



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP19/60

Thursday, 10 October 2019

Benjamin Hornigold Limited 08R, 10R & 11R – Review Panel agrees with Initial Panel’s Declaration

The review Panel has agreed with the decision of the initial Panel to make a declaration of unacceptable circumstances in Benjamin Hornigold Limited 05, 06 & 07 (see [TP19/50](#)). In that matter, the initial Panel had concluded (in summary) that the following transactions in effect operated as a lock-up device:

- the placement by Benjamin Hornigold of approximately \$5.46 million in aggregate in foreign currency banknotes with King's Currency Exchange Pty Ltd and
- the extension of the period for the return of all banknotes placed by Benjamin Hornigold with King's Currency.

On 10 September 2019, John Bridgeman Limited sought a review of the initial Panel's decision to make a declaration (08R - see [TP 19/51](#)). The review Panel agreed with the inferences drawn and conclusions reached by the initial Panel and considered that further material provided in the review proceedings further supported those inferences and conclusions. The review Panel has varied the initial Panel's declaration (in part) to take into account this additional material (see annexure A).¹

On 26 September 2019, John Bridgeman Limited sought a review of the initial Panel's decision to make orders (10R). On the same day, JB Financial Group Pty Ltd and Kings Currency sought a review of the initial Panel's decision to make orders (11R). The review Panel decided to hear all three review applications together. The review Panel is still considering the review applications in relation to orders. In the interim, the review Panel's interim order staying some of the initial Panel's final orders continues to operate (see [TP 19/58](#)).

The sitting review Panel is Richard Hunt (sitting President), Diana Nicholson and Karen Phin.

¹ The Panel did not consider it against the public interest to vary the initial Panel's declaration, and in making it had regard to the matters in section 657A(3) of the *Corporations Act 2001* (Cth)

The Panel will publish its reasons for the decision in due course on its website
www.takeovers.gov.au.

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ANNEXURE A

CORPORATIONS ACT

SECTION 657EA

VARIATION OF DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

BENJAMIN HORNIGOLD LIMITED 08R, 10R & 11R

VARIATION

The declaration made on 6 September 2019 in relation to *Benjamin Hornigold Limited 05, 06 & 07* is varied by:

- (a) replacing “June” with “July” in paragraph 2
- (b) inserting new paragraphs 8, 26 and 28 and footnotes 12, 19 and 22 (as renumbered)
- (c) amending paragraph 27(b) (as renumbered)
- (d) fixing typographical errors and making consequential changes to paragraph numbers, footnote numbers and cross references,

so that the declaration reads as follows:

CIRCUMSTANCES

1. John Bridgeman Limited (**John Bridgeman** or **JBL**) is an NSX listed company (NSX: JBL). Trading in John Bridgeman securities has been suspended since 10 April 2019.
2. Benjamin Hornigold Limited (**Benjamin Hornigold** or **BHD**) is an ASX listed investment company (ASX: BHD). Trading in Benjamin Hornigold securities has been suspended since 30 July 2018.
3. John Bridgeman is the exclusive investment manager for Benjamin Hornigold pursuant to the terms of a management services agreement dated 27 March 2017 and a services agreement dated 1 October 2016. John Bridgeman is also the investment manager for Henry Morgan Limited (**Henry Morgan** or **HML**) and Bartholomew Roberts Pty Limited (**BRL**) under agreements with the respective entities.

