



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Cardinal Resources Limited 02  
[2020] ATP 21**

**Catchwords:**

*Decline to conduct proceedings – takeover bid – association – relevant agreement – understanding – acting in concert – intention statements – superior proposal – truth in takeovers*

*Corporations Act 2001 (Cth), sections 12(2), 606*

*Guidance Note 23: Shareholder intention statements*

*ASIC Regulatory Guide 25 – Takeovers: False and misleading statements*

*Finders Resources Limited 02 [2018] ATP 9, Mount Gibson Iron Limited [2008] ATP 4, BreakFree Limited 04 [2003] ATP 39, BreakFree Limited 03 [2003] ATP 38*

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 Nord Gold S.E. in relation to the affairs of Cardinal Resources Limited. Cardinal is the subject of competing takeover bids from Nordgold and Shandong Gold Mining (HongKong) Co., Limited. The application concerned whether Cardinal's conduct in relation to the solicitation of shareholder intention statements (to the effect that its shareholders intend to accept the Shandong Offer) was unacceptable, and whether Shandong and Cardinal were associated. The Panel considered (among other things) that there was not sufficient evidence that Cardinal's conduct in soliciting shareholder intention statements was unacceptable and that there was not sufficient material to justify the Panel making further enquiries as to whether Shandong and Cardinal were associated. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

<b>Accepting Shareholders</b>	has the meaning given in paragraph 15
<b>Cardinal</b>	Cardinal Resources Limited
<b>Cardinal Announcement</b>	has the meaning given in paragraph 15
<b>Last and Final Statement</b>	Shandong's last and final statement in respect of the Shandong Offer, as described in paragraph 9
<b>Nordgold</b>	Nord Gold S.E.
<b>Nordgold Offer</b>	has the meaning given in paragraph 5

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<b>Shandong</b>	Shandong Gold Mining (HongKong) Co., Limited
<b>Shandong Offer</b>	has the meaning given in paragraph 6
<b>Shareholder Intention Statements</b>	has the meaning given in paragraph 15

#### FACTS

3. Cardinal is a company listed on the ASX and Toronto Stock Exchange (ASX/TSX code: CDV). Nordgold, the applicant, is the registered holder of approximately 27.77% of the issued share capital of Cardinal.<sup>1</sup>
4. On 18 June 2020, Cardinal announced that it had entered into a Bid Implementation Agreement with Shandong,<sup>2</sup> 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.
5. 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.
6. 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.
7. On 2 September 2020, Nordgold increased the offer price of the Nordgold Offer from A\$0.66 to A\$0.90 per Cardinal share.
8. On 7 September 2020, Shandong increased the offer price of the Shandong Offer from A\$0.70 to A\$1.00 per Cardinal share.
9. 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 share is "*best and final in the absence of a higher competing offer*" (**Last and Final Statement**).
10. 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*".
11. 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*."
12. 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*

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<sup>1</sup> As at the date of the application

<sup>2</sup> As at the date of the application, Shandong is the registered holder of approximately 11.86% of the issued share capital of Cardinal

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*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.”*

13. 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.*”
14. 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.
15. Also on 23 October 2020 at approximately 3.59pm, Cardinal made an announcement (**Cardinal Announcement**) that it had received shareholder intention statements from 28 of its shareholders (representing 19.38% of its shares) (**Accepting Shareholders**) to the effect that the Accepting 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).**
16. The Cardinal Announcement also:
  - (a) invited Cardinal shareholders to “*provide additional statements to the Shareholder Intention Statements*” and
  - (b) stated that “*[i]n the event that Nordgold elects not to increase its offer... the persons providing the Shareholder Intention Statements who own or control 19.38% of Cardinal’s shares will accept the Shandong Gold Offer, increasing Shandong Gold’s relevant interest in Cardinal shares to 31.37%”.*
17. Following Nordgold’s application to the Panel, 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.

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18. 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”*.
19. Also on 26 October 2020 at approximately 8.23pm, Shandong determined to extend the offer period of the Shandong Offer until 31 December 2020.

