Australian Government

Takeovers Panel

Reasons for Decision
Westgold Resources Limited
[2024] ATP 15

Catchwords:

Decline to make a declaration – plan of arrangement – deal protection - fiduciary out – break fee – reverse break fee – standstill – price-sensitive information – commercially sensitive information – forward looking statements – synergies – reasonable grounds

Corporations Act 2001 (Cth), section 602

Takeovers Panel Procedural Rules 2020, rule 19

Guidance Note 7: Deal protection

Virtus Health Limited [2022] ATP 5, Brisbane Markets Limited [2016] ATP 3, Ross Human Directions Ltd [2010] ATP 8, International All Sports Limited 01R [2009] ATP 5, International All Sports Limited [2009] ATP 4, Midwest Corporation Limited [2007] ATP 33, Anaconda Nickel Limited 02, 03, 04 & 05 [2003] ATP 4

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

INTRODUCTION

1. The Panel, James Burchnall, Deborah Page and Sarah Rennie (sitting President), declined to make a declaration of unacceptable circumstances in relation to the affairs of Westgold Resources Limited. The application by Ramelius Resources Limited concerned (among other things) complaints in relation to deal protection arrangements in an arrangement agreement between Westgold and Karora Resources Inc., pursuant to which Westgold was to acquire Karora via a Canadian plan of arrangement, and a standstill in a confidentiality deed which Westgold entered into with Ramelius. The Panel decided not to make a declaration after accepting undertakings provided by Westgold and Karora to amend the arrangement agreement.

2. In these reasons, the following definitions apply.

Arrangement Agreement	has the meaning given in paragraph 9
ASIC Act	*ASIC Act 2001* (Cth)
Confidentiality Deed	has the meaning given in paragraph 6
Corporations Act	*Corporations Act 2001* (Cth)[1]

[1] All terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

Estimated Synergies	has the meaning given in paragraph 11
Fiduciary Out	has the meaning given in paragraph 15
Further Ramelius Proposal	has the meaning given in paragraph 21
Initial Ramelius Proposal	has the meaning given in paragraph 5
Karora	Karora Resources Inc.
Karora Transaction	has the meaning given in paragraph 9
Non-Solicitation Provisions	has the meaning given in paragraph 13
Pre-existing Standstills Obligation	has the meaning given in paragraph 14
Ramelius	Ramelius Resources Limited
Standstill Restrictions	has the meaning given in paragraph 6
Termination Fee	has the meaning given in paragraph 18
Updated Ramelius Proposal	has the meaning given in paragraph 19
Westgold	Westgold Resources Limited
Westgold Announcement	has the meaning given in paragraph 9

FACTS

3. Westgold and Ramelius are both ASX-listed gold mining companies with operations in Western Australia (ASX codes: WGX and RMS, respectively).[2]

4. Karora was a TSX-listed mineral resource company established in Canada with mining interests located in Western Australia.[3]

5. On 17 October 2023, Ramelius submitted a non-binding indicative offer to acquire Westgold noting that it envisaged a scrip-based deal by way of either a scheme of arrangement or an off-market takeover bid (**Initial Ramelius Proposal**).

6. On 14 November 2023, Ramelius and Westgold entered into a mutual confidentiality deed (**Confidentiality Deed**). In addition to standard terms, the Confidentiality

[2] Westgold's shares also commenced trading on the TSX on 6 August 2024 under the ticker symbol WGX
[3] Karora's shares were delisted from the TSX at market close on 2 August 2024

Deed contained mutual standstill provisions which restricted a party from (among other things) acquiring shares or assets of the other party, or soliciting or entering into negotiations with third parties including shareholders in relation to the acquisition of shares, for a period of 12 months ending on 14 November 2024 (**Standstill Restrictions**). The Standstill Restrictions were capable of being waived by the other party providing its prior written consent. There were a number of exceptions to the Standstill Restrictions, including where:

(a) a party to the Confidentiality Deed proceeds with a "Proposed Transaction"[4] which is recommended by the board of directors of the other party

(b) a takeover bid is made and announced for at least 50% of the issued capital of a party to the Confidentiality Deed or

(c) the board of a party to the Confidentiality Deed recommends and announces a scheme of arrangement under which a person that is not a party will acquire all or at least 50% of the issued capital of a party.

7. Commencing on or around 16 November 2023, Westgold and Ramelius made available various technical and financial information under the terms of the Confidentiality Deed. The information provided by Westgold to Ramelius included a financial model and information, including drill hole data, block models, wireframes and pit shell designs, underpinning its statement of Mineral Resources and Ore Reserves.

8. On 30 November 2023, Westgold rejected the Initial Ramelius Proposal and terminated discussions with Ramelius.

9. On 8 April 2024, Westgold announced (**Westgold Announcement**) that it had entered into an arrangement agreement with Karora (**Arrangement Agreement**) pursuant to which Westgold was to acquire 100% of the issued capital of Karora via a Canadian plan of arrangement[5] (**Karora Transaction**). Under the terms of the Karora Transaction, Karora shareholders were to receive 2.524 Westgold shares, plus A$0.68 (C$0.61[6]) cash and 0.30 of a share in a new spin-out vehicle, for each Karora share held, resulting in a pro forma merged company ownership of 50.1% Westgold shareholders and 49.9% Karora shareholders.

10. The Westgold Announcement did not attach a copy of the Arrangement Agreement, although it was released on SEDAR+[7] by Karora on 18 April 2024.

11. The Westgold Announcement and the investor presentation in relation to the Karora Transaction released on the same day disclosed (among other things) that:

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[4] Defined as "*a potential agreed corporate transaction, asset level transaction or similar transaction between the parties*"

[5] A plan of arrangement is a statutory merger procedure regulated under the Canada Business Corporations Act akin to an Australian merger by way of a scheme of arrangement under Part 5.1 of the Corporations Act

[6] Based on AUD:CAD 0.8941 on 5 April 2024

[7] A publicly available web-based system operated by the Canadian Securities Administrators used by market participants to file, disclose and search for information in Canada's capital markets

(a) the parties were "targeting" synergies of A$490 million, including:

(i) procurement and supply chain cost savings of A$209 million (C$187 million), calculated as 5% of 60% of combined operating costs over the current 10-year life of mine plan and

(ii) estimated corporate cost savings of A$281 million (C$251 million),

both amounts being estimated on a pre-tax and undiscounted basis

(b) "*operating synergies are based on, but not limited to, forecast savings relating to consumables, capital cost savings through optimisation of equipment, site administration, and staff attraction and retention etc that the larger combined entity's market presence is expected deliver [sic] and has been calculated as a 5% saving of 60% of the combined operating costs over the current 10 year life of mine plan*" and

(c) "*corporate synergies are based on, but not limited to, closure of multiple Karora North American offices, reduction in overhead and removal of duplication of some administrative functions*",

(together, the **Estimated Synergies**).