4. Mr Stuart McAuliffe is the Managing Director and Chief Investment Officer (CIO) of John Bridgeman. As CIO, Mr McAuliffe has the primary responsibility for the investment decisions of John Bridgeman, including investment decisions made in John Bridgeman's capacity as investment manager for Benjamin Hornigold.¹
5. As at 8 February 2019:
 - (a) Mr McAuliffe held a deemed 22.97% relevant interest in John Bridgeman,² a 6.77% interest in BRL and a 8.92% interest in JB Financial Group Pty Ltd (**JB Financial Group** or **JBFG**)
 - (b) John Bridgeman held a 11.07% interest in Henry Morgan, a 51.71% direct interest in BRL and a 7.63% direct interest in JB Financial Group
 - (c) Henry Morgan held a 30.12% interest in BRL and a 19.87% interest in JB Financial Group
 - (d) BRL held a 32.86% interest in JB Financial Group and
 - (e) King's Currency Exchange Pty Ltd (**King's Currency** or **KC**) was a wholly owned subsidiary of JB Financial Group.³
6. The table below sets out common officers and employees (including Mr McAuliffe) across various interrelated entities during the period 8 February 2019 to 12 June 2019 (inclusive).⁴

	JBL	BHD	HML	BRL	JBFG	KC
Stuart McAuliffe	Managing Director CIO	Executive Chairman ⁵	Managing Director	Director	CEO	N/A
John McAuliffe	Chairman	N/A	Director	Director ⁶	N/A	N/A

¹ In his capacity as CIO of John Bridgeman, Mr McAuliffe receives support from various investment professionals who are employed by John Bridgeman or engaged as external advisers

² Consisting of shares held directly and indirectly through various entities

³ Paragraph 5 does not set out all holdings (direct or indirect), relevant interests or voting powers for each of the relevant entities

⁴ The table does not name all common officers and employees of each of the interrelated entities

⁵ Mr McAuliffe resigned as a director of Benjamin Hornigold at a Benjamin Hornigold board meeting held on 12 June 2019 (effective 7:45pm)

⁶ Mr John McAuliffe resigned as a director of BRL on 16 April 2019

	JBL	BHD	HML	BRL	JBFG	KC
Ross Patane	Director	Director ⁷	Director	Director ⁸	N/A	N/A
Peter Aardoom	N/A	Director ⁹	N/A	N/A	Director	Director
Peter Ziegler	N/A	Director ¹⁰	Director	N/A	N/A	N/A
James Stewart-Koster	N/A	N/A	N/A	N/A	Compliance Officer (Group) CEO (Retail FX)	CEO
Rachel Weeks	Chief Operating Officer	N/A	N/A	N/A	Chief Operating Officer	N/A
Jody Wright ¹¹	Company Secretary	Company Secretary	Company Secretary	Company Secretary	Company Secretary	Director

7. On 10 September 2018, John Bridgeman announced an intention to make an off-market bid for all of the securities in Benjamin Hornigold (**2018 Bid**).
8. On 30 November 2018, Partners for Growth V, L.P. (**Partners for Growth**) entered into a Facility Agreement, General Security Deed and related agreements with JB Financial Group, King's Currency and their related bodies corporate, providing JB Financial Group with \$7 million in loan notes (**Partners for Growth Facility**). Under the General Security Deed, Partners for Growth was granted first-ranking security over all the assets of a number of companies, including JB Financial Group and King's Currency.¹²

⁷ Mr Patane was appointed as a director of Benjamin Hornigold on 10 June 2019 and resigned as a director at a Benjamin Hornigold board meeting held on 12 June 2019 (effective 7:45pm)

⁸ Mr Patane resigned as a director of BRL on 16 April 2019

⁹ Mr Aardoom resigned as a director of Benjamin Hornigold at a Benjamin Hornigold board meeting held on 12 June 2019 (effective 7:45pm)

¹⁰ Mr Ziegler was appointed as a director of Benjamin Hornigold on 28 May 2019 and resigned as a director at a Benjamin Hornigold board meeting held on 12 June 2019 (effective 7:45pm)

¹¹ The co-company secretary of JBL, BHD, HML, BRL and JBFG and the company secretary of KC resigned as company secretary of each entity on 10 May 2019

