:

[RG 25.6] The market participant may reserve the right to depart from its last and final statement by attaching to it a clear, express qualification. Whatever language the market participant uses, it must clearly convey the message to all holders of securities in the target that it is reserving the right to change its mind.

54. The purposes of chapter 6 are set out in section 602. The purpose in section 602(a) is to ensure that the acquisition of control over shares takes place in an efficient, competitive and informed market. If statements on which the market should be entitled to rely are subsequently departed from, or are actions are taken inconsistent

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with them, the review Panel considers that all or some aspects of this purpose are undermined. The need for reliable and accurate information also underpins sections 602(b) and (c). Accordingly, the review Panel considers that these statements by ASIC reflect appropriate practice and are supportable by reference to the policy underpinning the takeovers chapters.

55. Allowing shareholders to retain a dividend (which under the Offer they were not entitled to retain) is improving the Offer consideration. The review Panel notes that when CEMEX earlier improved its Offer consideration by increasing the price to US\$15.85 and allowed shareholders to retain the interim dividend of A\$0.16, it included the interim dividend as part of its notice of variation.
56. As the initial Panel noted, section 650B(1)(g) makes it clear that giving shareholders a right to retain a dividend improves the bid consideration and this accords with market practice and common understanding.
57. CEMEX submitted that, if it made a best and final statement, it had included an appropriate and proportionate qualification to it by:
 - (a) reminding the market of clause 8.8(e) of its Offer terms,
 - (b) stating that a supplementary bidder's statement would be filed, and
 - (c) including a dividend adjustment statement in the 10 April announcement.
58. These submissions are addressed in turn.

Appropriate and proportionate qualification

59. CEMEX submitted that it did qualify the best and final statement, namely by reference to Clause 8.8(e), and did so appropriately and proportionately. The review Panels considers that reference to clause 8.8(e) was no qualification. This is discussed next. In any event, there was no proximate qualification, the nearest reference being on page 6 of the 10 April announcement and others being in separate documents up to 8 days later. The qualification "in the absence of a superior proposal", that was attached to the best and final statement, indicates that there was no other qualification.

Clause 8.8(e) and CEMEX'S discretion

60. CEMEX submitted to the initial Panel, and maintained in its submissions to the review Panel, that the discretion it had under clause 8.8(e) allowed it to decide whether it would, or would not, take the benefit of "Rights" as defined in the Offer terms (which included a dividend). Such a discretion would mean that there need be no variation of the Offer to allow shareholders to keep a dividend. As CEMEX submitted:

"The CEMEX Bidder's Statement identifies that if CEMEX acquires a shareholder's Rinker Securities it will also be entitled to all rights in respect of those Securities [section 8.1(c)]. Having that entitlement, does not create an obligation on CEMEX to act on its entitlement". (Original emphasis)¹²

61. Clause 8.1(c) of the Offer terms provided:

¹² Review Panel submissions para 4.

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“If [CEMEX Australia Pty Ltd] acquires your Rinker Securities under this Offer, it will also be entitled to all Rights in respect of your Rinker Securities.”

62. Clause 8.8(e) of the Offer terms provided:

“If Bidder[CEMEX Australia Pty Ltd] 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.”

63. 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)”

64. In the review Panel's view it is quite clear that CEMEX did not have the discretion for which it contends. Nor does the review Panel consider that Rinker shareholders would have understood it as having such a discretion. Put simply, under its best and final offer CEMEX was entitled to the final dividend. Any giving up of that entitlement was an improvement of its Offer and therefore a clear departure from, and action inconsistent with, the statement of 10 April that the then Offer was CEMEX's best and final offer.
65. The review Panel agrees with the initial Panel that the discretion conferred by clause 8.8(e) determined the way in which CEMEX could take the benefit of existing or future Rights it was entitled to, and was not a discretion to elect whether or not to deduct Rights (such as dividends) from the Offer price. CEMEX would be expected to enforce its rights and anyway the ability not to enforce a right is not the same as the discretion CEMEX is contending it has.
66. Shareholders must have regard to the terms of the Offer as well as to the terms of any announcements but having regard to clause 8.8(e) would not enlighten shareholders that the best and final statement of CEMEX was qualified to allow the Offer consideration to be improved by allowing them to keep the benefit of a future dividend.
67. In support of its view, the review Panel notes that on 10 April 2007 CEMEX lodged a notice of variation that included its decision to permit Rinker shareholders to retain the benefit of the interim dividend. Section 650B(1)(g) provides that a bidder may vary the offers made under the bid to improve the consideration offered by giving shareholders a right to retain a dividend (for shares to which rights to accrued dividends are attached). Section 650D sets out what a bidder must do to vary offers under an off market bid. The review Panel considers that CEMEX followed usual practice by including in its notice of variation on 10 April the improved Offer consideration that resulted by allowing Rinker shareholders to retain the benefit of the interim dividend. As the initial Panel noted, it accords with market practice and

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common understanding that allowing the benefit of a dividend to be retained improves the Offer consideration. The review Panel thinks it is also a variation.

Clause 8.5(h)

68. Clause 8.5(h) of the Offer terms provided:

“By signing and returning the Share Acceptance Form ... you irrevocably authorise and direct Rinker to pay to [CEMEX] or to account to [CEMEX] for, all Rights in respect of your Rinker Securities subject, however, to any such Rights received ... being accounted for... to you if any contract resulting from your acceptance of this Offer is rescinded or rendered void.”

69. Clause 8.5(h) needed to be varied to allow shareholders who had already accepted to retain the benefit of the final dividend. There was no variation. This also suggests that there was no dividend discretion.

Adequacy of the “dividend discretion”

70. In the alternative, the review Panel considered whether the dividend discretion that CEMEX contended for would be wide enough in any event to allow shareholders to retain the benefit of the final dividend. The review Panel decided it was not wide enough because two further steps were needed to give effect to exercise of the discretion and clause 8.8(e) did not cover them. The two steps were:

- (a) extending the closing date of the Offer to 8 June (the record date for the final dividend); and
- (b) agreeing not to register transfers until after the record date.

Dividend adjustment statement

71. The 10 April announcement included a summary of a bid agreement between CEMEX and Rinker which addressed dividends, and at page 6 included the statement:

“... 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.”

72. CEMEX submitted that this was a qualification of the best and final statement. This is at best a vague “wait and see” statement. Perhaps it is better understood as a warning that CEMEX was likely to reduce its Offer consideration if there was a subsequent distribution by Rinker. The review Panel does not consider it a clear reservation of a discretion. In any event, it was too remote from the best and final statement. The review Panel does not accept that the ‘fine print’ can take precedence over the ‘headline’.

73. CEMEX also submitted that retaining discretion to do something incorporates discretion not to do it, and shareholders were on notice that CEMEX might or might not reduce the Offer consideration by the amount of any future dividend. The review

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Panel does not consider that the dividend adjustment statement does more than warn Rinker shareholders that CEMEX is likely to reduce its Offer consideration (so as to keep the total value unchanged) if there is a subsequent distribution by Rinker.

74. This deals with the discretion submissions. However, because CEMEX sought to point to the understanding of some market participants to support its submissions that there was a discretion, the review Panel addresses those arguments. However, it should be emphasised that it is for the review Panel to assess how the market and investors would interpret CEMEX's best and final offer statement of 10 April 2007. That assessment is outlined in these reasons.

