

Out there in public M&A land, competition for Cardinal Resources, a Western Australia-based gold explorer with African assets, has been continuing for months, much to the delight of shareholders and particularly those hedge funds who piled in when the bid was first announced. The two competing bidders are the China-based Shandong Gold, and the Russian-backed Nordgold, based in London.

The bidders have backed themselves both into corners whether by design or otherwise and Shandong is not lawfully able to raise its AU\$1 per share takeover bid but the shareholders under Nordgold's bid will not be entitled to any subsequent increase in the offer after they have accepted. The shareholders, and, no doubt, the target company, want the Takeovers Panel to relieve Shandong from its last and final statement, which under ASIC's "Truth in Takeovers" Policy has locked Shandong in to its current bid of AU\$1 per Cardinal share. A betting man would say that Shandong will increase its offer price if it is allowed and Nordgold might increase its offer price if Cardinal does not change its recommendation to shareholders to continue to accept the Shandong offer.

What started off as a battle where the Foreign Investment Review Board was touted to determine the outcome¹, by not clearing Shandong's offer, has turned into a bidding war that now rests in the jurisdiction of the Takeovers Panel. The no objection from the Foreign Investment Review Board was received with relative ease, much to the envy of other China-backed acquirers seeking Australian assets.

Background

Cardinal is a West African gold-focused exploration and development company that holds interests in tenements within Ghana, West Africa. Nordgold holds approximately 27.8% of Cardinal's shares, and made an offer under an unconditional on-market takeover bid to acquire all of the ordinary shares in the capital of Cardinal. The Nordgold offer had an initial offer price of AU\$0.66 per Cardinal share.

Shandong has also made an offer under an off-market takeover bid to acquire all of the Cardinal shares. The Shandong offer had an initial offer price of AU\$0.70 per Cardinal share.

On 2 September 2020, Nordgold increased its offer price under the Offer from AU\$0.66 to AU\$0.90 cash per Cardinal share.

On 7 September 2020, Shandong increased its offer price under the Shandong Offer from AU\$0.70 to AU\$1 per Cardinal share.

On 19 October 2020, Shandong lodged its Second Supplementary Bidder's Statement stating that its AU\$1 per share offer price is "best and final in the absence of a higher competing offer" (what is known in the takeovers industry as a last and final statement).

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".

On 21 October 2020, Nordgold increased the price under its offer from AU\$0.90 to AU\$1 per share. On the same day, Nordgold released an announcement and its Third Supplementary Bidder's Statement in which it stated that its increased price under the Offer "is not a higher competing offer".

During the course of the two competing offers, there have been five applications to the Takeovers Panel, with the first application being withdrawn, the Panel declining to conduct in relation to the second application and the other three applications remaining on foot and currently knocking around the electronic halls of the Panel. Interestingly, the fourth application has been made by a 5.5% shareholder of Cardinal, Samson Rock, who will be financially motivated to ensure the Takeovers Panel unshackles Shandong with a view to the auction for the control of Cardinal continuing.

¹ Simon Rear was interviewed by the Business team at The West for his views on the FIRB outcome.

The Key Issues

At the heart of the impasse that prevents Shandong from departing from its last and final statements is ASIC's "Truth in Takeovers" Policy. In summary, the policy prevents key stakeholders from departing from statements made in the context of a takeover.

The trouble for both bidders started when Shandong made its last and final statement (namely that its offer of AU\$1 per Cardinal share was its best and final in the absence of a higher offer) and Nordgold promptly increased its offer under its on-market offer to AU\$1. The revised Nordgold offer is clearly not a higher offer, arguably equal, but certainly not higher. This revised offer has not allowed Shandong to depart from its last and final statement. Presumably, Nordgold does not want to increase its offer above AU\$1 per share as it will free Shandong from its last and final statement and the auction for Cardinal will continue. A genius move by Nordgold and its advisers, except for one key issue – the recommendation from the board of Cardinal has not been forthcoming for Nordgold's bid, and the Cardinal board has continued to recommend the Shandong offer.

Unfortunately, it does not end there for the woes of the bidders. Nordgold's offer suffers from it being an on-market bid (i.e. the shares are bought by a broker on behalf of Nordgold on the market from accepting shareholders). Under that offer structure, shareholders do not receive any subsequent increase in the bid consideration. In contrast, under an off-market takeover offer, shareholders who have already accepted will benefit from any subsequent increase in the offer. In our view, this is likely the reason that the Cardinal board has recommended that shareholders accept the Shandong bid and take no action in relation to the Nordgold bid. To remedy this issue, Nordgold has announced an off-market takeover offer to supplement its on-market offer. However, Nordgold will need to follow the usual timetable set out in the Corporations Act (absent technical relief from ASIC being provided), which will only see shareholders receiving offers that can be accepted in a couple of weeks following the announcement. The Cardinal board is yet to give its opinion in relation to whether this changes its recommendation on whose bid should be preferred, but the Cardinal board will be grappling with an absurd situation where it has two unconditional bids on virtually the same terms at the same price.

How will the Panel deal with this? At its heart, the Takeovers Panel is a commercial arbitrator of takeover disputes. It has, in recent past, (such as in the competing bid for Ludowici and the bid for Finders Resources where a major shareholder gave a "Truth in Takeovers" statement that it was not accepting at AU\$0.23 per share, and then subsequently did accept) found a way through the ASIC policy by imposing a penalty on the offending party to compensate for loss suffered on reliance on the statement. We suspect that the Panel will find a way again and let Shandong increase its bid (which we have presumed it will do) and implement a mechanism to compensate any shareholders who have suffered loss. Having said that, there are not likely to be any shareholders who have suffered loss as the market has traded above the AU\$1 offer price at all times since Shandong announced its revised price of AU\$1.

If Nordgold increases its offer price, which it might do if the Cardinal board does not change its recommendation to shareholders to accept the Shandong bid, Shandong will be freed from its last and final statement and the auction will re-commence. Although there are a number of allegations in the Panel applications regarding association, the main aspects of the Panel applications will fall away and Cardinal and its shareholders will reap the rewards of any price increases.

For the bidders, one outcome is a definite possibility – whoever wins control is likely to have the other bidder as a major shareholder going forward. This will be weighing on the bidders' minds – a knockout blow that not only convinces the Cardinal board and its shareholders to accept, but also sees the other bidder accept the offer, will have some serious advantages in having full and absolute control of the Ghanaian asset.

Over to you, the Takeovers Panel.

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