

TAKEOVERS PANEL REFUSES TO BREAK A TRUTH IN TAKEOVERS DEADLOCK

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Legal Briefings - By **Rodd Levy and Claire Thompson**

The Takeovers Panel has held two bidders for Cardinal Resources Limited to their last and final statements, despite both offers being stuck in a deadlock at \$1.00 per share.

IN BRIEF

- The Takeover Panel has declined to conduct proceedings in Cardinal Resources Limited 03 & 04 to allow bidders to increase their bids as they had declared their bids “best and final”.
- The Panel confirmed again that ASIC’s “truth in takeovers” policy contained in RG 25 is a “fundamental tenet” of Australia’s takeover regime.

BACKGROUND

Cardinal Resources Limited (**Cardinal**) was subject to competing takeovers bids from Nord Gold S.E. (**Nordgold**) and Shandong Gold Mining (Hong Kong) Co., Limited (**Shandong**).

On 19 October 2020, Shandong announced that its offer of \$1.00 per share was best and final in the absence of a higher competing offer.

On 21 October 2020, Nordgold increased the price under its offer from \$0.90 to \$1.00 per share and a few days later announced that its offer at \$1.00 per share was best and final in the absence of a higher competing offer.

Both offers were unconditional. They were in a deadlock.

Cardinal and Samson Rock, a substantial shareholder of Cardinal, each applied to the Panel seeking orders releasing the bidders from their last and final statements.

Cardinal argued:

- the truth in takeovers policy was “being used as a sword against a rival bidder by exploiting a technicality in the Shandong [last and final statement]” and not as “a shield for market integrity and to give rise to an efficient, competitive and informed market”;
- the Cardinal share price had consistently traded above \$1.00 per share since the last and final statements were made which showed that shareholders did not believe the statements;
- allowing both bidders to depart from their last and final statements in “an appropriate and structured manner” would promote a fully informed and competitive market.

Samson Rock argued that the bids for Cardinal had hit an impasse “with neither bidder able to increase its offer, and the very real prospect that neither will be able to be successful, so that control of the company will not be resolved through the bids” and there had ceased to be an efficient, competitive and informed market for control.

Both Cardinal and Samson Rock proposed that any shareholders who has suffered a detriment, for example by selling on-market after the last and final statements, could receive compensation.

THE PANEL DECLINES TO CONDUCT PROCEEDINGS

In declining to conduct proceedings, the Panel found that:

- Shandong’s qualification that its offer was best and final “in the absence of a higher competing offer” was not ambiguous;
- Nordgold matching the Shandong offer and seeking to hold Shandong to its last and final statement was not a misuse of the truth in takeovers policy; and
- notwithstanding that the auction between Shandong and Nordgold has been stalled, there was no material to suggest that the market was inefficient or uninformed.

Accordingly, there was no reasonable prospect that the Panel would find the situation between Shandong and Nordgold unacceptable.

The decision remains subject to a review application to the Review Panel by Cardinal. At the time of writing, the outcome of that application was not yet known, but it may have been superseded by events as on 24 November 2020, Engineers & Planners Company Limited, a Ghanaian owned mining and construction company, launched a conditional off-market bid for Cardinal at \$1.05 per share.

Shandong soon announced that the E&P offer constituted a “higher competing offer” for the purposes of its last and final statement, freeing Shandong to increase its bid to \$1.05.

Nordgold announced on the same day that it did not consider the E&P bid constituted an “offer” and therefore was not a “higher competing offer” capable of freeing Nordgold and Shandong from their last and final statements. In Nordgold’s view, because the E&P bid was conditional and there were material deficiencies in its Bidder’s Statement, it did not comply with the requirements for an off-market bid and could not be an “offer”.

On 26 November 2020, Nordgold announced that notwithstanding its comments regarding the E&P bid, Shandong had increased its offer to \$1.05 and therefore Nordgold considered itself free of its best and final statement. At the time of writing, Nordgold has not increased its offer price.

COMMENTARY

ASIC’s truth in takeovers policy governs statements made by market participants that they will or will not do something in the course of a bid. Market participants cannot depart from last and final statements unless they have clearly qualified their statement, reserving the right to do.

The Panel’s decision is a reminder to bidders that they can expect to be held to their last and final statements, so it pays to be careful and unambiguous with the wording.

In the past, the Panel has not always enforced last and final statements strictly, particularly where target shareholders have stood to benefit from the bidder being released from their statement, for example, Rinker Group (2007). The Cardinal decision signals a move to a stricter enforcement of the policy.

In declining to conduct proceedings in this case, the Panel referred to Breakfree Limited 03 and 04 in noting that that requiring “persons to act in accordance with statements that they have made to the market concerning their intentions in the context of a takeover bid under Chapter 6 promotes the principle set out in section 602(a).”

A stricter enforcement of ASIC’s truth in takeovers policy provides greater clarity and certainty for target shareholders and reinforces market integrity, a good thing for all market participants.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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