Equity analysts

75. CEMEX submitted that a number of equity analysts stated, or implied, in their research reports that CEMEX remained free to allow shareholders to retain the final dividend. Accordingly, it submitted, there was no basis to say that the analysts (or, by inference, the market) were under any misapprehension as to CEMEX's ability to refrain from deducting the final dividend from the Offer consideration.
76. In the review Panel's opinion, one research report supports CEMEX's contention, the others do not. As ASIC pointed out in its submissions¹³, of the 7 reports submitted by CEMEX:
- (a) one indicated a view that CEMEX could allow Rinker shareholders to retain the benefit of the final dividend;
 - (b) two indicated a view that CEMEX had waived the right to allow Rinker shareholders to retain the benefit of future dividends; and
 - (c) the others did not specifically address the matter.

Affidavit evidence

77. CEMEX filed an affidavit sworn by Andrew Clarke, managing director of Citigroup, in which he said:
3. *It has been my understanding since well before 10 April 2007, and remains my understanding, that the terms of CEMEX'S offer for Rinker shares allowed CEMEX a discretion to reduce its offer price by reference to the amount of any dividends which might be declared by Rinker in the bid period.*
78. He did not say why he had that understanding.
79. Mr Clarke then detailed conversations he had with four institutional investors:
- (a) One asked (by subsequent email) "Sorry, but I forgot to ask about the intentions re: the RIN A\$0.25c (sic) final dividend".
 - (b) One said words to the following effect "How does CEMEX intend to treat the Rinker dividend. Will CEMEX allow shareholders to receive the benefit of that dividend or will CEMEX reduce the offer price?"
 - (c) One said they were unlikely to sell into the bid if CEMEX reduced its offer price by the dividend.

¹³ ASIC Rebuttal Submissions, para 33.

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- (d) One (Perpetual Group) indicated that if CEMEX confirmed it would not reduce its offer price by the dividend and reduced its minimum acceptance condition to 50% it would accept.
80. Mr Clarke said in all his discussions he did not recall any person suggesting that CEMEX “*might not be able to refrain from reducing the offer price of US\$15.85 by reference to any Rinker dividend*”.
81. The review Panel did not doubt Mr Clarke. However, in the review Panel's opinion, the language of the affidavit indicates that the conversations were not confirmation that CEMEX had a discretion under the Offer, or whether CEMEX reserved any discretion in the 10 April announcement. Nor are they confirmation that the investors believed that CEMEX had the discretion it now claims, or that the best and final statement was qualified in that respect. Even if those institutional investors did believe that, that is not evidence of a general market understanding.
82. CEMEX did not provide any evidence from the investors directly.
83. ASIC submitted that the affidavit details no responses to the queries. The review Panel agrees that this would have been instructive. The review Panel's brief asked CEMEX to provide evidence of its responses. CEMEX said only that Citibank had told the inquiring institutions that the queries would be passed on to CEMEX. How CEMEX dealt with the queries has not been disclosed.
84. Furthermore, ASIC submitted that the conversations might be explained as queries arising from the analyst's report referred to above (i.e., the report that indicated a view that CEMEX could allow Rinker shareholders to retain the benefit of the final dividend). If so, the queries would simply reflect enquiries as to whether or not the analyst's view was valid. ASIC submitted its analysis was supported by the timing of the report (27 April) and the queries (30 April to 4 May). This seems a reasonable inference to draw, although the queries may also have been generated by the 27 April dividend announcement.

Rinker statements

85. The review Panel also notes that, when announcing the final dividend, Rinker stated (page 2 of the news release):
- “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.”*
86. CEMEX says that it did not contradict or clarify Rinker's statement because the statement was not ambiguous or wrong. However, in the review Panel's view, the statement does not support CEMEX's interpretation any more than clause 8.8(e), which the review Panel has found does not give CEMEX the discretion for which it contends. The review Panel considers that an ordinary reading of the statement merely reminds shareholders of the Offer terms, not that CEMEX might improve the Offer consideration in future by allowing them to retain a dividend.

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Newspaper report

87. CEMEX also submitted that in one newspaper, *The Australian*, on 1 May 2007 there was an article that acknowledged CEMEX's option to allow shareholders to keep the final dividend. It said:

"Certainly Cemex appears to have done itself no favours by pitching its final offer at the very bottom of the independent expert's valuation of between \$US15.85 and \$US17.74.

This penny-pinching -- which seems a strange thing to say about an \$18 billion cash offer -- could well mean Cemex either has to surrender its 90 per cent minimum acceptance condition or, because it has gone final on price, retire and return with a better offer in three months. The one other option to add value to the mix might be to allow accepting shareholders to keep the final dividend of US25c.

Cemex has form on this sort of move: when it increased its price, it also dropped a condition that would have deducted interim payouts from the final settlement."

88. It may be that the article simply reflects that CEMEX had previously allowed shareholders to retain the interim dividend without considering the relationship between dividends and bid consideration and the best and final statement. The review Panel does not consider that the article reflects the true position with respect to CEMEX's discretion following the best and final statement, or the general market's understanding. It is also contradictory, suggesting as well that CEMEX might have to retire and return with a better offer because it had "gone final on price".
89. In its submissions, CEMEX advised that this was the only article it was aware of making such a statement of the many written in the course of the bid.

Annualised return chart

90. CEMEX submitted that the annualised returns on Rinker shares (drawn from a chart prepared by its adviser, Citigroup) were returns that the market expected based on the market price, Offer price and other factors. It said the returns showed¹⁴ that it was more likely that, following the announcement of the dividend on 27 April, the market expected that the dividend would be paid to shareholders. It said that this followed from the uncertainty level being higher when deduction of the dividend is assumed that when it is not.
91. The review Panel considers that drawing firm conclusions from very small annualized return differences (for example 0.6% for the assumption that the dividend would be deducted) is hard to justify. The review Panel does not consider that the annualised return chart indicates support for CEMEX's submission.

Waiver arguments

92. CEMEX made additional submissions – linked to the submissions on discretion – concerning waiver of its entitlement:

- (a) It submitted that the 7 May announcement was consistent with the 10 April announcement, because the 10 April announcement conveyed to shareholders that the Offer consideration would not be lowered by a future dividend. This argument proceeds on wrong assumptions, first that the Offer consideration is

¹⁴ Based on certain assumptions and its analysis of movements in the chart.

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only the amount of US\$15.85, and second that deducting the dividend lowered the Offer consideration rather than keeping it the same in the hands of the shareholders (and in the hands of the bidder, who pays out less and receives a company of that equivalent lower value). ASIC submitted that if there was a dividend discretion it was waived by the best and final statement because the statement related to the totality of the value of the consideration offered to Rinker shareholders, including any dividends. If there was a waiver, the review Panel considers that this alternative approach is sustainable. But it notes that such a waiver might amount to changing the terms of the Offer, which would have been a variation requiring a modification of the Act by ASIC.

- (b) It also submitted that, if shareholders did not know of clause 8.8(e), they could be presumed to have assumed that they would receive any dividend declared while they were registered holders. This would be a benefit contrary to the terms of the Offer and anyway the review Panel does not assume that shareholders were unaware of the terms.
- (c) It also submitted that its position in respect of future dividends would only have been waived if it had said how it would act in respect of those dividends. The review Panel considers that the best and final statement was broad enough to cover future dividends.