12. Westgold did not seek Westgold shareholder approval for the Karora Transaction.[8]

13. The Arrangement Agreement included at Section 7.2 "non-solicitation" provisions (**Non-Solicitation Provisions**) including a no-shop[9], no-talk[10] and notification[11] regime.

14. Section 7.2(a) of the Arrangement Agreement included the following obligation (**Pre-existing Standstills Obligation**):

> "*…Each Party agrees not to release any third party from any confidentiality agreement relating to a potential Acquisition Proposal to which such third party is a party. Each Party further represents and warrants that it has not waived any confidentiality, standstill, non-disclosure, non-solicitation or similar agreement, restriction or covenant to which it or a subsidiary is a party and covenants, agrees and confirms that (i) it shall use commercial best efforts to enforce each confidentiality, standstill, non-disclosure, non-solicitation or similar agreement, restriction or covenant to which it or a subsidiary is a party, and (ii) neither it, nor its subsidiary nor any of their respective Representatives have released or shall, without the prior written consent of the other Party (which may be withheld or delayed at the other Party's sole and absolute discretion), release any person from, or waive, amend, suspend or otherwise modify, such person's obligations under any confidentiality, standstill, non-disclosure, non-solicitation or similar agreement, restriction or covenant to which it or its subsidiary is*

[8] The Arrangement Agreement contemplated that Westgold shareholder approval may be required for the Karora Transaction under the ASX Listing Rules, pursuant to one or more of Listing Rule 7.1 or Listing Rule 11. On 5 April 2024, Westgold obtained a routine waiver of Listing Rule 7.1 in respect of the Westgold Shares to be issued under the Karora Transaction, on the basis that it is not a "reverse takeover" for the purposes of that Listing Rule

[9] Section 7.2(b)(i)

[10] Section 7.2(b)(ii)

[11] Section 7.2(c)

a party (it being acknowledged that the automatic termination or release of any such agreement, restriction or covenant, including as a result of entering into this Agreement shall not be a violation of this Section 7.2(a))."

15. Section 7.2(d) of the Arrangement Agreement contained a 'fiduciary out' (**Fiduciary Out**) to the Non-Solicitation Provisions that permitted either Westgold or Karora as the case may be (the "Solicited Party") to engage with a potential alternative bidder who had delivered an "Acquisition Proposal" provided the conditions set out in Section 7.2(d)(i) were met, including:

> "*(B) such person making the Acquisition Proposal was not restricted from making such Acquisition Proposal pursuant to an existing confidentiality, standstill, non-disclosure, non-solicitation or similar agreement, restriction or covenant contained in any Contract entered into with the Solicited Party*"
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> "*(C) the Solicited Party has been and continues to be in compliance in all material respects with its obligations under this Section 7.2*", which includes an obligation to ensure that "*its officers, directors and employees and its subsidiaries and their officers, directors, employees and any financial advisors or other advisors or Representatives retained by it are aware of the provisions of this Section 7.2*"
>
> "*(D) if the Solicited Party provides confidential non-public information to such person, the Solicited Party obtains a confidentiality and standstill agreement from the person making such Acquisition Proposal that is substantively the same as the confidentiality agreement between the Parties hereto, and otherwise on terms no more favourable to such person than such confidentiality agreement, including a standstill provision at least as stringent as contained in such confidentiality agreement, provided, however, that such agreement shall not preclude such person from making an Acquisition Proposal or related communications to the Solicited Party and such agreement shall not restrict or prohibit the Solicited Party from disclosing to the other Party any details concerning the Acquisition Proposal or any Superior Proposal made by such person*"
>
> "*(E) prior to engaging in or participating in discussions or negotiations with such person regarding such Acquisition Proposal (excluding, for certainty, negotiations regarding the confidentiality agreement that do not relate to the terms and conditions of the Acquisition Proposal) or providing any such copies, access or disclosure, the Solicited Party provides the other Party with:*
>
> > *(1) written notice stating the Solicited Party's intention to participate in such discussions or negotiations and to provide such copies, access or disclosure and that the board of directors of the Solicited Party has determined that failure to take such action would be inconsistent with its fiduciary duties;*
> >
> > *(2) promptly, a copy of any such confidentiality agreement referred to in this Section 7.2(d)(i) upon its execution; and*
> >
> > *(3) a list of the information provided to such person and is immediately provided with access to similar information to which such person was provided.*"

16. Under Section 7.3(a) of the Arrangement Agreement, a party that had received an Acquisition Proposal that constituted a Superior Proposal (the "Terminating Party")

had a right to accept such Superior Proposal prior to requisite shareholder approvals being received and terminate the Arrangement Agreement provided that certain conditions were met including:

(a) "*the Terminating Party has provided the other Party with a copy of all documentation required pursuant to Section 7.2(c) and 7.2(d) and a copy of the definitive agreement for the Superior Proposal (including any supporting agreements)*"

(b) "*the Terminating Party has delivered to the other Party a written notice advising it that the Terminating Party's board of directors has resolved to make a Change in Recommendation or to terminate this Agreement or to accept, approve, recommend or enter into an agreement in respect of such Superior Proposal subject only to this Section 7.3 (including a notice as to the value in financial terms that the board of directors has, in consultation with its financial advisors, determined should be ascribed to any non-cash consideration offered under the Superior Proposal)…*".

17. "Superior Proposal" was defined under Section 1.1 of the Arrangement Agreement as a bona fide unsolicited proposal to acquire all the shares in Westgold or Karora as the case may be that (among other things):

> "*(c) is made by a person or group of persons who has demonstrated to the satisfaction of the Westgold Board or Karora Board, as the case may be, acting in good faith (after receipt of advice from its financial advisers and its outside legal counsel), that it has (i) adequate cash on hand and/or (ii) fully committed financing from a bank or other recognized and reputable financial institution, fund or organization that makes debt or equity investments or financing as part of its usual activities, and that is not subject to any condition or contingency other than closing conditions substantially similar to those contained in Article 6, required to complete such Acquisition Proposal at the time and on the basis set out therein*".

18. The Arrangement Agreement also included a "termination fee"[12] of C$40 million (**Termination Fee**) payable by Westgold to Karora if a "Westgold Termination Fee Event" occurred and was payable by Karora to Westgold if a "Karora Termination Fee Event" occurred. Westgold Termination Fee Event was defined to include (among other things) where Westgold terminates the Arrangement Agreement due to its entry into a legally binding agreement with respect to a Superior Proposal.[13] The Westgold Announcement described the Termination Fee as a "*mutual reciprocal break fee*".