## APPLICATION

20. By application dated 26 October 2020, Nordgold sought a declaration of unacceptable circumstances. Nordgold submitted (among other things) that:
  - (a) The description of the effect of the Shareholder Intention Statements in the Cardinal Announcement<sup>3</sup> was materially misleading and deceptive in that it implied Accepting Shareholders were bound by ASIC’s ‘truth in takeovers’ policy to accept the Shandong Offer.
  - (b) Cardinal had used the truth in takeovers policy for an illegitimate purpose to establish a *“‘truth in takeovers’ acceptance facility on behalf of Shandong”*, thereby locking-up and delivering Shandong a significant parcel of Cardinal shares which, when aggregated with Shandong’s shareholding, exceeded 20% in breach of section 606.<sup>4</sup>
  - (c) Shandong and Cardinal are associates. In particular, that the Shareholder Intention Statements *“were part of an agreement, arrangement or understanding, or evidenced that they were acting in concert, intended to either deliver control to Shandong, or cause Nordgold to increase its offer.”*

## Interim orders sought

21. Nordgold sought interim orders (and final orders) including that:
  - (a) Shandong be restrained from processing any acceptances in respect of the Shandong Offer.
  - (b) Cardinal cease soliciting statements of intention in relation to acceptance of the Shandong Offer.
  - (c) Accepting Shareholders be restrained from accepting the Shandong Offer (and to the extent that Accepting Shareholders had accepted the Shandong Offer, that such acceptances be cancelled or withdrawn).
22. The acting President (Richard Hunt) considered the interim orders request on an urgent basis on 26 October 2020.
23. The acting President was not minded to make interim orders, for reasons including that:

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<sup>3</sup> See paragraph 16(b) above

<sup>4</sup> Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

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- (a) The Shareholder Intention Statements were subject to either Nordgold not increasing the offer price under the Nordgold Offer above A\$1.00 per Cardinal share or there being no superior proposal, in each case prior to 5.30pm (AEDT) on Thursday, 29 October 2020. Accordingly, an interim order restraining Shandong from processing any acceptances under the Shandong Offer from Accepting Shareholders was unnecessary at the time given that Accepting Shareholders could not accept into the Shandong Offer until after 5.30pm (AEDT) on Thursday, 29 October 2020.
  - (b) An order restraining the processing of acceptances generally in relation to one bid could unfairly encourage Cardinal shareholders to accept into the other competing bid.
  - (c) The balance of the interim orders requested were either more akin to final orders or could be adequately remedied by final orders.
24. In communicating the acting President’s decision on interim orders to the parties, it was noted that the question of interim orders may be revisited by a sitting Panel once appointed (or by the President again if there is a change in circumstances).

#### **Final orders sought**

25. In addition to the final orders set out in paragraph 21 above, Nordgold sought other final orders, including that:
- (a) Cardinal immediately make an announcement to the market that Accepting Shareholders are not bound to accept the Shandong Offer and that Cardinal has withdrawn its recommendation of the Shandong Offer.
  - (b) Cardinal “*cease to describe Nordgold’s offer in a manner that suggests it is not equal to Shandong’s offer, and otherwise ceases to describe Nordgold’s offer in a manner that implies that Shandong’s offer is superior to Nordgold’s offer*”.
  - (c) Withdrawal rights be given to all Cardinal shareholders who have accepted the Shandong Offer since the date of Nordgold’s application.

#### **DISCUSSION**

26. 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 Nordgold are to submissions in its application. References to submissions from Shandong and Cardinal are to submissions in their respective preliminary submissions (both submitting that the Panel should decline to conduct proceedings).

#### **Shareholder Intention Statements**

27. Nordgold submitted that Cardinal had mischaracterised the effect of the Shareholder Intention Statements in the Cardinal Announcement.<sup>5</sup> In particular, it submitted (among other things) that:

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<sup>5</sup> See paragraph 16(b) above

