

In 2012, an unsolicited mysterious takeover offer emerged for David Jones (DJs) from an unknown firm, EB Private Equity, the details of which were leaked through a newly created investor blog.

The address of EB Private Equity was published in the mainstream press as being little more than a post office box in a back street in Newcastle, UK, “wedged between a wig shop and a noodle restaurant.” The purported bidder had limited *bona fides* and clearly did not have the funds to make the AU\$1.65 billion offer to the shareholders of DJs. A similar situation has recently arisen in the hotly contested bid for Cardinal Resources, which this author wrote about a couple of weeks ago.

On 24 November 2020, an engineering and mining services company based in Ghana, Engineers & Planners Company Limited (E&P), announced a takeover offer for all of the shares in Cardinal at a bid price of AU\$1.05 per Cardinal share. As the two competing bidders, Shandong Gold and Nordgold, had painted themselves into a corner with their best and final statements of AU\$1 per Cardinal share (namely, exactly the same price) and the Takeovers Panel rightfully decided that it was not going to bless any of the bidders departing from these statements, the E&P bid has purportedly given the bidders the opportunity to depart from their “Truth in Takeovers” statements. Shandong wasted no time and immediately increased its bid to AU\$1.05 per share.

Nordgold has been more circumspect, but has had a bet each way. Nordgold has said that the E&P bid is not a real bid and, therefore, could not be a higher competing offer, but at the same time has said that it can now be freed from its best and final statement because Shandong has increased its bid.

The Takeovers Panel – You Can Seek Forgiveness, But Not Permission

Since our article “The Battle for Cardinal Resources: At an Impasse?,” the Takeovers Panel declined to conduct various proceedings centering on the issue of whether any of the bidders would be permitted to depart from their best and final statements. Although the reasons for those decisions are yet to be made public, we believe that the Panel would have struggled with the jurisdictional conundrum that no circumstances had occurred that could be unacceptable because none of the bidders had yet breached the Truth in Takeovers policy. This is because none of the bidders had departed from its best and final statement. The Panel was not about to provide permission to a party in a takeover to breach the policy. You can come to the Panel for forgiveness, but not permission.

The Panel also took the opportunity to confirm that it sees the Truth in Takeovers policy as a “fundamental tenet” of Australia’s takeover regime. Supporters of this approach will be reassured¹. We support the policy as a fundamental tenet, but it would be trite to say that the Panel has not “sold” the policy previously.

All in all, we look forward to the reasons but we completely agree with the Panel’s approach and that it has correctly grappled with this jurisdictional issue. Namely, there were circumstances, they were just not unacceptable. Yet.

The E&P Bid

So the Panel did not want to break the deadlock. Fair enough. The target, Cardinal, has also sought a review of the Panel’s decision, but we do not expect that to be fruitful

Prior to the announcement of the E&P bid, the bidders would have been considering whether a game of chicken was worth it and who would be brave enough to be the first to depart from its statement. However, the E&P bid has purportedly allowed bidders to depart. The timing is uncanny.

A cursory glance at the E&P bid announcement and associated cover letters reveals that this is not an offer capable of acceptance, it is missing key offer terms, it does not comply with the Corporations Act, ASIC guidance and Takeovers Panel guidance and it is missing a key ingredient – the funding to support the payment of the half a billion dollars of consideration to Cardinal shareholders. It does not even appear that E&P has obtained any Australian legal advice on its bid. This is not a real offer and should not allow bidders to depart from best and final statements. A higher competing offer must, at its heart, be an offer.

Shandong has taken very little time to accept that the E&P bid is a higher competing offer, which allows Shandong to depart from its best and final statement. Shandong increased its offer to AU\$1.05 per Cardinal share on the day of the announcement of the E&P bid.

Nordgold has been far more circumspect on the other hand. Nordgold has criticised the E&P bid for its failings and stated that it should not allow bidders to depart from their best and final statements. In the same breath, Nordgold has said that it is no longer bound to its statement because Shandong has departed from its. In Nordgold’s view, two wrongs make a right. We are sure that someone’s mother once said that was definitely not the case.

We would be surprised if further Panel applications were not made in this matter. However, for the moment, shareholders of Cardinal will be happy that they **might** be getting more money!



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¹ See article “Truth in takeovers for sale?” Australian Financial Review, 11 November 2020 by Rodd Levy.