



Australian Government

Takeovers Panel

**Reasons for Decision
Cardinal Resources Limited 06R
[2020] ATP 28**

Catchwords:

Decline to conduct proceedings – Panel procedures – 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), regulations 16 and 20

ASIC Regulatory Guide 25 – Takeovers: False and misleading statements

Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311

Cardinal Resources Limited 03 & 04 [2020] ATP 13, Donaco International Limited 03R [2019] ATP 24, Taipan Resources NL 06 [2000] ATP 15

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

INTRODUCTION

1. The Panel, Bruce McLennan, Rory Moriarty and Sharon Warburton (sitting President) declined to conduct proceedings on an application by Cardinal Resources Limited to review the decision of the initial Panel in *Cardinal Resources Limited 03 & 04*.¹ The review Panel agreed with the initial Panel and concluded, particularly in light of subsequent events, that there was no reasonable prospect that it would make a declaration of unacceptable circumstances.

2. In these reasons, the following definitions apply.

Cardinal	Cardinal Resources Limited
E&P	Engineers & Planners Company Limited
Nordgold	Nord Gold S.E.
Nordgold’s Last and Final Statement	has the meaning given in paragraph 3(b)
Nordgold’s On-Market Offer	has the meaning given in paragraph 3(a)
Nordgold’s Off-Market Offer	has the meaning given in paragraph 3(d)
Samson Rock	Samson Rock Capital LLP

¹ [2020] ATP 13

Takeovers Panel

Reasons – Cardinal Resources Limited 06R [2020] ATP 28

Shandong Shandong Gold Mining (HongKong) Co., Limited
Shandong’s Last and Final Statement has the meaning given in paragraph 3(a)

FACTS

3. The facts are set out in *Cardinal Resources Limited 03 & 04*. In summary:
- (a) On 19 October 2020, Shandong lodged a second supplementary bidder’s statement in respect of its off-market takeover offer for Cardinal stating that its offer price of A\$1.00 per Cardinal share was “*best and final in the absence of a higher competing offer*” (**Shandong’s Last and Final Statement**). At that time, Nordgold was offering A\$0.90 per Cardinal share under an on-market offer (**Nordgold’s On-Market Offer**), which was increased to A\$1.00 per Cardinal share on 21 October 2020.
 - (b) On 26 October 2020, Nordgold made an announcement stating that the offer price of A\$1.00 per Cardinal share under Nordgold’s On-Market Offer was best and final in the absence of a higher competing offer (**Nordgold’s Last and Final Statement**).
 - (c) Also on 26 October 2020, 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.*”
 - (d) On 28 October 2020, Nordgold announced that it would make an off-market takeover for Cardinal (**Nordgold’s Off-Market Offer**) concurrently with Nordgold’s On-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*”.
 - (e) On 30 October 2020, Samson Rock made a Panel application (*Cardinal Resources Limited 03*) submitting, among other things, 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.*”
 - (f) Also on 30 October 2020, Cardinal made a Panel application (*Cardinal Resources Limited 04*) submitting, among other things, that there was “*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...*”.
4. The initial Panel decided to hear the applications from Samson Rock and Cardinal together² and declined to conduct proceedings, stating (among other things) the following:

² under a direction made pursuant to Regulation 16 of the *Australian Securities and Investments Commission Regulations 2001* (Cth)

Takeovers Panel

Reasons – Cardinal Resources Limited 06R [2020] ATP 28

- “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 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.”

APPLICATION

5. By application dated 18 November 2020, Cardinal sought a review of the initial Panel’s decision in relation to its initial application. Cardinal submitted (among other things) that:
- (a) Shandong’s Last and Final Statement was not unambiguous. The current circumstances were not circumstances that were envisaged “when the statement was made due to the actions of another person (namely Nordgold’s subsequent actions in first matching then launching a new concurrent off-market bid following the making of last and final statements)”.³

³ Cardinal quoted the following observation from the Panel regarding “Truth in Takeovers” in *Taipan Resources NL 06* [2000] ATP 15 at [28]:

“This principle is not an absolute rule that the bidder must act out its stated intentions mechanically. What it is reasonable to expect depends also on the degree of precision of its statement, the presence or absence of clear qualifications to the statement, on the acts of other persons, on new circumstances, on later statements of the bidder itself and on how far it is reasonable to expect stated intentions to be pursued.”