Supplementary bidder's statement

93. The 10 April announcement included a statement that:

"A Supplementary Bidder's Statement reflecting the full extent of the agreement with Rinker and the resulting Revised Offer will be filed in the coming days".

94. On 18 April 2007, CEMEX's fourth supplementary bidder's statement (dated 17 April 2007) was released on ASX. Attached to it was the Notice of Variation filed on 10 April 2007. A little later that day the fifth supplementary bidder's statement (dated 18 April 2007) was released. On page 6 of the fifth supplementary bidder's statement was the question - "What dividends will I receive if I accept the Offer?" In response, was the statement:

"CEMEX has agreed not to reduce the higher US\$15.85 offer by the amount of the interim dividend which was paid on 11 December 2006. CEMEX has retained the right to reduce the consideration paid under its offer for any subsequent distributions by Rinker."

95. The review Panel does not consider that the reference to the supplementary bidder's statement qualified the best and final statement. This is all the more so when there was already a clear, unambiguous and proximate qualification of "in the absence of a superior proposal". Moreover, even if it was a qualification, it was not sufficiently clear, unambiguous or proximate. Lastly, the review Panel does not consider the question and answer in the supplementary bidder's statement amounted to a reservation of a discretion.

Best and final only as to "price"

96. CEMEX also submitted that, if it made a best and final statement, that statement was that the Offer was final only as to price. Allowing shareholders to retain the

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dividend, it said, did not affect the price (namely, the US\$15.85). This is similar to the waiver argument above.

97. The review Panel does not accept this submission. The Offer consideration is the totality of the value provided to shareholders. In addition, the review Panel does not think that shareholders or the market would have reasonably understood the best and final statement in the way CEMEX suggests. This is especially the case since the 10 April announcement included the interim dividend as did the notice of variation.
98. In addition, the review Panel does not consider that CEMEX intended any distinction between “offer” and “offer price”. The 10 April announcement says the “*The offer is CEMEX’s best and final offer...*” The 7 May announcement says “*The CEMEX Offer has been declared final as to price...*” This change may indicate that CEMEX itself recognised its difficulty, but CEMEX’s fifth supplementary bidder’s statement more strongly suggests to the Panel that no meaningful distinction was being drawn. It says on page 17:

“CEMEX’s Offer consideration is final (Heading)

CEMEX’s Offer cannot be increased (sub-heading)

CEMEX has declared this recommended Offer Price as final, in the absence of a superior proposal

The effect of that declaration under Australian law is that CEMEX cannot increase its offer price further unless a superior proposal emerges”.

99. If CEMEX did not make a distinction between ‘price’ and ‘consideration’ in all its documents, it is unlikely that such a distinction, even if valid, would have been made by shareholders in relation to the announcements.

Effect of the circumstances

100. The review Panel was satisfied that CEMEX’s departure from its 10 April announcement had an effect on:
- (a) the control or potential control of Rinker,
 - (b) the acquisition of a substantial interest in Rinker by CEMEX,
 - (c) Rinker shareholders who were not given sufficient information about the status of the Offer to enable them to assess the merits of the Offer,
 - (d) the acquisition of control over voting shares in Rinker taking place in an efficient and informed market, or
 - (e) holders of the relevant class having a reasonable and equal opportunity to participate in any benefits.

Effect on control or acquisition of a substantial interest

101. After the 10 April announcement acceptances went from approximately 0.3% to only 3.24% at 7 May 2007. After the 7 May announcement, acceptances of the Offer increased as follows:
- (a) to 11.75% by 9 May
 - (b) to 15.75% by 11 May,

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- (c) to 24.19% by 16 May, and
- (d) to 95.66% at the close of the Offer on 16 July 2007.¹⁵

102. There may have been a number of influences on the level of acceptances. CEMEX dropping its minimum acceptance condition to 50% and Perpetual Group accepting are likely to have been among them. The review Panel considers it was likely that Perpetual's acceptance was largely a result of the improved Offer consideration. This is confirmed in Mr Clarke's affidavit. In turn, Perpetual's acceptance is likely to have encouraged other acceptances.
103. Accordingly, improving the Offer consideration influenced the level of acceptances.
104. The review Panel considers that CEMEX's departure from, and acting inconsistent with, its best and final statement had a significant effect on control of Rinker or on the acquisition by CEMEX of a substantial interest in Rinker.
105. The review Panel disagrees with CEMEX's submission that there was no adverse effect because the market was fully informed.

Effect on an efficient or informed market

106. The number of trades, and number of Rinker shares traded, after the 10 April announcement was approximately twice the level of the 18 trading days immediately before it. According to ASIC, there were 166,142,109 shares traded, an additional 87,304,096 shares compared to the 18 days before the 10 April announcement (in which 78,838,013 shares traded).
107. ASIC submitted that an explanation for the increased level of trading was that shareholders were more willing to sell their shares following the best and final statement since they expected that CEMEX would not improve its Offer. CEMEX denied any ambiguity regarding future dividends and therefore denied that its conduct had an unacceptable effect.
108. The review Panel was prepared to draw the inference that after the 10 April announcement shareholders were no longer waiting to see if the Offer consideration would be improved. When CEMEX departed from its best and final statement, this meant that the market between the 10 April announcement and the 7 May announcement had been inefficient, because it had been misled as to the status of CEMEX's offer.
109. It also meant that the existence of an informed market had been undermined, because the market expects that participants will adhere to their best and final statements.

Effect on information to assess merits of the Offer

110. The review Panel considers that Rinker shareholders were told on 10 April that the Offer would not be further improved. If CEMEX had, as it submitted, retained a discretion to improve the Offer then the possibility of improvement was an element of the merits of the Offer. This would be important when comparing the merits of the Offer to the merits of selling on-market. Rinker shareholders were not given sufficiently accurate or reliable information about the possibility of being able to

¹⁵ Change of substantial holding notices.

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retain the final dividend, or any future dividends, if they accepted the Offer to assess the merits of the Offer in the period between the two announcements.

Effect on reasonable and equal opportunity

111. The review Panel also considered market prices of Rinker shares before and after the 7 May announcement. While there was some 'noise' created by the exchange rate differences, it is clear that, as the initial Panel found, there was a sustained shift upwards of the closing price following the 7 May announcement. Between 10 April and 4 May the closing price had been between a low of \$18.60 and a high of \$18.89. On 7 May the closing price of Rinker shares on ASX was \$0.34 higher than the closing price on 4 May, retreating a little thereafter (moving with the currency conversion rate).
112. The review Panel's experience suggests that an inference can be drawn that the sustained upward shift in the market closing price after the 7 May announcement was due to a number of factors, but the review Panel considers that the most important was the improved Offer consideration.
113. Accordingly, CEMEX's departure from the best and final statement by the 7 May announcement meant that sellers of shares between the two announcements did not have a reasonable and equal opportunity to participate in the benefits of the improved Offer consideration. They lost the opportunity to include as part of their decision to sell the information that the Offer consideration might be improved.

