



Australian Government

Takeovers Panel

**Reasons for Decision
Cardinal Resources Limited 07
[2020] ATP 27**

Catchwords:

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

Corporations Act 2001 (Cth), section 606

Australian Securities and Investments Commission Act 2001 (Cth), section 201A

ASIC Regulatory Guide 25 – Takeovers: False and misleading statements

Cardinal Resources Limited 05 [2020] ATP 24, Cardinal Resources Limited 03 & 04 [2020] ATP 23, Cardinal Resources Limited 02 [2020] ATP 21, Gulf Alumina Limited [2016] ATP 4

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

INTRODUCTION

1. The Panel, Jeremy Leibler, Karen Phin (sitting President) and Sarah Rennie, declined to conduct proceedings on an application by Cardinal Resources Limited in relation to its affairs. The application concerned (among other things) whether certain statements made in an announcement by Nord Gold S.E. in relation to the Panel proceedings in *Cardinal Resources Limited 03 & 04*¹ (**Cardinal 03 & 04**) were misleading or in contravention of the undertakings given in notices of appearance lodged by Nordgold in relation to those proceedings. The Panel considered (among other things) that it was not persuaded that any of the statements made in Nordgold’s announcement were misleading and there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

Cardinal	Cardinal Resources Limited
Cardinal 03 & 04	has the meaning given in paragraph 1
Cardinal 05	has the meaning given in paragraph 5
E&P Bid	has the meaning given in paragraph 14
Nordgold	Nord Gold S.E.
Nordgold Announcement	has the meaning given in paragraph 9
Nordgold Offer	has the meaning given in paragraph 5

¹ *Cardinal Resources Limited 03 & 04 [2020] ATP 23*

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Nordgold Undertakings	has the meaning given in paragraph 6
Shandong	Shandong Gold Mining (HongKong) Co., Limited

FACTS

3. Cardinal is a company listed on the ASX and Toronto Stock Exchange (ASX/TSX code: CDV).
4. The facts relevant to the application are set out in detail in Cardinal 03 & 04,² being applications made on 30 October 2020 from Samson Rock Capital LLP and Cardinal respectively. In that decision, we considered whether circumstances surrounding Nordgold and Shandong making equivalent takeover offers for Cardinal at A\$1.00 per share that are both ‘last and final’ (in the absence of a higher competing offer) were unacceptable such that both bidders should be released from their respective last and final statements.
5. On 2 November 2020, Shandong made an application to the Panel regarding the affairs of Cardinal³ (**Cardinal 05**). That application concerned whether Nordgold had come to an agreement, arrangement or understanding with a substantial shareholder of Cardinal that it would accept into Nordgold’s on-market offer (**Nordgold Offer**) in consideration for Nordgold increasing the offer price under its bid on 2 September 2020, leading to a breach of section 606 of the *Corporations Act 2001* (Cth).
6. On 3 November 2020, Nordgold executed notices of appearance in respect of the Cardinal 03 & 04 proceedings in the standard form appearing on the Panel’s website, which contains the confidentiality and media canvassing undertakings given to the Panel under section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth) (**Nordgold Undertakings**).
7. On 17 November 2020, the Panel announced that it had declined to conduct proceedings in relation to the Cardinal 03 & 04 and Cardinal 05 applications.
8. On 18 November 2020, Cardinal sought a review of the Panel’s decision in Cardinal 03 & 04 which was announced at approximately 3.42pm that same day.
9. Also on 18 November 2020 at approximately 5.50pm, Nordgold made an announcement extending the closing date for the Nordgold Offer to 7 December 2020 (**Nordgold Announcement**). The Nordgold Announcement contained statements, including that:

... Nordgold’s on-market offer has been extended by seven days and will now close on Monday 7 December 2020, ahead of results being determined for the 2020 Ghanaian General Election which is scheduled to take place on the same day...;

² See also *Cardinal Resources Limited 01 (withdrawn)*, *Cardinal Resources Limited 02* [2020] ATP 21, *Cardinal Resources Limited 05* [2020] ATP 24 and *Cardinal Resources Limited 06R*

³ *Cardinal Resources Limited 05* [2020] ATP 24

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... the Takeovers Panel has determined not to consider the applications made by Cardinal and Shandong, announced on 30 October and 2 November 2020, respectively.¹ Therefore the offers made by Shandong and Nordgold are determined best and final...;

... Nordgold's on-market offer therefore provides shareholders with the quickest and most expedient route to securing the full cash payment for tendered shares...;

... Nordgold also intends to provide an off-market alternative for shareholders who prefer this option. The terms of this alternative will be commercially the same as those offered by Shandong and will have expedited payment terms. Nordgold received approval from ASIC to conduct the simultaneous off-market bid on 18 November 2020...; and

... With both Nordgold and Shandong's offers best and final, we hope that the takeover can now be concluded successfully...