Takeovers Panel

Reasons – Cardinal Resources Limited 06R [2020] ATP 28

- (b) *“The Panel should have regard to the current situation as exceptional and the circumstances are such that they are unlikely to be repeated, thereby not eroding the integrity of the Policy.”*
- (c) In declining to conduct proceedings, the initial Panel *“prevented the parties from having regard to the position of ASIC, as the author of the Policy, in assessing the conduct of the Parties.”*
- (d) Unacceptable circumstances had arisen as a result of each bidder’s subsequent actions, including Nordgold’s Off-Market Offer.

DISCUSSION

6. The powers of a review Panel are set out in section 657EA of the *Corporations Act 2001* (Cth). Our role is to conduct a *de novo review*.⁴ One of the powers a review Panel has is to decline to conduct proceedings and allow the initial Panel’s decision to stand.⁵
7. We have considered all the material (including the material that was before the initial Panel), but address only specifically that part of the material we consider necessary to explain our reasoning. As the initial Panel decided to hear Samson Rock’s and Cardinal’s applications together, we have treated Cardinal’s review application as an application for a review of the initial Panel’s decision in *Cardinal Resources Limited 03 & 04*.
8. The following events (among others) occurred after Cardinal lodged its review application:
 - (a) On 24 November 2020, E&P announced a conditional all cash off-market offer for Cardinal at A\$1.05 per Cardinal share.
 - (b) Also on 24 November 2020, Shandong announced that it will improve its offer price to A\$1.05 per Cardinal share and subsequently lodged its third supplementary bidder’s statement disclosing its revised A\$1.05 per share offer.
 - (c) On 26 November 2020, Nordgold announced (among other things) that:
“Nordgold has a number of concerns pertaining to the validity of the E&P Bid... However, we note that Shandong has increased its offer. Accordingly, Nordgold considers that it is free of its best and final statement made on 26 October 2020.”
9. We asked the parties whether they had any comments on the initial Panel’s reasons and whether, in light of the matters referred to in paragraph 8, the matters raised in Cardinal’s review application had been overtaken by events.
10. Cardinal submitted that Nordgold’s announcement referred to in paragraph 8(c) *“appears to leave the door open for a further application to the Panel relating to the E&P Bid and perhaps also as regards the Shandong Increase following the E&P Bid Announcement”* and that the review application may still be relevant if Nordgold were to apply to the Panel, and in response, the Panel makes an order *“removing the Shandong Increase”*. Cardinal also submitted that there was *“some utility for the broader market in having*

⁴ *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [187]

⁵ *Donaco International Limited 03R* [2019] ATP 24 at [6]

Takeovers Panel

Reasons – Cardinal Resources Limited 06R [2020] ATP 28

these issues fully ventilated, such that Cardinal Resources Limited 03 & 04 does not stand as “precedent””.

11. Shandong submitted that *“to the extent that Nordgold or anyone else intends to make an application to the Panel in relation to the improvement of Shandong Gold’s offer to \$1.05 per share (which Shandong Gold considers would be misconceived), Shandong Gold respectfully suggests that these review proceedings should be stayed pending the outcome of that application”*.
12. Nordgold (the party that Cardinal and Shandong appear to consider may make a Panel application challenging the increase in Shandong’s bid) submitted that the matters raised in the review application had been overtaken by events, noting that *“both Nordgold and Shandong announced that they consider they are freed from their respective “best and final” statements and consequently permitted to increase the offer price under their respective takeover bids”*.
13. We have considered the initial Panel’s reasons and agree with them. In addition, we agree with Nordgold and consider that the issues raised in the application have been overtaken by events, with the scenarios suggested by Cardinal and Shandong to be remote.

DECISION

14. 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 application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth). 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.

Sharon Warburton

President of the sitting Panel

Decision dated 9 December 2020

Reasons given to parties 18 January 2021

Reasons published 21 January 2021

Takeovers Panel

Reasons – Cardinal Resources Limited 06R
[2020] ATP 28

Advisers

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