Declaration

114. The review Panel considers that Rinker shareholders and the market were entitled to accept the statement that there would be no other improvements to the Offer consideration after 10 April 2007 (in the absence of a superior proposal¹⁶). The review Panel considers that in making the 7 May announcement CEMEX departed from and acted inconsistent with the best and final statement in its 10 April announcement. It appeared to the review Panel that there are unacceptable circumstances in relation to the affairs of Rinker, as in Annexure A, having regard to:
 - (a) the effect that the Panel is satisfied the circumstances have had on :
 - (i) the control or potential control of Rinker;
 - (ii) the acquisition by CEMEX of a substantial interest in Rinker;
 - (b) the purposes of Chapter 6 of the Corporations Act as set out in section 602, in that:
 - (i) the acquisition of control over Rinker shares did not take place in an efficient and informed market; or
 - (ii) Rinker shareholders who sold shares otherwise than into the Offer after the 10 April announcement and before the 7 May announcement did not

¹⁶ As earlier noted, Rinker board stated on 10 April that it had worked hard to find a superior alternative but over the previous five months and had been unsuccessful therefore Rinker shareholders should accept the CEMEX offer. The review Panel takes the view that the market would take the statement as final because it is clear there was no realistic prospect of a superior proposal.

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have a reasonable and equal opportunity to share in the benefits flowing from the Offer.

Public interest

115. CEMEX submitted that it would not be in the public interest to make a declaration of unacceptable circumstances where:
- (a) it submitted, there is an absence of evidence that the relevant conduct had any adverse effect on the market or shareholders' rights. The review Panel considers that there is material on which it can base its decision. The material available to the review Panel included the following:
 - (i) the announcements made on 10 April and 7 May;
 - (ii) market price movements following the two announcements;
 - (iii) the number of trades and number of shares traded on ASX before, and between, the two announcements; and
 - (iv) the level of acceptances into the Offer after each of the announcements.
 - (b) it submitted, there has been no allegation or finding of a contravention of the Act, or enquiry into whether the conduct may or may not amount to a contravention of the Act, but rather the elevation of policy statements which purport to summarise the law to a status above the law. The review Panel did not consider contraventions of the law to be a factor in this case. It considered that the circumstances are unacceptable in accordance with sections 657A(2)(a) and (b). The review Panel considers that truth in takeovers is a fundamental policy consideration in takeovers regulation (per *Summit*¹⁷) and is reflected in the policy of the takeovers provisions. The policy in RG 25 is an articulation of a number of aspects of the principles in section 602. This is not placing policy above the law.
 - (c) it submitted, the consequence will be the imposition of a significant penalty on CEMEX by reference only to broad policy considerations and without any reference to questions such as whether the relevant conduct affected the market or any party suffered loss. As the review Panel later explains, there was an effect of the unacceptable circumstances on the rights or interests of shareholders who sold Rinker shares between the two announcements. Its orders protect the rights or interests of Rinker shareholders who sold between the two announcements. The value of the final dividend is, in the review Panel's opinion, the most logical and best estimate of the value of the lost opportunity. Its orders protect those rights or interests, and in creating those new rights cannot be characterized as a penalty on CEMEX in the review Panel's view.
116. The review Panel considered that it was not against the public interest to make a declaration of unacceptable circumstances. An efficient and informed market, and the principle of equal opportunity, are important elements of the Australian

¹⁷ Summit Resources Ltd [2007] ATP 9.

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takeovers regime and best and final statements must be clearly, unambiguously and proximately qualified if there is an intention to reserve a position.

117. The review Panel had regard to the matters in section 657A(3).

118. The review Panel revoked the declaration of the initial Panel and made a declaration in slightly different form, albeit to similar effect (see Annexure A).

Orders

Power to make orders

119. Under section 657D the Panel's power to make orders is very wide. The Panel is empowered to make "any order"¹⁸, including a remedial order, if 4 tests are met:

- (a) it has made a declaration under section 657A;¹⁹
- (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person;
- (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions; and
- (d) it considers the orders appropriate to either –
 - (i) protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons; or
 - (ii) ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred.

120. The order power includes power to make a remedial order, which is defined in section 9. That definition does not include a 'payment order' but this does not restrict the Panel's power to make a payment order. If it were otherwise, section 657D(2) could simply have said "the Panel may make a remedial order..." The section does not limit itself in that way, which suggests that Parliament intended it to have a wider operation.

121. The Panel has previously considered payment orders or similar: *Citect Corporation Ltd*²⁰, *Re Pivot Nutrition Pty Ltd*²¹, and *Austral Coal Ltd 02RR*²².

New Rights

122. CEMEX submitted that the initial Panel could not order it to pay compensation because in these circumstances it was not appropriate as a remedy to protect shareholders' rights or interests. It maintained this submission before the review Panel. The initial Panel considered that CEMEX had misunderstood the nature of the

¹⁸ Other than an order requiring a person to comply with a provision of chapters 6, 6A, 6B or 6C.

¹⁹ This was done on 12 August 2007.

²⁰ [2006] ATP 6. The order involved paying sellers of shares on market.

²¹ (1997). Pivot Nutrition responded to the Panel's declaration by undertaking to raise its bid price and the Panel accepted the undertaking and refrained from making orders. The order contemplated was different in form (increase in the bid price) but in substance was a payment order.

²² [2005] ATP 20. A compensation order was made by the remitter Panel. The initial Panel [2005] ATP 13 and the review Panel [2005] ATP 16 made orders similar to compensation orders in substance if not form, being a 'restoration order' that Glencore sell shares back to persons who disposed of them on-market.

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Panel's proposed orders. The initial Panel said that the Panel's order-making power was not one which orders 'compensation' as a court might, but created new rights. The review Panel agrees: *Precision Data Holdings*²³, *Alinta*²⁴.

123. The Panel's orders are not intended to 'compensate' as a court might do at law. Rather, in this case, they are appropriate to protect the rights or interests of affected persons, noting that it is not feasible to "restore any disadvantaged parties to the position they would have been in had the unacceptable circumstances not occurred": Guidance Note 4 at [4.13]. Possible orders available on, say, 8 May, included a payment order to sellers, holding CEMEX to its best and final statement, or returning to sellers an equivalent number of shares (each possibility assuming there would be no unfair prejudice). The passing of time has removed the availability of the latter two options but the first remains.
124. The review Panel disagrees with CEMEX that the concept of new rights is no different in form or substance to rights enforced by a court. The Panel is directed by section 657A(3) to have regard to (among other things) the policy of the takeovers chapter as set out in section 602 when exercising its powers, including its order powers. This goes beyond what a court would consider. Also, any order can only be made if the Panel makes a declaration as the foundation. A declaration takes into account policy and other considerations. The review Panel therefore considers that its orders create new rights. Moreover, orders the Panel may make in appropriate circumstances can extend to orders so that a takeover proceeds as it would have if the unacceptable circumstances had not occurred. Although not ordered in this case, such an order does not necessarily align with enforcing or adjudicating pre-existing rights either. Lastly, the Panel notes that orders can protect rights or interests of persons not parties to the application (i.e., who are not asking the Panel to enforce their pre-existing rights or interests).
125. CEMEX submitted that it would be difficult or impossible for the Panel to have regard to individual circumstances, and submitted that the Panel should not make an arbitrary order without considering such issues as whether the circumstances had an effect on the market or whether any person actually suffered loss.
126. The review Panel considers that looking at individual circumstances is not necessary in the present case. Consistent with the approach taken in *Austral Coal Limited 02 (RR)*²⁵, affected shareholders in this case can be dealt with as a group. The review Panel had regard to the material considerations, such as effect on the market and loss of opportunity occasioned by the unacceptable circumstances, to determine what orders are appropriate to protect the rights or interests of persons affected. In particular, it is significant that in the present case the unacceptable circumstances resulted in the market for Rinker shares being misled as to the status of CEMEX's

²³ (1999) 173 CLR 167 at 188 and 192.