10. Footnote 1 to the Nordgold Announcement stated that *"Cardinal has applied to the Takeovers Panel seeking a review of the Takeovers Panel's determination in relation to the applications made on 30 October 2020..."*.
11. On 18 November 2020 at approximately 10.43pm, Cardinal wrote to the Panel (copying the parties to the Cardinal 03 & 04 proceedings) expressing concerns (in effect) that through the Nordgold Announcement, *"Nordgold has sought to cast the decisions of the Panel in the most favourable light for Nordgold's strategy to acquire Cardinal in a stalled auction for control"*. Cardinal requested (among other things) that Nordgold retract certain statements from the Nordgold Announcement.
12. On 19 November 2020, Cardinal wrote to Nordgold in similar terms and again, requested that Nordgold retract certain statements from the Nordgold Announcement.
13. On 20 November 2020, Nordgold responded to Cardinal stating (among other things) that it *"did not mischaracterise the status or effect of the Panel applications..."* and *"struggles to understand why it would retract or withdraw its unobjectionable statements"*.
14. On 24 November 2020 at approximately 11.33am, Engineers & Planners Company Limited announced a conditional all cash off-market offer for Cardinal at A\$1.05 per Cardinal share (**E&P Bid**).
15. On 24 November 2020 at approximately 7.24pm, Nordgold made an announcement which (in effect) expressed the view that the E&P Bid is not an 'offer' or a 'higher competing offer' and accordingly, did not have the effect of freeing Nordgold or Shandong from their respective last and final statements.
16. Also on 24 November 2020 at approximately 8.07pm, Shandong made an announcement that it would improve the offer price under Shandong's takeover offer from A\$1.00 to A\$1.05 per Cardinal share. It subsequently lodged its Third Supplementary Bidder's Statement with the A\$1.05 increased offer price that same day.
17. On 26 November 2020, Nordgold made an announcement which stated that while it had a number of concerns pertaining to the validity of the E&P Bid, it noted *"that Shandong has increased its offer. Accordingly, Nordgold considers that it is free of its best*

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and final statement made on 26 October 2020.” It also announced that it had determined to extend the offer period of the Nordgold Offer until 14 December 2020.

APPLICATION

18. By application dated 20 November 2020, Cardinal sought a declaration of unacceptable circumstances.
19. Cardinal submitted (among other things) that the Nordgold Announcement had resulted in an uninformed market and was designed to signal to the market that the Panel had *“conclusively determined that the offers made by Shandong and Nordgold were best and final”* and there was no merit in the Cardinal 04 or Cardinal 05 applications. It also submitted that the Nordgold Announcement was made prior to the Panel publishing its reasons in respect of the Cardinal 03 & 04 and Cardinal 05 proceedings and at a time in which the Nordgold Undertakings still applied.

Final orders sought

20. Cardinal sought final orders that Nordgold be required to retract the statements made in the Nordgold Announcement and issue a corrective release.

DISCUSSION

21. We have considered all the material, but address only specifically that part of the material we consider necessary to explain our reasoning.

Nordgold Announcement – misleading or otherwise unacceptable?

22. Cardinal submitted that the statements in the Nordgold Announcement *“are an obvious strategy by Nordgold”* to create an impression in the market that the auction for control of Cardinal is over, there is a timing urgency to accept the Nordgold Offer and that Cardinal shareholders will be paid quicker under the Nordgold Offer.
23. Specifically, Cardinal submitted (among other things) that the Nordgold Announcement:
 - (a) signalled that *“there would not be an increase in bid price from Shandong or Nordgold above A\$1.00 per Cardinal Share”* and that the Panel had *“conclusively determined”* the competing offers to be best and final
 - (b) indicated that the Cardinal 04 and Cardinal 05 applications were without merit by *“deliberately describing the Panel’s decline to conduct proceedings decisions as the Panel determining not to consider the Applications”*
 - (c) gave *“improper prominence”* to the fact that Cardinal had exercised its review rights in Cardinal 04 by including a footnote reference to the review application and
 - (d) *“specifically stated without qualification in a headline paragraph that Nordgold’s on-market takeover offer had been extended by seven days and would close on Monday 7 December 2020 prior to the results of the 2020 Ghanaian General Election on the same day, while then reserving its right to further extend its offer period in the second last paragraph of the [Nordgold] Announcement”*.

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24. We do not agree with Cardinal’s submissions that the Nordgold Announcement has misrepresented the Panel’s decision⁴ to decline to conduct proceedings in respect of the Cardinal 03 & 04 and Cardinal 05 applications.
25. We are not persuaded that any of the statements made in the Nordgold Announcement were misleading or in contravention of the Nordgold Undertakings and, in any event, those statements (in particular the statements set out in paragraphs 23(a) and 23(d) above) have been overtaken by events,⁵ given that:
 - (a) following the E&P Bid, Shandong considered itself free of its best and final statement and increased the offer price under Shandong’s takeover offer to A\$1.05 per Cardinal share
 - (b) in response to the increased offer price of A\$1.05 per Cardinal share under Shandong’s takeover offer, Nordgold announced that it considers itself free of its best and final statement and
 - (c) Nordgold has extended the offer period of the Nordgold Offer to 14 December 2020.

DECISION

26. 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).
27. 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 2 December 2020

Reasons given to parties 8 December 2020

Reasons published 9 December 2020

⁴ Compare *Gulf Alumina Limited* [2016] ATP 4 at [53]-[55] where the Panel considered that an announcement made by a bidder inaccurately summarised the Panel’s declaration and orders and accompanying media release, and was therefore inappropriate and had misrepresented the Panel’s decision

⁵ The subsequent events are more fully described in paragraphs 14 to 17 above

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Advisers

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