19. On 29 April 2024, Ramelius submitted an updated non-binding indicative offer to acquire Westgold through an all-scrip transaction structured as either a scheme of arrangement or an off-market takeover bid (**Updated Ramelius Proposal**). The Updated Ramelius Proposal factored in the full payment of the Termination Fee by Westgold to Karora.

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[12] Set out in Section 7.4(d)(i)

[13] Section 7.4(d)(iii)(D). See also Section 8.2(a)(iii)(B)

20. On 8 May 2024, Westgold rejected the Updated Ramelius Proposal on the basis that the Westgold Board considered it did not constitute and would not reasonably be expected to constitute a Superior Proposal under the Arrangement Agreement.

21. On 16 May 2024, Ramelius submitted a further non-binding indicative offer to acquire Westgold (**Further Ramelius Proposal**). The Further Ramelius Proposal noted that Ramelius "*is prepared to further increase its offer by an amount equivalent to any reduction in [the] Termination Fee to bring this more in-line with Panel guidance. By way of example, if the Termination Fee was reduced from C$40m (A$45m) to C$10m (A$11m) (being approximately 1% of the current equity value of Westgold), Ramelius would pass on this additional A$34m in value to Westgold shareholders by adjusting the proposed exchange ratio in Westgold's favour*". The Further Ramelius Proposal also requested that if the Westgold Board determined that the Further Ramelius Proposal was not a Superior Proposal under the Arrangement Agreement, Westgold release Ramelius from the Standstill Restrictions to "*enable Ramelius to consult with key Westgold shareholders directly*" on a confidential basis and otherwise on terms and conditions agreed between Ramelius and Westgold.

22. On 20 May 2024, Westgold rejected the Further Ramelius Proposal on the basis that the Westgold Board considered it did not constitute and would not reasonably be expected to constitute a Superior Proposal under the Arrangement Agreement. The Westgold Board also noted that "*[c]onsistent with its obligations under the Arrangement Agreement, Westgold confirms that it does not release Ramelius from this or any other obligation under the [Confidentiality Deed]*".

APPLICATION

23. By application dated 27 May 2024,[14] Ramelius sought a declaration of unacceptable circumstances. Ramelius submitted (among other things) that:

    (a) the Arrangement Agreement prevents Westgold from releasing Ramelius from the Standstill Restrictions without Karora's consent

    (b) the Non-Solicitation Provisions are not subject to an "*effective fiduciary out*"

    (c) the Standstill Restrictions no longer operate to protect the confidentiality of any materially price sensitive information in relation to Westgold, yet preclude Ramelius from even engaging with Westgold shareholders regarding a potential alternative proposal in circumstances where Westgold has effectively put itself "in play" by entering into the Arrangement Agreement

    (d) the Termination Fee is equivalent to approximately 4% of Westgold's market capitalisation,[15] exceeds Panel guidance and is anti-competitive

    (e) the Standstill Restrictions together with the Arrangement Agreement act as an unacceptable lock up device in respect of Westgold

[14] There have been suggestions in the press that the application was made in April. This was not the case
[15] As at 5 April 2024 (assuming an exchange rate of A$1:C$0.892)

(f) the Estimated Synergies are "*hypothetical rather than having a reasonable basis*" and

(g) the ability of the Westgold Board to consider properly whether an alternative transaction is a Superior Proposal under the Arrangement Agreement is "*impaired*" by both the obligation to pay the Termination Fee and the Estimated Synergies.

24. Ramelius did not seek any interim orders as part of the application.[16]

25. Ramelius sought final orders including to the following effect:

(a) the Arrangement Agreement be unenforceable against Westgold unless the Termination Fee (as it applies to Westgold) is amended such that it is not greater than either C$2 million or in the alternative 1% of Westgold's equity value

(b) Westgold be required to make corrective disclosure in relation to the Estimated Synergies and

(c) either the Standstill Restrictions be unenforceable against Ramelius or in the alternative the Standstill Restrictions do not apply to discussions between Ramelius and Westgold shareholders in relation to the Further Ramelius Proposal and any subsequent takeover bid by Ramelius for Westgold.

DISCUSSION

26. We have considered all the submissions and rebuttals from the parties but address specifically only those we consider necessary to explain our reasoning.

Decision to conduct proceedings

27. Westgold and Karora each made preliminary submissions.

28. Westgold's preliminary submissions included (footnotes omitted):

(a) "*There is no precedent for the Panel permitting a party, who has voluntarily entered into a mutual confidentiality arrangement, which includes a standstill provision, and subsequently received confidential and price sensitive information, to breach their obligations by seeking orders from the Panel.*"

(b) "*It would create new policy if the Panel extends its guidance to reverse break fees (including applying such guidance extra-territorially) and the creation of such a precedent would be contrary to established market practice in Australia.*"

[16] In rebuttals, Ramelius submitted that the Panel "*may consider it appropriate to make orders on either an interim or final basis*" restraining Karora from dispatching (or publicly releasing) the shareholder circular in respect of the Karora shareholder meeting or taking any further steps to convene that meeting either until these proceedings are fully and finally disposed of, or for a specified period of time. Westgold and Karora made out of process submissions in response. Ramelius subsequently clarified that it "*did not, in fact, seek any further orders*"

(c) "*Importantly, if the Applicant was to make a Superior Proposal, or one that would be reasonably likely to constitute a Superior Proposal, no such consent or release from Karora in respect of the Standstill would be required. The Applicant is not impeded.*"

29. Karora's preliminary submissions included (footnotes omitted):

(a) "*The Plan of Arrangement remains subject to approval by the Ontario Superior Court of Justice, and the jurisdiction of the Ontario Securities Commission. The Applicant has not established that the Panel in fact has jurisdiction in this regard.*"

(b) "*In effect, Ramelius asks the Panel to conclude – without authority – that an effective fiduciary out must allow a potential bidder to by-pass the Board, take supervision of the process out of the Board's hands, and directly solicit the target's shareholders contrary to the competing bidder's pre-existing contractual obligations.*"

(c) "*[T]he reverse break fee as negotiated is consistent with North American practice under a Canadian Plan of Arrangement*".

30. The application raised a number of questions from our perspective and we felt we needed to hear further from the parties, including in relation to:

(a) the Non-Solicitation Provisions and the application of the Fiduciary Out

(b) the information provided by Westgold to Ramelius under the Confidentiality Deed noting the bearing this could potentially have on the appropriateness of the Standstill Restrictions and

(c) the Termination Fee payable by Westgold. In particular, we were interested in how the quantum of the Termination Fee was determined and whether it should be considered a 'reverse break fee' or a traditional 'break fee' noting that the Karora Transaction appeared to be a 'merger of equals' and, notwithstanding that Westgold might technically be the 'bidder', the Termination Fee included a trigger where Westgold terminates the Arrangement Agreement due to it proceeding with a superior proposal. [17]

31. We were also mindful that Westgold shareholder approval had not been sought in relation to the Karora Transaction.

32. In relation to Karora's preliminary submission regarding jurisdiction, we considered that the application raised complaints which primarily related to the control or potential control of Westgold, a Chapter 6 company, and were unlikely to be considered by the Ontario Superior Court of Justice. We also note that at the time of the application the Ontario Superior Court of Justice was yet to commence scrutiny of the Karora Transaction.[18] We considered we had jurisdiction in relation to this application.