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- (a) Cardinal *“has implied that each Accepting Shareholder is compelled under ASIC’s ‘truth in takeovers’ policy to accept the Shandong Offer (in the absence of a superior proposal)...”*
  - (b) The truth in takeovers policy is not intended to apply to shareholders that are not substantial shareholders.<sup>6</sup> As a result, only one of the 28 Accepting Shareholders (representing 5.55% of Cardinal’s shares) is bound by that policy.
28. Nordgold further submitted that by *“misrepresenting the effect of the Shareholder Intention Statements”* and inviting Cardinal shareholders to *“provide additional statements to the Shareholder Intention Statements”*, Cardinal had attempted to establish a truth in takeovers acceptance facility on behalf of Shandong.
29. Cardinal submitted (among other things) that:
  - (a) It is incorrect to assume that *“public shareholder intention statements by shareholders who do not ordinarily fall within the definition of a ‘market participant’ can never be binding on those holders.”*<sup>7</sup>
  - (b) The Shareholder Intention Statements *“provide an incentive to Nordgold or a third party bidder to make a higher offer... Absent an incentive for a price increase, Cardinal and presumably its Shareholders (given the statements received) were concerned Nordgold would also declare its Offer “best and final” stifling the competitive tension and ending the auction for Cardinal’s Shares with two bids at \$1.00 (as Nordgold has now done).”*
30. Shandong submitted (among other things) that the Shareholder Intention Statements did not give rise to unacceptable circumstances, including because:
  - (a) The Shareholder Intention Statements are not in terms that give rise to unacceptable circumstances when having regard to Guidance Note 23: *Shareholder intention statements.*
  - (b) *“The question of whether or not the statement makers [of the Shareholder Intention Statements] could be compelled to act in accordance with the Shareholder Intention Statements would ultimately be a matter for the Panel if the makers sought to resile from them in future and any Panel application were made at that time. No such issue currently arises on the facts... there is no basis for the Panel to conduct proceedings into what is an entirely theoretical issue.”*
31. We do not consider the wording of the Shareholder Intention Statements indicates that the Accepting Shareholders are compelled to accept the Shandong Offer. The Cardinal Announcement uses the phrase ‘intend to accept’ and defines the letters from the Accepting Shareholders as ‘Shareholder Intention Statements’. Accordingly, we also do not consider that the Shareholder Intention Statements,

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<sup>6</sup> Citing *Finders Resources Limited 02* [2018] ATP 9 at [28], and *BreakFree Limited 03* [2003] ATP 38 and *BreakFree Limited 04* [2003] ATP 39 at [126]

<sup>7</sup> A footnote to Cardinal’s submissions stated that *“Where such shareholders voluntarily agree to make statements of intention with knowledge and acceptance of the policy and the consequences of departing from the policy (as is the case for the Cardinal Accepting Shareholders) then it would not be misleading (as suggested by Nordgold) to state or imply that those shareholders are bound by such statements in the absence of relief otherwise.”*

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together with Cardinal's invitation to other shareholders to provide additional statements, operate as a type of acceptance facility for the Shandong Offer.

32. The parties made a number of submissions on the question of whether non-substantial holders are bound by ASIC's truth in takeovers policy. We agree with Cardinal's submission that in the absence of the Accepting Shareholders resiling from their Shareholder Intention Statements, the question of whether some or all of the Accepting Shareholders are bound by their Shareholder Intention Statements is theoretical. Accordingly, we did not need to consider the question of whether shareholders who make intention statements in bids will be bound by their statements irrespective of whether they are substantial holders.
33. We note that at the time of soliciting the Shareholder Intention Statements, the Shandong Offer and the Nordgold Offer were fundamentally on equivalent terms. Both bids were priced at A\$1.00 per Cardinal share and the difference in the payment terms between the two bids was insignificant. The Nordgold Offer had also not yet been declared best and final.
34. At the time the Shareholder Intention Statements were first made, it was possible that they could have incentivised Nordgold to increase its offer, thereby triggering the 'superior proposal' conditions in the Shareholder Intention Statements. It was not prima facie unreasonable for Cardinal to solicit intention statements from its shareholders at a time prior to Nordgold making its offer best and final. We do not consider Cardinal's behaviour to be commercially irrational in the circumstances.
35. We note that the Shareholder Intention Statements are complicated given the multiple conditions. The Shareholder Intention Statements are to the effect that the Accepting Shareholders intend to accept the Shandong Offer by Friday, 30 October 2020 (if the offer period has not been extended by that date), or if the offer period has been extended, by the new last day of the offer period. This is subject to Nordgold not increasing the offer price under the Nordgold Offer above A\$1.00 per Cardinal share or there otherwise being no superior proposal, in each case prior to 5.30pm (AEDT) on Thursday, 29 October 2020.
36. Given that on 26 October 2020, Shandong determined to extend the offer period of the Shandong Offer to 31 December 2020, our interpretation of the Shareholder Intention Statements is that if there is no superior proposal in excess of A\$1.00 per Cardinal share prior to 5.30pm (AEDT) on Thursday, 29 October 2020, then Accepting Shareholders will have until 31 December 2020 to accept the Shandong Offer.