²⁴ [2006] FCA 1378 per Emmett J. On appeal, [2007] FCAFC 55 at [413], the majority did not overturn that finding, at least in respect of s657A(2)(a). However, they did say the power to determine whether a breach of the law has been committed and, if so, power to make an appropriate remedial order is enough to indicate that more than the creation of new rights is involved. The review Panel here is not finding a contravention of the law.

²⁵ [2005] ATP 20 at paragraph 11 of Annexure D.

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offer. That affected the rights and interests of vendors of Rinker shares (as a group) in that market between 10 April and 7 May.

127. Moreover, the review Panel notes the amendment to section 657D(2)(a) by the Corporations Amendments (Takeovers) Act 2007, which introduced specific reference to a “group of persons”. In the Panel’s view it may make orders with respect to a group of persons without needing to address individual persons within the group.
128. CEMEX also submitted that there was a delay commencing proceedings and this removed the availability of more suitable remedies. CEMEX did not say what those remedies might be. It submitted that the Panel is now an inappropriate forum to deal with the matter. The review Panel disagrees. ASIC submitted that it did not delay and in any event, there has been no adverse effect on the available or appropriate remedies. The review Panel considers that an appropriate remedy is available.

Unfair prejudice

129. The review Panel has considered the balance between the benefit of making orders and the prejudice that might flow from doing so: *Glencore International AG v Takeovers Panel*.²⁶ It has considered whether any prejudice is unfair.
130. ASIC submits that there is no unfair prejudice. As the initial Panel noted, the Panel has consistently stated that mere prejudice is not, in itself, unfair.
131. CEMEX submitted that without a detailed analysis of the circumstances of each affected shareholder, a payment order like the initial Panel’s would result in significant over-compensation of some affected shareholders, and therefore would amount to a penalty. This, it submits, would be unfair prejudice to CEMEX.
132. The review Panel considers that if there is a sensible and logical basis for valuing the effect, and the group of persons to whom the payment is to be made can reasonably be determined, *prima facie* there is no penalty involved. These conditions are met in this case. Undoubtedly CEMEX is worse off by a payment order than if no order is made, but CEMEX is not unfairly prejudiced for the following reasons:
 - (a) As a result of the unacceptable circumstances persons who sold shares between the 10 April and 7 May announcements did so in a market that was not efficient and informed. They lost the opportunity to include as part of their decision to sell the information that the Offer consideration might be improved. The value of the final dividend is, in the review Panel’s opinion, the most logical and best estimate of the value of the lost opportunity.
 - (b) CEMEX’s best estimate to the initial Panel of the relevant number of shares involved (i.e., the net sales between the two announcements) was 44,849,359²⁷, and the amount involved was A\$11,212,340.²⁸ That must be compared to the benefits that CEMEX received by departing from its best and final statement. Allowing shareholders to retain the benefit of the final dividend significantly, if

²⁶ [2006] FCA 274 at [124]

²⁷ As submitted by Rinker’s share registry, less 74,566,365 shares described as part of the purchase of one custodian’s sub-custody business by another custodian that involved no change in beneficial ownership.

²⁸ Submissions on the Panel draft declaration and orders, page 7.

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not wholly, contributed to the success of the Offer. The total value of the Offer was approximately \$A17 billion. CEMEX submitted as its best estimate to the initial Panel, that the value of the final dividend was approximately A\$223.7 million. Relative to these amounts, the likely amount of the payment order is not out of proportion or otherwise unfair.

Opportunity to make submissions

133. The review Panel has provided an opportunity to CEMEX and ASIC to make submissions. It has also read and considered the submissions made in respect of the initial Panel's orders.

Protect rights or interests

134. The review Panel considered that Rinker shareholders who sold shares between the 10 April announcement and the 7 May announcement as a group did not have:

- (a) the acquisition of control over their Rinker shares taking place in an efficient and informed market (see section 602(a)). Because the best and final statement was not relevantly qualified, shareholders had not factored into their decision to sell the possibility of an improved Offer consideration, putting to one side that there is no superior proposal. Accordingly, departure from the best and final statement resulted in the market between the 10 April announcement and the 7 May announcement not being efficient and informed. The shareholders in the group lost the opportunity to trade in an efficient and informed market (i.e. a market in Rinker shares that was not misled that CEMEX's Offer was its best and final offer in the absence of a superior proposal).
- (b) a reasonable and equal opportunity to participate in the benefits of the improved Offer consideration (see section 602(c)). The review Panel considered that the best and final statement conveyed to the market CEMEX's intention and its assurance that there would be no improvement in the Offer consideration (in the absence of a superior proposal). Departure from and acting inconsistently with the assurance meant that Rinker shareholders who made a decision to sell in the market lost the opportunity to receive the improvement, being the final Rinker dividend.

135. The market would have been efficient and informed if the assurance in the best and final statement had not been departed from or CEMEX had acted consistently with it.

136. As noted earlier, there was a sustained improvement in the market price following the 7 May announcement (closing \$0.34 higher than gradually dropping back over succeeding days' close - moving with the exchange rate - but still above the closing price on 4 May). There are likely to be many reasons why the closing price improved, but the review Panel agrees with the initial Panel that the shares traded in "a range significantly above the range in which the price closed before the 7 May announcement" and considers this to be likely to be a reflection of the improved Offer consideration.

137. Having determined that as a result of the unacceptable circumstances the vendor shareholders as a group had lost the right or interest to receive the benefit of such a bid, the review Panel concluded that the only way to protect the rights or interests of those shareholders was to provide the group what had been lost. The proposed

Reasons for Decision – Rinker Group Limited 02R

orders have that effect. It is not possible to reconstruct the market to see what would have happened if the 10 April announcement was not departed from or CEMEX had not acted inconsistently with it. The review Panel took account of all the factors considered by the initial Panel and agreed with the initial Panel that there was not one determinative factor but the influence of many factors. However it is clear that the market factored in the amount of the final dividend, namely A\$0.25, when told that shareholders would be allowed to retain it. Accordingly the review Panel considers that the appropriate way to protect the rights or interests of the affected group of persons is payment of that amount.

138. Given that the review Panel has found that there are appropriate orders, it does not agree with CEMEX'S submission that the situation is similar to *Summit Resources*, where a declaration was made but no orders were considered appropriate.²⁹
139. If this matter had come before the review Panel on 8 May one way (of a number) the rights and interests of the vendor shareholders as a group (i.e. those selling between 10 April and 7 May) may have been protected was by only permitting CEMEX to proceed with its takeover (i.e., including the improved Offer) if it agreed to give the group the benefit of the improvement (i.e. the A\$0.25 dividend). The fact that the matter is being dealt with by the review Panel at a later date should not result in a different or less protective order.