33. We decided to conduct proceedings.

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[17] See paragraph 18

[18] See the Panel's observation in *Ross Human Directions Ltd* [2010] ATP 8 (at [19]), albeit made in the context of an Australian scheme of arrangement rather than a Canadian plan of arrangement

Fiduciary Out and related provisions

34. Guidance Note 7 provides that "*[t]he effectiveness of any 'fiduciary out' is relevant to the Panel's consideration of whether unacceptable circumstances exist. Generally, a 'fiduciary out' should be available to target directors in practical terms. That is, it should allow target directors to fully exercise their fiduciary duties without unreasonable fetters or constraints*" and sets out various examples of where the Panel may consider there to be unacceptable fetters or constraints.[19]

35. We asked the parties whether the Fiduciary Out was an "effective fiduciary-out" as contemplated by the Panel's guidance.

36. Ramelius submitted that "*the inability to waive the Standstill Restrictions without Karora's consent in substance places the decision of whether an unsolicited bid made by a person subject to an existing standstill could trigger the Fiduciary Out into the hands of Karora*".

37. Ramelius further submitted:

> "*When read together, the practical implication of the Arrangement Agreement and Standstill Restrictions is that, unique among all potential acquirers… Ramelius is unable to offer to acquire Westgold on a stand-alone basis without the consent of the Westgold board (or, by reason of the Pre-existing Standstills Obligation, Karora). This gives rise to unacceptable circumstances, particularly in circumstances where the Karora Transaction is structured in such a way that Westgold shareholders effectively have no say as to whether the Karora Transaction will proceed.*"

38. Westgold submitted:

> "*Importantly, with Guidance Note 7, Westgold has full discretion and control, under the Fiduciary Out, to discuss and negotiate and, under Section 7.3(a) of the Arrangement Agreement, to agree to, a Proposed Transaction with Ramelius if it determines that the Proposed Transaction is or would reasonably be expected to constitute a Superior Proposal. By extension, the Pre-Existing Standstills Obligation does not require Karora's waiver for Westgold to engage with Ramelius on any Proposed Transaction given that the Proposed Transaction is explicitly excluded from the Standstill Restrictions to which the Pre-Existing Standstills Obligation might otherwise apply.*"

39. Karora submitted (footnotes omitted):

> "*As one component of the non-solicitation obligations, Karora and Westgold agreed not to release any third party from any existing confidentiality or standstill arrangements without each other's consent (i.e. the Pre-Existing Standstills Obligation). This is a standard provision in Canadian plans of arrangement and is designed to allow the Board to supervise the acquisition process that potential acquirors sign on to.*"

40. ASIC submitted that "*[i]t is open to the Panel to consider there to be unacceptable fetters or constraints on the Fiduciary Out*" in the Arrangement Agreement, including because:

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[19] Guidance Note 7: *Deal Protection* at [35]-[36]

(a) Section 7.2(d)(i)(C) has the effect of elevating the performance of all obligations in clause 7.2 to "additional requirements" on the Fiduciary Out. It submitted as an example that the effect of Section 7.2(d)(i)(C) and Section 7.2(f) is that Westgold would be restricted from exercising the Fiduciary Out if any of its employees or its subsidiaries' employees were unaware of Section 7.2 due to Section 7.2(f)[20]

(b) Section 7.2(d)(i)(D) is similar to a restriction considered in *Ross Human Directions Ltd* [2010] ATP 8 at [34(d)], where the Panel found that such a requirement was not necessary to ensure a "level playing field". ASIC also noted that the confidentiality deed in *Ross Human Directions* had not been publicly disclosed which undermined a potential competing bidder from determining what restrictions would need to be promised to obtain due diligence. It submitted that the present circumstances are analogous in that the Arrangement Agreement was not disclosed on an Australian securities market, which undermines the principle of an informed market in s602(a) and (b)(iii) of the Corporations Act.

(c) Section 7.2(d)(i)(E) hinders Westgold from engaging with a potential Superior Proposal, because it "*provides Karora with an opportunity to disrupt Westgold considering the potential Superior Proposal, by relying on one of the numerous fetters on the Fiduciary Out*" and

(d) Section 7.3(a) "*restricts Westgold's ability to proceed with a Superior Proposal unless it falls within the narrow parameters provided in the Arrangement Agreement*".

41. ASIC further submitted that the notification obligations in Section 7.2(d)(i)(E) "*extend beyond market practice and provide an unfair advantage to Karora*" including because of the breadth of information to be disclosed.

42. ASIC further submitted that the Arrangement Agreement contains "*an expansive definition of 'Superior Proposal*" and that "*[a] fiduciary out will not be appropriately available where the restriction is embedded into the very definition of what constitutes a 'Superior Proposal'…*".

43. In rebuttals, Westgold and Karora offered draft undertakings to:

(a) exclude from Section 7.2(a) of the Arrangement Agreement any requirement that Westgold cannot release Ramelius from, or waive, amend, suspend or otherwise modify, Ramelius' obligations under the Confidentiality Deed without Karora's prior written consent and

(b) remove the reference to "employees" from Section 7.2(f) of the Arrangement Agreement, save that each party shall remain responsible for any breach of Section 7.2 by any of its or its subsidiaries' employees.

[20] ASIC further submitted that Westgold's Annual Report 2023 disclosed that the group had 918 employees as at 30 June 2023

44. Westgold submitted that by providing the undertakings, the Fiduciary Out is appropriately unencumbered and enforcement of the Standstill Restrictions will be solely a matter within the control of and at the discretion of Westgold.

45. Westgold further submitted that "*it will not release the Standstill Restrictions on Ramelius*".

46. The draft undertakings did not address a number of ASIC's submissions referred to above, with which we generally agreed.

47. We also had other concerns in relation to the Fiduciary Out and related provisions not addressed by the draft undertakings, which we now turn to.

48. Guidance Note 7 notes that an information right may reduce the likelihood that a competing bidder will want to make an approach.[21] Footnote 20 cites as an example, *Virtus Health Limited* [2022] ATP 5 at [49] where the Panel required a carve out to protect bidder sensitive information in exceptional circumstances. The information right set out in clause 7.2(d)(i)(E)(3) of the Arrangement Agreement (see paragraph 15) did not include a carve out for exceptional circumstances.