#### Association

37. Nordgold submitted the alleged association between Shandong and Cardinal in its application was supported by a number of events and circumstances, including the following:
  - (a) Cardinal's announcement on 21 October 2020 stating that "*Cardinal notes that Nordgold has made a higher competing offer...*" was "*plainly incorrect and misleading*"

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and was *“to benefit Shandong by creating ambiguity to enable Shandong to depart from [the Shandong] Last and Final Statement”*.

- (b) Cardinal being able to procure the Shareholder Intention Statements (from shareholders domiciled in different time zones) and preparing the Cardinal Announcement in limited time (approximately 56 minutes) after Shandong announced an extension to its bid (to which the Shareholder Intention Statements refer)<sup>8</sup> demonstrated a *“significant degree of orchestration”* between Cardinal and Shandong.
- (c) Cardinal’s solicitation of the Shareholder Intention Statements and the invitation to Cardinal Shareholders to *“provide additional statements to the Shareholder Intention Statements”* demonstrated Cardinal’s desire to assist in releasing Shandong from its Last and Final Statement.
- (d) *“The unwavering support and unanimous recommendation by the Cardinal Board of the Shandong Offer, notwithstanding Nordgold’s matching offer and preferential payment terms.”*

- 38. Cardinal denied the alleged association, submitting that *“there is no separate contractual obligation or otherwise in place outside of the [Shareholder Intention Statements] received by Cardinal (which are clearly qualified in their operation). Cardinal has no relevant interest in such shares. It is entirely legitimate and economic in the circumstances for shareholders to make a supporting statement to indicate their intentions, particularly in the interests of continuing the price auction for control.”* We are willing to accept that Cardinal’s actions may have been motivated by the desire to promote an auction for control, given that it solicited the Shareholders Intention Statements prior to Nordgold announcing that its offer price was best and final.
- 39. Cardinal also submitted there was *“no grand orchestration”* between it and Shandong in preparing their respective ASX releases on 23 October 2020. It submitted that it *“became aware that, given the imminent expiry of [the Shandong] Offer, Shandong was intending to announce a potential one-week extension of its Offer. The relevant [Shareholder Intention Statements] were then prepared in a manner consistent with an assumption that there would be a one week extension by Shandong to continue the auction for control of Cardinal.”*
- 40. Shandong submitted that there was *“no credible basis”* for asserting the association, that the Cardinal board was *“self-evidently acting in the interests of Cardinal shareholders”* and *“that Cardinal’s conduct happened to support [the Shandong Offer] is irrelevant and not probative”*.
- 41. The Panel’s starting point is that it is for the applicant to demonstrate a sufficient body of material, albeit with proper inferences being drawn, to support the Panel

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<sup>8</sup> Shandong announced its intention to extend the offer period of the Shandong Offer in its announcement on the 23 October 2020 at approximately 3.03pm. The Cardinal Announcement was made on 23 October 2020 at approximately 3.59pm



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conducting proceedings and inquiring into association.<sup>9</sup> For the purpose of Chapter 6, the association alleged in this application requires two persons to have a relevant agreement for the purpose of controlling or influencing the composition of a company's board or conduct of its affairs, or two persons to act in concert or propose to act in concert in relation to a company's affairs.<sup>10</sup>

42. In this case, Nordgold did not adduce sufficient material to establish the existence of a relevant agreement between Cardinal and Shandong,<sup>11</sup> or that they were acting in concert.
43. Accordingly, we consider that Nordgold has not provided a sufficient body of material to justify us making further enquiries as to whether there is an association leading to a contravention of section 606.

## DECISION

44. 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).
45. 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 29 October 2020**

**Reasons given to parties 30 November 2020**

**Reasons published 2 December 2020**

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<sup>9</sup> *Mount Gibson Iron Limited* [2008] ATP 4 at [15]

<sup>10</sup> Section 12(2)(b) and 12(2)(c)

<sup>11</sup> For the purpose of controlling or influencing the composition of Cardinal's board or the conduct of Cardinal's affairs (see section 12(2)(b))

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### Advisers

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