



Australian Government

Takeovers Panel

**Reasons for Decision
Cardinal Resources Limited 03 & 04
[2020] ATP 23**

Catchwords:

Decline to conduct proceedings – takeover bid – rival bids - truth in takeovers – last and final statements – efficient, competitive and informed market

Corporations Act 2001 (Cth), section 602

Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 16

ASIC Regulatory Guide 25 – Takeovers: False and misleading statements

Finders Resources Limited 02 [2018] ATP 9, Ambassador Oil and Gas Limited 01 [2014] ATP 14, Warrnambool Cheese and Butter Factory Company Holdings Limited [2013] ATP 16, Ludowici Limited [2012] ATP 3, MYOB Ltd [2008] ATP 27, Rinker Group Limited 02R [2007] ATP 19, Rinker Group Limited 02 [2007] ATP 17, Summit Resources Limited [2007] ATP 9, Australasian Leisure & Hospitality Group Ltd 03 [2004] ATP 25, BreakFree Limited 04R [2003] ATP 42, BreakFree Limited 03 & 04 [2003] ATP 38 & 39, Taipan Resources NL 06 [2000] ATP 15

Procedural Rule 6.1.1, Note 2(d)

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	NO	NO	NO	NO

INTRODUCTION

- The Panel, Jeremy Leibler, Karen Phin (sitting President) and Sarah Rennie, declined to conduct proceedings on applications by Samson Rock Capital LLP and Cardinal Resources Limited in relation to the affairs of Cardinal. Cardinal is the subject of competing takeover bids from Nord Gold S.E. and Shandong Gold Mining (HongKong) Co., Limited. The application concerned whether the circumstances in relation to Cardinal, where (among other things) Nordgold and Shandong have made equivalent offers for Cardinal which are both ‘last and final’ (in the absence of a higher competing offer), are unacceptable, such that both bidders should be released from their respective last and final statements. The Panel considered there was no reasonable prospect that it would declare the circumstances unacceptable.
- In these reasons, the following definitions apply.

Cardinal	Cardinal Resources Limited
Corporations Act	<i>Corporations Act 2001 (Cth)</i>
Last and Final Statement(s)	Shandong’s Last and Final Statement and Nordgold’s Last and Final Statement (individually or together, as the context requires)
Nordgold	Nord Gold S.E.
Nordgold Offer	has the meaning given in paragraph 8

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Nordgold’s Last and Final Statement	has the meaning given in paragraph 20
Nordgold Simultaneous Off-Market Offer	has the meaning given in paragraph 24
Samson Rock	Samson Rock Capital LLP
Shandong	Shandong Gold Mining (HongKong) Co., Limited
Shandong Offer	has the meaning given in paragraph 9
Shandong’s Last and Final Statement	has the meaning given in paragraph 12
Shareholder Intention Statements	has the meaning given in paragraph 18

FACTS

- Cardinal is a company listed on the ASX and Toronto Stock Exchange (ASX/TSX code: CDV).
- Nordgold holds approximately 27.77% of the shares in Cardinal.¹
- Shandong holds approximately 11.86% of the shares in Cardinal.²
- Samson Rock holds approximately 5.55% of the shares in Cardinal and is Cardinal’s largest shareholder outside of Nordgold and Shandong.³
- On 18 June 2020, Cardinal announced that it had entered into a Bid Implementation Agreement with Shandong, pursuant to which Shandong agreed to acquire all of the ordinary shares of Cardinal at A\$0.60 per share by way of an off-market takeover bid.
- On 15 July 2020, Nordgold made an unconditional on-market takeover bid to acquire all of the ordinary shares of Cardinal at A\$0.66 per share (**Nordgold Offer**). Nordgold lodged its Bidder’s Statement with ASIC on the same day.
- On 22 July 2020, Cardinal announced that it had received a revised and improved proposal for an off-market takeover from Shandong to acquire all of the ordinary shares of Cardinal at A\$0.70 per share (**Shandong Offer**). Shandong’s Bidder’s Statement was lodged with ASIC on 11 August 2020.
- On 2 September 2020, Nordgold increased the offer price of the Nordgold Offer from A\$0.66 to A\$0.90 per Cardinal share.
- On 7 September 2020, Shandong increased the offer price of the Shandong Offer from A\$0.70 to A\$1.00 per Cardinal share.
- On 19 October 2020, Shandong lodged its Second Supplementary Bidder’s Statement in respect of the Shandong Offer stating that the offer price of A\$1.00 per Cardinal

¹ As at the date of the applications

² As at the date of the applications

³ As at the date of the applications

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share is “*best and final in the absence of a higher competing offer*” (**Shandong’s Last and Final Statement**).