49. Guidance Note 7 also notes that the Panel may consider there to be unacceptable fetters or constraints on a 'fiduciary out' where the requirements to be able to rely upon the 'fiduciary out' are overly restrictive, and provides as an example where it is specified that the target board can only consider a competing proposal to be a superior proposal if the competing proposal is fully financed.[22] Limb (c) of the definition of Superior Proposal in clause 1.1 of the Arrangement Agreement (see paragraph 17) appeared to us to be contrary to the Panel's guidance in this regard.

50. Moreover, Guidance Note 7 states (footnote omitted) that "*[a]t a minimum, the existence and nature of all material terms of any deal protection arrangement should normally be disclosed by no later than when the relevant control proposal is announced…*".[23] The guidance also notes that in certain circumstances the failure to disclose the material terms of the deal protection arrangements once those arrangements are entered into may give rise to unacceptable circumstances, including where the arrangements include a notification obligation which requires notification of the identity of a competing bidder or the terms of its competing proposal.[24] It did not appear that the material terms of the deal protection arrangements in the Arrangement Agreement were disclosed on ASX by the time the Karora Transaction was announced. In our view, this was contrary to the Panel's guidance referred to above. However, we note that Westgold released a copy of the Arrangement Agreement on ASX during the proceedings.[25] We noted that we would expect Westgold to release the updated deal protection terms promptly once amended pursuant to the undertaking (assuming the undertaking was accepted).

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[21] Guidance Note 7: *Deal Protection* at [31]
[22] Guidance Note 7: *Deal Protection* at [36(c)(iii)]
[23] Guidance Note 7: *Deal Protection* at [53]
[24] Guidance Note 7: *Deal Protection* at [55(a)]
[25] See Westgold's ASX announcement of 24 June 2024

51. We invited Westgold and Karora to provide revised undertakings.

52. We ultimately received proposed undertakings from Westgold and Karora which sufficiently addressed our concerns in relation to the effectiveness of the Fiduciary Out and related provisions.

53. ASIC and Ramelius were given an opportunity to make submissions on a draft version of the undertakings.

54. ASIC did not raise any further concerns. It submitted that the public interest would be served by the Panel accepting an undertaking that addresses any unacceptable circumstances, providing such undertakings are to the Panel's satisfaction.

55. Ramelius submitted that if the Panel was minded to accept the undertakings from Westgold and Karora, those undertakings should be broadened, including to incorporate an undertaking that "*Westgold waive the Standstill Restrictions so far as they would otherwise preclude the Applicant from either soliciting support for a competing proposal from, or making such an offer directly to, Westgold shareholders.*" We did not consider this to be appropriate; we discuss the Standstill Restrictions at paragraphs 73 to 90 below.

56. We decided to accept the undertakings which were consolidated into a single undertaking signed by Westgold and Karora (Annexure A). We note that had we not received the undertaking we would have been minded to consider making a declaration of unacceptable circumstances.

Termination Fee

57. Guidance Note 7 provides (at [48]) that "*[i]n the absence of other factors, a break fee payable by a target not exceeding 1% of the equity value of the target*[26] *is generally not unacceptable.*" (the **1% guideline**)

58. Both Karora and Westgold acknowledged in their submissions that the Termination Fee payable by Westgold on termination of the Arrangement Agreement represents "*approximately 3.6% of equity value*" (of Karora), being well in excess of the 1% guideline but each of them submitted that the 1% guideline should not apply.

59. Westgold submitted "*[t]he fact that the Karora Transaction is a Canadian plan of arrangement is determinative. To extend the application of the Panel's 1% guidance on break fees extra-territorially to reverse break fees for foreign transactions is a significant policy decision impacting Australian public companies that would render Australian companies uncompetitive overseas, particularly in light of the Panel's 1% guidance on break fees being below the quantum applicable in other jurisdictions.*" Karora made a similar submission.

60. Karora also submitted that "*[i]f Panel guidance were to require reverse break fees to be similarly limited to 1% of equity value, it would effectively provide bidders with an option as to whether or not to proceed with an acquisition.*"

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[26] The aggregate of the value of all classes of equity securities issued by the target having regard to the value of the bid consideration when announced. In limited cases, it may be appropriate for the 1% guideline to apply to a company's enterprise value, for instance because the target is highly geared

61. Ramelius submitted that seeking to characterise the Termination Fee as a "reverse break fee" merely because the Karora Transaction is structured as Westgold acquiring Karora ignores the practical outcome of the Karora Transaction and seeks to place form over substance. It further submitted that the Karora Transaction is "*effectively a merger of equals with the value ascribed to the Karora equity greater than that given to the Westgold equity*" and that Westgold should be considered the "target" for the purposes of Guidance Note 7.

62. In relation to the genesis of the Termination Fee, Westgold submitted:

> "*It was in the context of the competition for Karora, market practice in Canada and deal protection for Westgold's benefit, that Westgold was willing to accept Karora's request for a reverse break fee of an equal amount to the break fee that Westgold had requested with respect to Karora and also the reason why the "Westgold Termination Fee Events" reflected the "Karora Termination Fee Events"… It is not in dispute that the Westgold Termination Fee was necessary to induce Karora to enter into the Arrangement Agreement.*"

63. Karora submitted that "*[b]ut for the quantum of the Reverse Break Fee, Karora (as the target) would not have entertained an ability for Westgold (as the bidder) to have a right to effectively 'walk away'.*"

64. Westgold submitted that "*[t]he market range for termination fees in Canadian public company mergers and acquisitions falls between 2-5% (with the average being around 3.5%) of transaction value.*" Karora also submitted that the Termination Fee is "*consistent with Canadian market practice*" and in support supplied an annexure tabulating details of the break fees and reverse break fees in Canadian mining transactions since 2020.

65. Ramelius submitted in rebuttals that "*[t]he Karora Submissions make much of higher break fees being usual market practice in Canada. However, merely because a practice exists elsewhere does not mean it should be imported into Australia, or that it is consistent with Australian policy…*".

66. Westgold and Karora also referred to a number of examples of transactions in the Australian market which included break fees or reverse break fees exceeding the 1% guideline.[27] Ramelius submitted that certain of these examples were not analogous to the present case.

67. Ramelius also submitted that "*[t]he simple fact is that Westgold cannot break its deal with Karora in order to entertain another proposal without paying the Termination Fee. It is a self-imposed contingent liability that immediately places any alternative acquirer of Westgold at a 4% disadvantage*".