Ensure takeover proceeds as it would have

140. This course is an alternative to protecting the rights and interests of the vendor shareholders in the manner set out above. It is not applicable here. Nonetheless, it should be considered as an alternative as a similar occurrence may happen in the future.
141. An appropriate remedy in a “Truth in Takeovers” matter may be that the maker of the statement is held to the statement. This might require one of two actions:
- (a) Immediate commencement of proceedings. It would have been preferable for these proceedings to have been commenced soon after the 7 May announcement. It is understandable, indeed desirable, that ASIC discussed its concerns with CEMEX before making application. Such discussions needed to be concluded quickly because circumstances demanded. However, it became apparent that they were taking some time.
 - (b) Immediate announcement to the market. Because discussions were taking time it may have been desirable for ASIC to make an announcement to the market alerting it to the discussions and the possibility of an application to the Panel. The review Panel accepts that great care is needed when taking this course but it would at least keep open a wider range of possible orders. This is because sellers would be on notice.
142. Had ASIC applied to the Panel (or made a public announcement) on, say, 8 or 9 May 2007, it may have been appropriate to order that CEMEX withdraw the 7 May announcement and offer withdrawal rights to any shareholders who had accepted its

²⁹ [2007] ATP 9. This case involved a bidder making a statement about its voting intentions and then changing its position. The Panel noted that the circumstances were unusual.

Reasons for Decision – Rinker Group Limited 02R

Offer after it. In other words, CEMEX would have been held to its best and final offer.

143. It is too late in the review Panel's view to order CEMEX to withdraw the 7 May announcement and offer withdrawal rights to shareholders who accepted its Offer after it. In any event, ASIC did not apply for such an order, although the review Panel does not consider that it was, for that reason, precluded from making such an order. However, in all the circumstances it is satisfied that the orders it proposes to make best protect the rights and interests of the relevant vendor shareholders as a group by ensuring they too receive the benefit of what they lost the opportunity to participate in, i.e. the benefit of the improved Offer.

Order

144. The initial Panel considered that the most appropriate order was that CEMEX pay shareholders who sold between the 10 April announcement and 7 May announcement A\$0.25 per share for the number of Rinker shares disposed of by them in the relevant period net of any acquisitions.³⁰ The review Panel agrees that this is an appropriate order.³¹
145. The review Panel agreed with the initial Panel that the 10 April announcement was the appropriate commencement point, and that adjustments to the net number of shares should be made to recognise beneficial ownership and avoid possibly overstating or understating the actual number of shares disposed of during the relevant period (i.e., transactions where a change in the registered holding may have occurred but with no underlying change in beneficial ownership, or *vice versa*).
146. The review Panel did not consider that it should take account of the value of any franking credits.
147. The review Panel's orders have been the subject of detailed discussions with the parties as to the mechanics of the orders (CEMEX reserving its rights to take review proceedings notwithstanding). This slowed up finalisation of the orders.

CONCLUSION

148. The review Panel made:
- (a) the declaration in Annexure A and
 - (b) the orders in Annexure B.
149. The review Panel did not receive an application for, and made no, costs order.

Simon McKeon**President of the sitting Panel****Decision dated 12 August 2007****Reasons published 20 September 2007**

³⁰ A transaction for 74 million shares occurred as part of the settlement of a business sale, and has been ignored.

³¹ ASIC's application sought an order for payment for each share sold, but the review Panel agreed with the initial Panel that net disposals was appropriate.



Annexure A
Corporations Act
Section 657A
Declaration of Unacceptable Circumstances

In the matter of RINKER GROUP LIMITED 02R

*The Takeovers Panel revokes the declaration made by it on 12 July 2007 in relation to the affairs of Rinker Group Ltd (**Rinker**) and substitutes this declaration.*

WHEREAS

Background

1. Rinker is a listed public company. It was 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**). The Offer closed on 16 July 2007.
3. Clause 8.1(c) of the Bidder's Statement stated:
"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 defined "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 set out a mechanism for dealing with adjustments to the bid consideration for "Rights". Clause 8.8(e) stated:
"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 2006³²; and

³² 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**) with a record date of 8 June 2007.
10. On 7 May 2007, CEMEX made an announcement to ASX (**7 May Announcement**) stating that, inter alia:
- (a) the Offer had been "declared final as to price, in the absence of a superior offer";
 - (b) CEMEX would extend the Offer until 7.00 p.m. AEST on 8 June 2007;
 - (c) CEMEX would not transfer Rinker shares to its name, pursuant to acceptances of its Offer, until after the record date for the Final Dividend;
 - (d) Rinker shareholders who were entitled to the Final Dividend would retain that dividend, irrespective of when they accepted the Offer;
 - (e) CEMEX would not exercise its right to deduct the Final Dividend from its offer price of \$US15.85 per share; and
 - (f) Perpetual Investments Limited, Rinker's largest shareholder, would accept the Offer as soon as practicable.
11. On 7 May 2007 the closing price of Rinker shares on ASX was A\$0.34 above the closing price on the previous trading day. The closing price fell back over the next few days but remained above the price prior to the 7 May Announcement.

Best and final statement

12. There was no clear, unambiguous and proximate qualification to the Best and Final Statement in the 10 April Announcement to the effect that CEMEX reserved the right to allow Rinker shareholders to retain some or any future “Rights”.
13. None of the Subsequent Statements adequately remedied the lack of a clear, unambiguous and proximate qualification to the Best and Final Statement concerning Rights.
14. Rinker shareholders and the market were entitled to assume that there would be no other improvements to the Offer after 10 April (in the absence of a superior proposal).
15. By making the 7 May Announcement, CEMEX departed from its Best and Final Statement such that 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 directors of Rinker were not given enough information to enable them to assess the merits of the Offer; and
 - (c) Rinker shareholders who sold shares otherwise than into the Offer between the 10 April and 7 May Announcements did not have an equal opportunity to share in the benefits flowing from the Offer (i.e. the increase in the Offer resulting from the amount of the Final Dividend not being deducted from the Offer price).
16. Following the 7 May Announcement the acceptances of CEMEX’s Offer increased from approximately 2.55% to over 90% of Rinker shares.

Circumstances unacceptable

17. 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 2001 (*Cth*) (**Act**) as set out in section 602 of the Act.
18. 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.
19. The Panel has had regard to the matters in section 657A(3) of the Act, 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 Act.

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

Simon McKeon

President of the Sitting Panel

Dated 12 August 2007



Annexure B

Corporations Act Section 657D Orders

In the matter of RINKER GROUP LIMITED 02R

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 August 2007 under section 657A of the *Corporations Act 2001* (Cth); and
2. section 657D of the *Corporations Act 2001* (Cth),

THE PANEL ORDERS THAT

3. Subject to Order 14, CEMEX shall pay to each Affected Shareholder who signs and returns a claim form (within the applicable period specified in Order 10) \$A0.25 per share for the net number of Rinker shares the Affected Shareholder disposed of a beneficial interest in during the Relevant Period as set out in the claim form.

AFFECTED SHAREHOLDERS

4. An Affected Shareholder means a person who disposed of a beneficial interest in a net number of Rinker shares during the Relevant Period.