13. On 20 October 2020, Cardinal announced that the effect of Shandong’s Last and Final Statement is “*that unless there is a higher competing offer to the Shandong Gold Offer (whether from Nordgold or a third party), Shandong Gold cannot increase its offer price*”.
14. On 21 October 2020, Nordgold increased the offer price of the Nordgold Offer from A\$0.90 to A\$1.00 per Cardinal share and released its Third Supplementary Bidder’s Statement in which it stated that its increased offer price “*is not a higher competing offer.*”
15. Subsequently on 21 October 2020, Cardinal made an announcement stating “*Cardinal notes that Nordgold has made a higher competing offer by increasing the Offer Price of the Nordgold Takeover Bid to A\$1.00 cash per share (previously A\$0.90 cash per share)*” and “*[b]ased on the advice from Shandong Gold, Cardinal understands that Nordgold’s increased offer may be a higher competing offer on the basis that it represents a higher offer than any competitive offer that existed as at the date of Shandong Gold’s 19 October announcement.*”
16. On 22 October 2020, Cardinal announced an update in respect of the competing takeover offers for Cardinal, noting (in effect) that Nordgold had a different interpretation of what constitutes a ‘higher competing offer’ and therefore Shandong’s ability to increase its offer under its Last and Final Statement. In that respect, Cardinal stated that it “*look[s] forward to Shandong Gold clarifying such intention in the market.*”
17. On 23 October 2020 at approximately 3.03pm, Shandong made an announcement clarifying the interpretation of its Last and Final Statement, to the effect that it will not increase the offer price under the Shandong Offer unless there is a higher competing offer exceeding A\$1.00 per Cardinal share. In that same announcement, Shandong confirmed its intention to extend the offer period of the Shandong Offer until 30 October 2020.
18. Also on 23 October 2020 at approximately 3.59pm, Cardinal made an announcement that it had received shareholder intention statements from 28 of its shareholders (representing 19.38% of its shares) to the effect that those shareholders:

“...intend to accept the unconditional off-market takeover offer by [Shandong] by Friday, 30 October 2020 if [Shandong] has not otherwise extended its offer period by 10:00am on Friday 30 October, or if [Shandong] has extended its offer by 10:00am on Friday 30 October, they intend to accept the [Shandong Offer] by 5:30pm (AEDT) on the new last day of the [Shandong Offer] period, subject to either:

 - a) *[Nordgold] not increasing the offer price of its takeover offer above A\$1.00 per Share; or*
 - b) *there being no superior proposal for value in excess of A\$1.00 per Share, in each case prior to 5.30pm (AEDT) on Thursday, 29 October 2020”*

(Shareholder Intention Statements).
19. Also on 23 October 2020 at approximately 8.23pm, Shandong announced that it had

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determined to extend the offer period of the Shandong Offer until 30 October 2020.

20. On 26 October 2020 at approximately 9.20am, Nordgold made an announcement stating that the offer price of A\$1.00 per Cardinal share under the Nordgold Offer was best and final in the absence of a higher competing offer (**Nordgold's Last and Final Statement**).
21. At approximately 11.12am that same day, Cardinal advised that it had received additional Shareholder Intention Statements, such that *"shareholders representing 22.81% of Cardinal's shares intend to accept the Shandong Gold Offer in the absence of an increase from Nordgold or a superior proposal"*.
22. On 26 October 2020 at approximately 7.43pm, Shandong announced that *"should a higher competing offer be made or announced, [Shandong] intends to increase the Cash Consideration under its Offer to A\$1.05 per Cardinal Share."*
23. Also on 26 October 2020 at approximately 8.23pm, Shandong determined to extend the offer period of the Shandong Offer until 31 December 2020.
24. On 28 October 2020, Nordgold announced that it would make a simultaneous off-market takeover for Cardinal concurrently with the Nordgold Offer (**Nordgold Simultaneous Off-Market Offer**) and made a statement to the effect that *"if a higher competing offer is made, Nordgold may increase its offer price under its off-market offer, including to A\$1.05 per share or another price that may defeat the higher competing offer and any competing offer from Shandong"*.