68. ASIC submitted as follows:

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[27] For example, Renesas Electronics Corporation / Altium Limited, Alcoa Corporation / Alumina Limited, Champion Iron Limited / Mamba Minerals Limited, Newmont Corporation / Newcrest Mining Limited

> "*…the Termination Fee may, only on the basis of the list in question 5(a)-(d)*[28]*, be unlikely to give rise to unacceptable circumstances, where it has been the cost of entering the bargain and appropriate advice has been obtained, and where the amount is not inconsistent with market practice of comparable fees as is generally the case in Australian scheme jurisprudence. However, the Termination Fee is one factor in the overall Arrangement Agreement that may influence the Panel to find unacceptable circumstances have arisen*"

69. ASIC also submitted that "*[a]t least in the case of Ramelius, the Termination Fee has not prevented a potential competing offer, as demonstrated by Ramelius' subsequent proposals on 29 April 2024 and 16 May 2024*" but that the "*consideration that could be put by Ramelius to Westgold shareholders has been impacted by the value of the Termination Fee (due to the leakage of value from the combined Ramelius/Westgold group).*"

70. We note that the Further Ramelius Proposal stipulated that Ramelius was prepared to increase its offer price by an amount equivalent to any reduction in the Termination Fee payable by Westgold to bring it in line with the 1% guideline (being an amount up to A$34 million in value).[29] That said, Westgold submitted that the Westgold Board "*rejected the offers made by the Applicant to date for…commercial and operational reasons*". We also note that there is currently no 'live' proposal to acquire Westgold.

71. In the specific circumstances of this matter, we considered that the Termination Fee was not currently having an anti-competitive effect on the market for control of Westgold. We agreed with ASIC's submission that the Termination Fee is one factor in the overall Arrangement Agreement that may influence the Panel to find unacceptable circumstances have arisen.[30] However, for the reasons stated above and having regard to the circumstances in the aggregate[31] and the undertakings provided by Westgold and Karora, we did not consider that the Termination Fee gave rise to unacceptable circumstances in this matter.

72. We note that we did not reach a concluded view on a number of matters raised in the submissions concerning the Termination Fee (as we did not consider we needed to), including whether the Termination Fee should properly be characterised as a 'reverse break fee' or a 'break fee' and whether it should be subject to the 1% guideline and the relevance of market practice concerning the quantum of break fees in Canadian plans of arrangement. A future Panel may well need to consider such matters depending on the facts of the particular case.

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[28] Which invited parties to make submissions in relation to the quantum of the Termination Fee (among other aspects of the Termination Fee)
[29] See paragraph 21
[30] See paragraph 68
[31] See Guidance Note 7: *Deal protection* at [11(e)]

Standstill Restrictions

73. Leaving aside the very recent matter, *Metallica Minerals Limited* [2024] ATP 9, the Panel has not considered a standstill for some time.[32]

74. In *International All Sports Limited* [2009] ATP 4, the Panel accepted the term of a standstill covenant as commercially justifiable having regard to the information intended to be, and actually, provided. The Panel was not satisfied that the information provided had ceased to be price-sensitive such that it should release Centrebet from its agreement. The Panel declined to make a declaration of unacceptable circumstances. The decision was affirmed by the review Panel in *International All Sports Limited 01R* [2009] ATP 5.

75. The Panel stated (footnote omitted):

> "*There is a public interest in enforcing confidentiality agreements and standstills as they promote the exchange of information and the maximisation of value to shareholders. Failure to enforce such agreements could disrupt the process of negotiating and consummating business transactions*"[33]

76. A similar statement was made by the review Panel, which added that "*the party seeking to be released from the arrangement needs to establish that unacceptable circumstances exist by it not being released.*"[34]

77. The Panel noted that "*in order to not give rise to unacceptable circumstances, the term of a standstill should be commercially justifiable according to the nature of the information to be provided under it.*"[35] It found that the 12 month term of the standstill was commercially justifiable.

78. The Panel also considered "*whether it may give rise to unacceptable circumstances for IAS to continue to enforce the standstill if all the information provided to Centrebet had ceased to be price-sensitive.*"[36] Moreover, the review Panel stated that "*[t]he making available of commercially sensitive information may also be a reason to rely on a standstill*".[37]

79. In the present case, Ramelius has acknowledged that the 12 month term of the Standstill Restrictions is not unusual or inconsistent with market practice. Rather, Ramelius submits that it is unacceptable for Westgold to continue to rely on the Standstill Restrictions given:

    (a) the nature of the information provided under the Confidentiality Deed

    (b) the time that has elapsed since its provision and

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[32] At the time of preparing these reasons, the reasons for decision in *Metallica Minerals Limited* were not available. However, we note that the issues raised in relation to the standstill in that matter differed from the present case

[33] *International All Sports Limited* [2009] ATP 4 at [21]

[34] *International All Sports Limited 01R* [2009] ATP 5 at [18]

[35] *International All Sports Limited* [2009] ATP 4 at [23]

[36] *International All Sports Limited* [2009] ATP 4 at [27]

[37] *International All Sports Limited 01R* [2009] ATP 5 at [24]

(c) "*the fact that Westgold has elected to embark on the Karora Transaction (over which its own shareholders do not have a say) and thereby bring upon itself enhanced disclosure obligations, including through the publication of a shareholder circular.*"

80. Westgold submitted that the information exchanged with Ramelius includes the following "*commercially sensitive and price sensitive information*":

(a) a detailed 10-year corporate financial model, containing a full forecast of quarterly operational performance across Westgold's business

(b) a detailed Mineral Resource and Ore Reserve statement as at 30 June 2023 and

(c) a full digital database of Mineral Resource estimation files pertaining to the key Westgold operations that underpin the 10-year corporate financial model referred to above.

81. Westgold further submitted that:

(a) the corporate financial model "*in the hands of a direct competitor is at a minimum commercially sensitive (if not price sensitive), given that it contains detailed strategic planning information, specific modelling of individual ore bodies and other insights that may be yielded via further interrogation and analysis, beyond the summary and project-level information which investors would ordinarily consider appropriate for disclosure to the market*"

(b) the full digital database "*in isolation may not be price sensitive, but when aggregated and interrogated by a direct competitor in the same industry and mining in the same region may provide a snapshot of the company, its prospects and strategies not otherwise available to other potential acquirers*".

82. Westgold also submitted that "*the information to be included in the Karora shareholder's circular… while detailed and in compliance with applicable requirements, does not contain the level of granularity or interrogability of the information previously provided to Ramelius…*".