CLAIM FORMS

5. Within 10 business days after the date of these Orders, CEMEX or the ISP shall send to each person that disposed of a net number of Rinker shares during the Relevant Period as identified from Rinker's share register:
 - (a) a claim form and a notice as set out in the Orders; and
 - (b) a prepaid self-addressed envelope.
6. The notice must set out the following information:
 - (a) the effect of, and a summary of the reasons for, the Orders;
 - (b) who is an Affected Shareholder and what is meant by disposing of a beneficial interest in a Rinker share;
 - (c) what an Affected Shareholder must do to receive payment (and the process that will be followed for the making of the payment);
 - (d) how an Affected Shareholder can obtain a blank claim form and the supporting information or evidence required to be provided with:
 - (i) a claim form completed from blank by an Affected Shareholder; or
 - (ii) a claim form altered by an Affected Shareholder from that sent to them under Order 5;

- (e) the applicable time periods in which Affected Shareholders must act to receive payment under the Orders;
 - (f) the Affected Shareholder Warranties; and
 - (g) the phone number of an enquiry line that can be called in relation entitlements under these Orders.
7. A claim form sent under Order 5 must set out the following information:
- (a) the name, address and HIN or SRN or other holder identification number appropriate for the Affected Shareholder;
 - (b) known details of the net Rinker shares the Affected Shareholder disposed of during the Relevant Period;
 - (c) space for the Affected Shareholder to correct the information in (a) and (b) above (if necessary);
 - (d) space for the Affected Shareholder to sign and date the claim form; and
 - (e) prominent notice of the Affected Shareholder Warranties that the Affected Shareholder will be giving to CEMEX by submitting the claim form to CEMEX.
8. If a person requests a blank claim form or notice from CEMEX within 12 months after the Distribution Date, CEMEX shall within 5 business days of that request send the person a blank claim form and notice.
9. The Panel must approve the form of the notice and claim form.

PAYMENT TO AFFECTED SHAREHOLDERS

10. For the purposes of Order 3, to be entitled to payment an Affected Shareholder must sign and return a claim form:
- (a) within 6 weeks after the Distribution Date; or
 - (b) within 12 months after the Distribution Date if the Affected Shareholder demonstrates that Special Circumstances apply to them.
11. If CEMEX does not refer a claim form to ASIC under Order 14, CEMEX shall pay the Affected Shareholder under Order 10 within 2 weeks of the earlier of receipt by CEMEX or the ISP of the claim form or 10 weeks after the Distribution Date (which ever is the later).
12. If CEMEX refers a claim form to ASIC under Order 14, and ASIC or the Panel determines that CEMEX shall pay an amount to the Affected Shareholder, CEMEX must pay that amount to the Affected Shareholder by the later of:
- (a) 10 weeks after the Distribution Date; or
 - (b) as soon as practicable.

SPECIAL CIRCUMSTANCES

13. Special Circumstances apply to an Affected Shareholder under Order 10(b) if in the circumstances applicable to that Affected Shareholder:
- (a) it was not unreasonable for the Affected Shareholder not to have submitted the claim form within 6 weeks after the Distribution Date; and

- (b) the Affected Shareholder does not unreasonably delay in submitting the claim form.

DISPUTE AS TO ENTITLEMENT TO PAYMENT

14. CEMEX may refer a claim form to ASIC within 2 weeks of CEMEX or the ISP receiving the claim form (whichever is earlier). CEMEX must provide to ASIC, with the referred claim form, the reasons it considers that the person submitting the claim form may not be entitled to the payment set out in the claim form because:
 - (a) CEMEX considers that the person submitting the claim form is not an Affected Shareholder;
 - (b) Special Circumstances do not apply;
 - (c) CEMEX disputes some or all of the details, supporting documents or evidence submitted in or with the claim form; or
 - (d) CEMEX considers that payments have already been made or claimed for in respect of some or all of the Rinker shares claimed for.
15. If CEMEX refers a claim form to ASIC under Order 14, ASIC shall within 2 weeks of receipt of that claim form make a determination, after consultation with CEMEX if ASIC considers it desirable, as to whether or not the person submitting the claim form is entitled to be paid in accordance with the Orders and if necessary, for how many Rinker shares.
16. If ASIC is unable to make a determination under Order 15, it shall refer the claim form to the Panel within 2 weeks of receipt by ASIC of that claim form for decision.
17. Before ASIC (or the Panel) decides that CEMEX is not required to pay a person in accordance with the claim form the person has submitted, ASIC must (and the Panel will if applicable):
 - (a) advise the person of the proposed decision and the reasons for the proposed decision;
 - (b) provide copies of any information or documents on which ASIC or the Panel proposes to base their decision; and
 - (c) allow the person a reasonable period to make submissions on the proposed decision.

CEMEX MAY REQUEST FURTHER INFORMATION

18. CEMEX may request further information from a person submitting a claim form to support the person's entitlement to payment if CEMEX has reasonable grounds to believe that the person may not be entitled to the payment claimed in the claim form submitted because CEMEX considers that:
 - (a) the person submitting the claim form is not an Affected Shareholder;
 - (b) the person submitting the claim form is not entitled to payment for the number of shares to which the claim relates;
 - (c) Special Circumstances do not apply;
 - (d) the person has not provided sufficient evidence to support their claim form; or

- (e) payment has already been made in respect of some or all of the Rinker shares claimed for.
19. If CEMEX refers a claim form to ASIC under Order 14, CEMEX must provide any information it receives, or has received, under Order 18 (or evidence as to a lack of it having been provided after a request) to ASIC for the purposes of ASIC making a determination under Order 15 and advise ASIC of the details of any outstanding requests for information that CEMEX has made to the relevant person.
 20. ASIC may extend the time it has under Order 15 or 16 to make a determination where:
 - (a) ASIC has advised the person of its proposed decision not to require CEMEX to pay the person all or some of the amount claimed by that person, and ASIC is conducting the procedure in Order 17; or
 - (b) CEMEX has made a request for further information under Order 18 and in ASIC's opinion it would be reasonable for further time to be allowed before a determination is made.

SPECIAL PURPOSE ACCOUNT

21. CEMEX shall establish the Special Purpose Account to be used solely for the purposes of carrying out the Orders.
22. The Special Purpose Account must be established by CEMEX within 5 business days of the date of the Orders.
23. CEMEX must deposit A\$15 million in the Special Purpose Account within 10 business days of the date of the Orders, such amount to be used to carry out the Orders.
24. At any time until the Special Purpose Account is closed in accordance with Order 28, CEMEX must deposit such additional amounts as reasonably determined by ASIC from time to time as necessary to ensure that there are sufficient funds in the Special Purpose Account for carrying out the Orders.
25. CEMEX must ensure that the ISP is given access to the Special Purpose Account to make the payments to Affected Shareholders as required by the Orders.
26. CEMEX must not draw from, or permit to be drawn from other than as required by the Orders, the Special Purpose Account until it is closed in accordance with Order 28.
27. CEMEX must ensure that the Special Purpose Account remains in place until all claim forms submitted to CEMEX have either been:
 - (a) in the case of claim forms that CEMEX has not disputed under Order 14, paid as claimed by the person submitting the claim form; or
 - (b) in the case of claim forms that CEMEX has disputed under Order 14, either:
 - (i) determined by ASIC under Order 15 or by the Panel as not entitling the person submitting the claim form to payment; or
 - (ii) paid by CEMEX as ASIC determines under Order 15 or the Panel orders.