CARDINAL RESOURCES LIMITED 03

Declaration sought

25. By application dated 30 October 2020, Samson Rock sought a declaration of unacceptable circumstances.
26. Samson Rock submitted (among other things) that *"there are two essentially identical offers on the table at \$1.00 per share, with neither bidder able to increase its offer, and the very real prospect that neither will be able to be successful, so that the control of the company will not be resolved through the bids."* Accordingly, it submitted that the effect of these circumstances, among others (as described more fully in paragraphs 12 to 24 above), is that *"the auction for control of Cardinal has hit an impasse, and there has ceased to be an efficient, competitive and informed market for control."*

Final orders sought

27. Samson Rock sought final orders that:
 - (a) each of Nordgold and Shandong be permitted to increase the offer price under their respective takeover bids above A\$1.00 per Cardinal share, on the condition that the successful bidder must pay compensation to any person who sold their Cardinal shares on-market after the date of the successful bidder's Last and Final Statement but prior to the Panel making final orders and
 - (b) the amount of compensation payable to such a person will be an amount equal to:

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- (i) the final offer price per share paid by the successful bidder; less
- (ii) the sale price per share received by that person when they sold on-market, multiplied by the number of shares sold-on market by that person.

CARDINAL RESOURCES LIMITED 04

Declaration sought

28. By application dated 30 October 2020, Cardinal sought a declaration of unacceptable circumstances.
29. Cardinal submitted (among other things) that the effect of the prevailing circumstances (as described more fully in paragraphs 12 to 24 above), where there is *“a contrived stalemate for control with the [truth in takeovers] Policy being used as a sword against a technical deficiency in a Best and Final Statement and the introduction of the Nordgold Simultaneous Off-Market Offer...”*, are such that the Panel should relieve both bidders from their Last and Final Statements.

Final orders sought

30. Cardinal sought final orders that Shandong and Nordgold be permitted to increase the offer price under their respective takeover offers for Cardinal or otherwise not be prevented from increasing the offer price.

DISCUSSION

31. We decided to hear each of the matters together and made a direction pursuant to Regulation 16 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
32. We have considered all the material, but address only specifically that part of the material we consider necessary to explain our reasoning. References to submissions from Samson Rock and Cardinal are to submissions in their respective applications. References to submissions from Shandong are to submissions in its preliminary submissions (which submitted that the Panel should conduct proceedings).

Truth in takeovers and the prevailing circumstances

33. ASIC Regulatory Guide 25 – Takeovers: false and misleading statements addresses 'last and final statements' in the context of bids. It says that *“a 'last and final statement' is a statement made by a market participant that it will or will not do something in the course of the bid”*.⁴
34. The 'truth in takeovers' policy has been endorsed by the Panel, on a number of occasions,⁵ as a *“fundamental tenet”* of Australia's takeover regime⁶ and that requiring *“persons to act in accordance with statements that they have made to the market concerning their intentions in the context of a takeover bid under Chapter 6 promotes the principle set out*

⁴ At paragraph [25.2]

⁵ See *Ludowici Limited* [2012] ATP 3 at [38] citing *Taipan Resources NL 06* [2000] ATP 15, *Summit Resources Limited* [2007] ATP 9, *Rinker Group Limited 02* [2007] ATP 17, *Rinker Group Limited 02R* [2007] ATP 19

⁶ *Summit Resources Limited* [2007] ATP 9 at [6]