83. ASIC submitted that the Standstill Restrictions appear to be enforceable "*because Ramelius has been provided with price-sensitive information, including for example (a) a 10-year life of mine plan; (b) finance model; and (c) information underpinning Westgold's statement of Mineral Resources and Ore Reserves*". ASIC further submitted that it understands that information provided to Ramelius "*remains price sensitive*" and noted for example that companies will typically disclose to the market a life of mine plan where at least a pre-feasibility study has been prepared and that "*[a]lthough Westgold has not prepared such a study, the information provided to Ramelius appears to be price-sensitive and would likely influence a reasonable investor in deciding whether or not to acquire or dispose of Westgold securities because of the detailed insights it gives into the prospects of Westgold's business*".

84. Ramelius submitted in rebuttals that "*[m]uch of the data referred to by Westgold is of the nature of geological data which is already reflected in public announcements of exploration results and Westgold's statement of Ore Reserves and Mineral Resources…*".

85. Ramelius also submitted that "*Westgold has brought upon itself a fundamental change in circumstances by entering to [sic] the Arrangement Agreement and including provisions in the Arrangement Agreement which, together with the existing Standstill Restrictions, have an unacceptable impact on the market for control of Westgold.*"

86. Ramelius further submitted that "*The practical effect of the Standstill Restrictions and the terms of the Arrangement Agreement (including the Pre-existing Standstills Obligation) is that, when read together, Ramelius is precluded from proposing, or even canvassing Westgold shareholders in relation to, an unsolicited takeover bid in respect of Westgold.*"

87. Westgold submitted that the Standstill Restrictions do not prevent Ramelius from making revised proposals for Westgold, as evidenced by the Updated Ramelius Proposal and Further Ramelius Proposal. Westgold also submitted that "*Ramelius does not seek to breach the Standstill Restrictions to make another bid for Westgold. Ramelius wants to breach the Standstill Restrictions in order to selectively brief Westgold shareholders while in possession of price sensitive and commercially sensitive information.*"

88. Karora in rebuttals submitted "*it would be unwarranted for the Panel to intervene to modify the Standstill Restrictions to simply allow the Applicant to engage with Westgold shareholders and/or to advance a hostile takeover bid on terms and value not supported by the Westgold Board, having regard to its status as a party having received the benefit of confidential information from Westgold under the terms of the Confidentiality Deed.*"

89. We did not consider that the reasons provided by Ramelius for seeking to be released from the Standstill Restrictions were sufficient to override the binding agreement of two sophisticated parties. We also consider that the Westgold Board is best placed to assess whether the information exchanged with Ramelius is price sensitive or commercially sensitive and on the materials presented to us in these proceedings we were not minded to question Westgold's assessment as articulated in its submissions.

90. Accordingly, we did not consider Westgold's continued reliance on the Standstill Restrictions to be inappropriate, noting as submitted by Westgold[38] that the Standstill Restrictions did not impede Ramelius in making revised proposals for Westgold. Again, in reaching this view we have considered the arrangements and the surrounding circumstances in totality including having regard to the undertaking to amend the Arrangement Agreement.[39]

Estimated Synergies

91. Ramelius in its application submitted that Estimated Synergies are "forward looking statements" conditional on completion of the Karora Transaction and that in the absence of "reasonable grounds" for the making of such statements, they are deemed pursuant to various provisions of the Corporations Act and the ASIC Act to be misleading.[40] It submitted that there are no reasonable grounds for the Estimated Synergies including because (among other reasons):

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[38] See paragraph 87
[39] See paragraph 71
[40] Citing sections 670A(2), 728(2) and 769C of the Corporations Act and section 12BB(1) of the ASIC Act

(a) "*Westgold has provided no justification for calculating operating synergies as a 5% saving of 60% of the combined company's operating costs*"

(b) "*Westgold has not disclosed how the A$281 million (C$251 million) of corporate savings will be achieved*" and

(c) "*it is unclear what basis there is to suggest that operational costs can be realised*".

92. Ramelius also submitted that the Panel has previously considered the impact of forward looking statements in takeover documents and referred to *Brisbane Markets Limited*[41] and *Midwest Corporation Limited*[42] as examples.

93. Westgold submitted that the Estimated Synergies are a business judgement made by the Westgold Board, appropriately discharging its duties in approving the estimates for publication, following "*considerable input from external financial advisers*". It also submitted that Ramelius' allegations regarding the Estimated Synergies are "*not relevant to the Panel and outside of its jurisdiction*".

94. Karora submitted that the Panel should defer to the Westgold Board's assessment and "*should generally accept the business judgement of an entity's board of directors and not seek to impose its own views… absent reasonable evidence being produced to overturn such acceptance*"[43].

95. ASIC submitted that "*the comments regarding possible synergies are likely to be a representation as to a future matter, requiring the existence of 'reasonable grounds'*"[44] and that based on the material presently before the Panel, it is unclear to ASIC whether Westgold and Karora have such reasonable grounds.

96. Ramelius in rebuttals submitted that "*in the ordinary situation of a level playing field for a competitive bid, it would be open for a target company (in a Target's Statement) or a competing bidder in a Bidder's Statement) to contest the other party's estimate of synergies as part of any critique of the deal*" and that in the present case no such "*adversarial*" process is available.

97. We note that in the present case the Estimated Synergies were contained in the Westgold Announcement and the investor presentation of the same date and relate to a transaction to acquire a Canadian target. We considered this quite different to the scenario where such estimates were included in a bidder's statement in a takeover to acquire an Australian target, as was the case in *Brisbane Markets Limited* and *Midwest Corporation Limited*. Nevertheless, Ramelius' complaint was (in effect) that the Estimated Synergies could cloud the Westgold board's judgement in relation to assessing whether any acquisition to acquire Westgold was a superior proposal, which we considered was a relevant submission and within our jurisdiction.

98. That said, on the materials provided we did not consider there was reason to question whether the Westgold and Karora boards of directors had reasonable

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[41] [2016] ATP 3
[42] [2007] ATP 33
[43] Citing *Anaconda Nickel Limited 02, 03, 04 & 05* [2003] ATP 4 at [56]
[44] Citing ASIC Information Sheet 214

grounds to support the Estimated Synergies. We asked the directors of Westgold and Karora to confirm they had reasonable grounds to support the Estimated Synergies; each of Westgold and Karora provided such confirmation. We did not consider that a deeper enquiry was warranted in the circumstances.

99. We note that following receipt of the confirmations by Westgold and Karora referred to above and as part of its submissions in relation to the draft undertakings, Ramelius attached a copy of Karora's information circular released on 24 June 2024 and Westgold's ASX announcement of the same date[45]. Ramelius submitted that neither of these documents contain any references to the Estimated Synergies and that the "undeniable conclusions" from this are (in summary) that Westgold and Karora have walked away from the Estimated Synergies and that either there was not a reasonable basis for the Estimated Synergies or if there were such reasonable grounds at that time, there are no longer any such reasonable grounds. We do not consider this to be necessarily the case. Noting the late stage of the proceedings we decided not to take this further.