28. CEMEX may close the Special Purpose Account after such time as Order 27 is satisfied and the balance remaining in the Special Purpose Account may be transferred in CEMEX's discretion.

REPORTING

29. CEMEX or the ISP (as appropriate) shall provide the following reports to ASIC:
- (a) *Dispatch Report*: a report within 5 business days of the Distribution Date setting out such information as reasonably required by ASIC;
 - (b) *First Payment Report*: a report, within 11 weeks of the Distribution Date, of all the claim forms submitted to CEMEX within 6 weeks of the Distribution Date which are either paid as claimed in the claim forms or referred to ASIC under Order 14, setting out such information as reasonably required by ASIC;
 - (c) *Special Purpose Account Report*: a report at least 10 business days before CEMEX closes the Special Purpose Account under Order 28 setting out such information as reasonably required by ASIC.
30. ASIC may also require from time to time any reports from:
- (a) CEMEX or the ISP (if it is still being used by CEMEX) on claim forms submitted more than 6 weeks after the Distribution Date and before 12 months after the Distribution Date, setting out such information as ASIC may reasonably require; and
 - (b) CEMEX on the Special Purpose Account including its balance and details of deposits to and withdrawals from it.

CEMEX or the ISP (as applicable) must provide the reports to ASIC within 2 business days of ASIC's request.

31. ASIC shall report to the Panel as the Panel requests from time to time as to the satisfaction (or the progress of the satisfaction) of the Orders. For the purposes of ASIC reporting to the Panel, ASIC shall be entitled to rely on the reports provided to it under Orders 29 and 30.

AFFECTED SHAREHOLDER WARRANTIES

32. In submitting a claim form to CEMEX, the person(s) submitting the claim form shall warrant to CEMEX to the effect that, to the best of the person's or persons' knowledge after due enquiry:
- (a) the information in the claim form is true and correct;
 - (b) the person(s) was/were the beneficial owner(s) of the net Rinker shares disposed of during the Relevant Period at the time of the disposal;
 - (c) the net disposal of the beneficially owned Rinker shares resulted from bona fide arm's length transactions; and
 - (d) any attached supporting documents are true copies of their originals.

THE ISP

33. CEMEX shall appoint a person to act on behalf of CEMEX as the ISP and shall agree the functions that are required to implement the Orders that are to be performed by the ISP on CEMEX's behalf. CEMEX shall enter into an agreement with the ISP to perform those functions.
34. The terms of the agreement to be entered into by CEMEX and the ISP under Order 33 shall document fully the processes to be followed by CEMEX and the ISP in implementing the Orders.
35. CEMEX must obtain approval from ASIC to the appointment of the ISP and the terms of the agreement between CEMEX and the ISP entered into under Order 33.
36. For the purposes of ASIC approving of the appointment of the ISP, ASIC may rely on the representations given by the ISP as to its competence or ability to carry out the functions required of it by the Orders (unless ASIC knows otherwise) and ASIC shall not be required to conduct other independent investigations into the competence and ability of the ISP to carry out the functions required of it by the Orders.
37. The ISP must pay the Affected Shareholders out of the Special Purpose Account the amounts required to be paid pursuant to the Orders by sending cheques to the addresses notified in the claim form (payments are taken to be made on the day that the ISP sends the cheque). In the case of a holding where there is more than one beneficial owner, CEMEX's obligations under these Orders are satisfied by the ISP sending the cheque to the person and the address provided on the claim form for the person first named on the claim form.

UNCLAIMED MONIES

38. CEMEX must publish in the Gazette details of any monies from cheques returned, or unpresented, for which it cannot reasonably establish a forwarding address for the Affected Shareholder concerned
39. Details published under Order 38 must include the name of the Affected Shareholder, the amount the Affected Shareholder is entitled to and the last known address of the Affected Shareholder.
40. CEMEX must hold funds represented by any returned or unpresented cheques for 12 months after publication in an ASIC Gazette under Order 38. If CEMEX has not transferred unclaimed monies after this time, it must within 1 month thereafter give the funds represented by any returned or unpresented cheques to ASIC (to treat as unclaimed monies to be dealt with under Part 9.7 of the *Corporations Act 2001* (Cth)).

PUBLICATION OF ENTITLEMENT TO PAYMENT

41. CEMEX shall within 2 business days of the Distribution Date cause to be published in one newspaper with a national circulation in Australia, one newspaper in each Australian State and Territory circulating in that State or Territory, one newspaper circulating nationally in New Zealand and the Wall Street Journal a notice that is approved by ASIC and is not smaller than 15 cm by 20 cm and placed in the general news sections of those newspapers which clearly states:
 - (a) the effect of, and a summary of the reasons for, the Orders;
 - (b) a description of the group of persons likely to be the Affected Shareholders;

- (c) what the Affected Shareholders must do to receive payment (and the process that will be followed for the making of the payment);
 - (d) what an Affected Shareholder must do to obtain a blank claim form and the supporting information or evidence required to be provided with a claim form completed from blank by an Affected Shareholder or a claim form altered by an Affected Shareholder from that sent to them under Order 5;
 - (e) the applicable time periods in which Affected Shareholders must act to receive payment under the Orders;
 - (f) the phone number of an enquiry line that can be called in relation entitlements under these Orders.
42. The information in the notices published under Order 41 above must also be set out prominently on the CEMEX and Rinker websites with a readily downloadable copy of a blank claim form and notice.

MANNER OF SENDING DOCUMENTS

43. Any document required to be sent under these Orders (including cheques under Order 37) shall be sent in accordance with section 648C of the *Corporations Act 2001* (Cth).

ASIC COSTS

44. CEMEX shall pay ASIC's disbursements and reasonable internal costs in relation to action taken by ASIC in relation to the Orders and ASIC shall provide to CEMEX an explanation of how the costs claimed by it have been calculated.

DATE OF ORDERS

45. The date of these Orders is 5 business days after the parties are provided with the final reasons of the review Panel in this matter.

DEFINITIONS AND INTERPRETATION

Affected Shareholder means a person described in Order 4.

Affected Shareholder Warranties means the warranties given by the Affected Shareholders by submitting the claim form described in Order 32;

ASIC means Australian Securities & Investments Commission

CEMEX means CEMEX Australia Pty Ltd (ACN 122 401 405)

Distribution Date means the last date that CEMEX sends claim forms pursuant to Order 5.

ISP means Computershare Investor Services Pty Limited, Level 2, 60 Carrington Street, Sydney, New South Wales 2000 or another independent service provider to be appointed by CEMEX under Order 33 and approved by ASIC under Order 35.

Offer means CEMEX's takeover offer for Rinker shares.

Panel means the Takeovers Panel.

Relevant Period means the period from:

(a) the time of the announcement on 10 April 2007 by CEMEX to the Australian Securities Exchange of the variation of its Offer;

to:

(b) the time of the announcement to the Australian Securities Exchange 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.

Rinker share means the security that traded on the Australian Securities Exchange during the Relevant Period under the symbol "RIN" being an ordinary share in Rinker.

Special Circumstances has the meaning given to it in Order 13.

Special Purpose Account means an account set up by CEMEX in CEMEX's name pursuant to Order 21.

Simon McKeon

President of the Sitting Panel