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*in section 602(a)."*⁷

35. Samson Rock, Cardinal and Shandong made submissions that Nordgold and Shandong should not be held strictly to their Last and Final Statements and that both bidders be permitted to increase the offer price under their respective takeover bids.
36. Samson Rock submitted (among other things) that:
 - (a) The truth in takeovers policy is not law, and that the policy is not intended to override the overarching requirement in the Corporations Act that the acquisitions of shares occur in an efficient, competitive and informed market.
 - (b) The Panel has not strictly enforced a best and final statement in all cases and has allowed the bidder to increase its offer, provided compensation is paid to those shareholders who have sold on-market in reliance on that statement.⁸
 - (c) Both bidders have effectively already acted contrary to their Last and Final Statements, by virtue of Shandong announcing that "*it intends to increase*" and Nordgold announcing that it "*may increase*" their respective bids.
37. Cardinal made similar submissions (in effect), and additionally submitted (among other things) that:
 - (a) "*... there is no [Panel] decision to support a position that a market participant will always and in all circumstances, be held to their last and final statement.*"
 - (b) The Last and Final Statements were not 'absolute' statements and "*should be considered by the Panel by virtue of their very nature, as implying that a higher bid may still arise.*"
 - (c) The Cardinal share price has consistently traded above A\$1.00 and no shareholders have accepted either bid as a result of the Last and Final Statements.
 - (d) The Nordgold Simultaneous Off-Market Offer is a "*wholly exceptional*" or "*unforeseeable circumstance*" that could not have been within Shandong's contemplation at the time of making its Last and Final Statement.
 - (e) In light of the signals sent to the market by each of the bidders (by making statements that they were prepared to increase their offers if there was a higher competing offer) and the lack of detriment to shareholders (or the ability to cure any detriment by way of compensation), allowing both bidders to depart from their Last and Final Statements would allow a fully informed market to arise (i.e. the freeing of the current stalemate) and a competitive market to arise (i.e. by allowing the bidder who offers the highest price to ultimately acquire Cardinal).
38. Shandong supported the submissions that a market participant should not be held to their last and final statement in all cases. It further submitted that it supported the

⁷ See *Breakfree Limited 03 & 04* [2003] ATP 38 & 39 at [110]-[111]

⁸ Citing *Australasian Leisure & Hospitality Group Ltd 03* [2004] ATP 25, *MYOB Ltd* [2008] ATP 27 and *Ambassador Oil and Gas Limited 01* [2014] ATP 14

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proposed orders sought by Cardinal and Samson Rock and agreed that any perceived prejudice to Cardinal shareholders who have sold on-market in purported reliance on the Last and Final Statements could be resolved by payment of compensation.

39. We note that the above submissions were mostly focussed on the orders sought (that is, that the truth in takeovers policy should not apply and that the bidders be allowed to depart from their Last and Final Statements). While one of the factors that the Panel takes into consideration when deciding whether to conduct proceedings is the remedies available,⁹ the primary question for our consideration, in the first instance, is whether there was a reasonable prospect that we would find the prevailing circumstances to be unacceptable. In considering this question, we had regard to the truth in takeovers policy and the principles underlying that policy.
40. Samson Rock, Cardinal and Shandong made submissions that the “*current impasse*” in relation to Cardinal gave rise to unacceptable circumstances.
41. Samson Rock submitted that the “*untenable situation has been brought about by a combination of factors*”, including:
 - (a) “*Shandong's ambiguously worded qualification in its best and final statement...*”
 - (b) Nordgold effectively “*snookeying Shandong*” by subsequently matching the Shandong Offer, when Nordgold “*could simply have gone to \$1.01 per Share*” and
 - (c) Nordgold then itself making the Nordgold Offer best and final.
42. Samson Rock and Cardinal made similar submissions that Nordgold had attempted to use the truth in takeovers policy as “*a weapon*” or “*sword*” against Shandong to prevent the auction for control of Cardinal continuing and that this was an unacceptable use of the policy. Shandong agreed.
43. Samson Rock and Cardinal also made similar submissions that there is a “*pseudo auction*” or “*virtual bidding war*” being conducted, with Shandong announcing that it “*intends to increase*” its offer price to A\$1.05 per Cardinal share in the event of a higher competing offer, and Nordgold announcing that it “*may increase*” its offer price “*including to A\$1.05 per share or another price that may defeat the higher competing offer and any competing offer from Shandong.*”
44. We do not agree with Samson Rock’s submission that the qualification in Shandong’s Last and Final Statement was ambiguous. The qualification used – “*in the absence of a higher competing offer*” – is a clear, express qualification to the effect that Shandong cannot increase its offer price of A\$1.00 per Cardinal share unless there is an offer above A\$1.00 per Cardinal share, whether from Nordgold or another bidder. We do not consider that the qualification was open to interpretation.
45. We also do not accept that Nordgold has ‘misused’ the truth in takeovers policy to stymie the auction for control of Cardinal by making the decision to match the Shandong Offer and then subsequently seeking to hold Shandong to its Last and