Other matters

100. In its preliminary submissions, Westgold submitted that the application had been brought for a tactical purpose to "*facilitate (directly or indirectly) a 'leak' to the media of information concerning the Revised Proposal and the subsequent approach the Applicant made to Westgold on 16 May 2024*"[46] and provided a copy of an Australian Financial Review article dated 29 May 2024 titled 'Ramelius approached Westgold for $3b-plus gold merger'.[47] Westgold subsequently submitted that this was a contravention of the Panel's media canvassing rules.[48]

101. Ramelius in its submissions confirmed that it did not provide any information relating to this matter to the media and that it has strictly complied with its undertakings to the Panel.

102. The Panel takes compliance with its Procedural Rules seriously and will in appropriate cases take action in relation to breaches of those rules. In the present case, having regard to the content of the media article and to the Panel's initial media release in relation to the receipt of the application[49], we did not consider that there had been a breach of Procedural Rule 19 as we did not consider there had been canvassing of an issue that is before the Panel[50]. Accordingly, we did not take this further.

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[45] Titled 'Westgold welcomes Karora's filing of the Management Information Circular'
[46] None of the Initial Ramelius Proposal, the Updated Ramelius Proposal or the Further Updated Ramelius proposal were disclosed on ASX
[47] Karora also referred to this media article in its preliminary submission
[48] Takeovers Panel Procedural Rules 2020, rule 19
[49] See TP24/029. Westgold made a request not to issue a media release in relation to the receipt of Ramelius' application. This request was put to the Acting President and the parties were invited to make submissions. The Acting President took into account the submissions received in relation to sensitivities and decided not to refer to Ramelius' indicative proposals for Westgold in the media release
[50] See Takeovers Panel Procedural Rules 2020, rule 19(1)

DECISION

103. Given the undertaking offered by Westgold and Karora[51], we declined to make a declaration and are satisfied that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Orders

104. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Sarah Rennie
President of the sitting Panel
Decision dated 8 July 2024
Reasons given to parties 2 September 2024
Reasons published 9 September 2024

[51] On 8 July 2024 (the date of our decision), Westgold announced that pursuant to the undertaking it had entered into an amending agreement in relation to the Arrangement Agreement

Advisers

Party	Advisers
Westgold	Thomson Geer
Ramelius	Gilbert + Tobin
Karora	HopgoodGanim Lawyers

Australian Government

Takeovers Panel

Annexure A

Section 201A
Australian Securities and Investments Commission Act (Cth)
Undertaking

Karora Resources Inc. and Westgold Resources Limited

Karora and Westgold each jointly and severally undertakes to the Panel to amend the Arrangement Agreement to:

1. exclude from Section 7.2(a) of the Arrangement Agreement any requirement that Westgold cannot release any third party from, or waive, amend, suspend or otherwise modify, any third party's obligations under any confidentiality agreement without Karora's prior written consent.

2. replace Section 7.2(a) of the Arrangement Agreement in its entirety with the following wording:

   > *"Each Party shall, and shall direct and cause its respective officers, directors, representatives, advisors and agents and its subsidiaries and their representatives, advisors, agents, officers and directors (collectively, the "**Representatives**") to immediately cease and cause to be terminated any solicitation, encouragement, activity, discussion or negotiation with any parties that may be ongoing with respect to an Acquisition Proposal whether or not initiated by such Party, and each Party shall immediately discontinue access to, and disclosure of, all information regarding such Party and such Party's subsidiaries and promptly, and in any event within two (2) Business Days, request the return or destruction of information regarding such Party and its respective subsidiaries previously provided to such parties and shall request the destruction of all materials including or incorporating any confidential information regarding such Party and its subsidiaries. Each Party further represents and warrants that it has not waived any confidentiality, standstill, non-disclosure, non-solicitation or similar agreement, restriction or covenant to which it or a subsidiary is a party."*

3. replace section 7.2(f) of the Arrangement Agreement in its entirety with the following wording:

   > *"Each Party shall ensure that its officers and directors and its subsidiaries and their officers and directors, and any financial advisors or other advisors retained by it are aware of the provisions of this Section 7.2, and it shall be responsible for any breach of this Section 7.2 by such officers, directors, financial advisors or other advisors."*

4. remove from section 7.2(d)(i)(D) of the Arrangement Agreement the following wording:

   > *"that is substantively the same as the confidentiality agreement between the Parties hereto, and otherwise on terms no more favourable to such person than such confidentiality agreement, including a standstill provision at least as stringent as contained in such confidentiality agreement"*

5. remove from section 7.2(d)(i)(E) of the Arrangement Agreement the following wording:

   "*(2) promptly, a copy of any such confidentiality agreement referred to in this Section 7.2(d)(i) upon its execution;*"

   and replace section 7.2(d)(i)(E)(3) of the Arrangement Agreement in its entirety with the following wording:

   "*(3) a list of the information provided to such person and is immediately provided with access to similar information to which such person was provided (to the extent that such information had not previously been provided or otherwise made available to the other Party). Nothing in this clause 7.2(d)(i)(E)(3) requires Karora or Westgold to provide or make available to the other Party any information the relevant Party, acting reasonably, considers is likely to disclose information relating to such person that is commercially sensitive information of that person. For the avoidance of doubt, this does not include the information required to be provided under section 7.3(a)(iii).*"

6. replace section 7.3(a)(iii) of the Arrangement Agreement in its entirety with the following wording:

   "*the Terminating Party has provided the other Party with a copy of all documentation required pursuant to Section 7.2(c) and 7.2(d) and a summary of all material terms and conditions of the definitive agreement for the Superior Proposal (including a summary of the material terms and conditions of any supporting agreements)*"

7. remove from section 7.3(a)(iv)) of the Arrangement Agreement the following wording:

   "*(including a notice as to the value in financial terms that the board of directors has, in consultation with its financial advisors, determined should be ascribed to any non-cash consideration offered under the Superior Proposal)*"

8. remove limb (c) of the definition of "Superior Proposal" in clause 1.1 of the Arrangement Agreement in its entirety.

Karora and Westgold each jointly and severally undertakes to the Panel that it will confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

In this undertaking the following terms have the corresponding meaning:

Arrangement Agreement means the arrangement agreement entered into between, among others, Karora Resources Inc. and Westgold Resources Limited on 8 April 2024.

Karora means Karora Resources Inc.

Ramelius means Ramelius Resources Limited.

Westgold means Westgold Resources Limited.

Signed by Wayne Bramwell of Westgold Resources Limited
with the authority, and on behalf, of Westgold Resources Limited.
Dated: 5 July 2024

Signed by Paul Huet of Karora Resources Inc.
with the authority, and on behalf, of Karora Resources Inc.
Dated: 5 July 2024