⁹ Procedural Rule 6.1.1, Note 2(d)

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Final Statement:

- (a) Firstly, we do not see why Nordgold should not be entitled to match the offer price under the Shandong Offer. Nordgold matching the offer price of A\$1.00 per Cardinal share is effectively no different from Nordgold abstaining from increasing its offer price. In either event, Shandong's qualification to its Last and Final Statement would not have been enlivened and Shandong could not increase its offer price.
 - (b) Secondly, it was open to Shandong to frame its Last and Final Statement differently, that is to say, to reserve its rights to also increase its offer price if another bid equal to A\$1.00 per Cardinal share emerged. Shandong did not do so in this case.
 - (c) Thirdly, we do not consider that Nordgold seeking to hold Shandong to its Last and Final Statement is unacceptable. The effect of this is merely to require Shandong to act consistently with a statement it had given.
46. We also do not consider there to be inappropriate conduct in Nordgold subsequently declaring its own Last and Final Statement or that the effect of Nordgold's action – that there is now two matched and final declared bids in respect of Cardinal – would be unacceptable.
 47. A fundamental principle of an efficient, competitive and informed market is that those who make last and final statements to the market about their own intentions or proposed conduct should act consistently with them. Thus, market participants that make a last and final statement should be held to it, as with a promise.¹⁰
 48. The Panel has said of ASIC Regulatory Guide 25 that it "*properly requires those who make definitive statements to the market as to their intentions to adhere to those intentions by reminding these market actors that an apparently definitive statement of intention will cause market disruption if it is not fulfilled*".¹¹
 49. In our view, both Shandong's and Nordgold's Last and Final Statements have been made on definitive terms (that is, that the offer price of A\$1.00 per Cardinal share was best and final unless an offer higher than A\$1.00 per Cardinal share emerged). These statements were given to the market voluntarily. Accordingly, it was incumbent upon the statement makers to carefully consider the implications of making their respective Last and Final Statements and to assume the risk for doing so (that is, that they could only raise their offer price in the event of an offer above A\$1.00 per Cardinal share). Given the significance of such statements, we expect that Shandong and Nordgold received advice on the meaning, and understood the implications, of the statements they were making.
 50. Here, Nordgold and Shandong being kept to their Last and Final Statements is no more than ensuring that they are abiding by a promise that they willingly offered. While we acknowledge that holding the bidders to those statements may not result in

¹⁰ See *Warrnambool Cheese and Butter Factory Company Holdings Limited* [2013] ATP 16 at [22]

¹¹ See *BreakFree Limited 04R* [2003] ATP 42 at [64]

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the most commercial outcome for all parties, including Cardinal's shareholders, it is important from a market integrity and certainty perspective that bidders should not be able to depart from their clear and definitive statements.

51. Notwithstanding that the auction between Shandong and Nordgold has been stalled, there is no material to suggest that the market is inefficient or uninformed.
52. Accordingly, for the reasons above, we do not consider that there is any reasonable prospect that we would find the current situation between Shandong and Nordgold in respect of their bids for Cardinal to be unacceptable.
53. While we do not need to need to consider the question of orders, we query whether allowing market participants to depart from their last and final statements and to instead make compensation orders would be consistent with the purposes behind Chapter 6.

DECISION

54. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the applications under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
55. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Karen Phin

President of the sitting Panel

Decision dated 16 November 2020

Reasons given to parties 30 November 2020

Reasons published 3 December 2020

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Advisers

Party	Advisers
Nordgold	DLA Piper
Cardinal	HopgoodGanim Lawyers
Shandong	King & Wood Mallesons
Samson Rock	Allens