¹² Ashdale Integrity Solutions Pty Ltd is listed as a subsidiary of JBFG in the Letter of Offer in relation to the Partners for Growth Facility. Ashdale Integrity Solutions Pty Ltd was a party in its capacity as guarantor to the Letter of Offer, Deed of Guarantee and Indemnity and General Security Deed. Mr Bryan Cook, a director of Benjamin Hornigold (including during the period 8 February 2019 to 12 June 2019 (inclusive)), signed the Letter of Offer, Deed of Guarantee and Indemnity and General Security Deed as a director of Ashdale Integrity Solutions Pty Ltd

9. On 3 December 2018, JB Financial Group placed approximately \$5.43 million¹³ in foreign currency banknotes with King's Currency.¹⁴
10. On 8 February 2019, the Panel in *Benjamin Hornigold Limited 02 and Henry Morgan Limited 02* [2019] ATP 1 made an order in relation to the affairs of Benjamin Hornigold requiring John Bridgeman to repay a \$4.5 million unsecured loan given by Benjamin Hornigold with any interest (**Repayment Order**). The Panel considered that (in combination with other things) the loan given to John Bridgeman diminished the value of important assets of Benjamin Hornigold making Benjamin Hornigold less attractive to an acquirer and less likely to attract competing proposals (and as a result, diminished the value of Benjamin Hornigold if shareholders did not accept the 2018 Bid), in effect operating as a lock-up device.
11. On 28 February 2019, John Bridgeman directed Benjamin Hornigold to place \$350,000 of foreign currency banknotes with King's Currency¹⁵ pursuant to a services agreement dated 21 February 2018¹⁶ between Benjamin Hornigold and King's Currency for the management and trading of physical foreign currency banknotes (**Services Agreement**). Under the terms of the Services Agreement, Benjamin Hornigold was to receive a return of 5.0% per annum on the capital value of the banknotes. The placement by Benjamin Hornigold on 28 February 2019 increased the total amount of physical foreign currency banknotes placed with King's Currency to approximately \$1.95 million in aggregate.
12. Through a series of transactions completed by early March 2019, JB Financial Group fully recalled all of the foreign currency banknotes it had placed with King's Currency in December 2018.¹⁷
13. On 5 March 2019, John Bridgeman announced that it had determined not to proceed with the 2018 Bid and all previous acceptances of the 2018 Bid were cancelled and the 2018 Bid would lapse.
14. On 6 March 2019, JB Financial Group provided an unsecured loan facility to John Bridgeman for up to \$7.0 million (**JBFG Facility**).
15. On 6 March 2019, John Bridgeman directed Benjamin Hornigold to place \$2.1 million of foreign currency banknotes with King's Currency, increasing the total amount placed by Benjamin Hornigold with King's Currency to approximately \$4.0 million in aggregate.

¹³ All references to amounts of foreign currency placed with King's Currency are to the Australian dollar equivalent

¹⁴ JB Financial Group had previously made a series of investments in King's Currency since February 2017

¹⁵ All placements of foreign currency banknotes by Benjamin Hornigold occurred by way of cash transfers in Australian dollars to King's Currency

¹⁶ As amended by variation deeds dated 31 July 2018 and 17 September 2018

¹⁷ Some of the transactions recalling foreign currency banknotes occurred as early as December 2018

16. On 7 March 2019, John Bridgeman drew down \$3.0 million of the JBFG Facility for the purposes of repaying Benjamin Hornigold in accordance with the Repayment Order. On the same day, John Bridgeman repaid \$3.0 million of the amount due under the Repayment Order to Benjamin Hornigold.
17. Through a series of transactions between 7 March 2019 and 27 March 2019, John Bridgeman directed Benjamin Hornigold to place an additional \$2.49 million of foreign currency banknotes with King's Currency, increasing the total amount placed by Benjamin Hornigold in foreign currency banknotes with King's Currency to approximately \$6.49 million by 27 March 2019. The amounts placed between 6 March 2019 (see paragraph 15) and 27 March 2019 totalled \$4.59 million.
18. On 8 March 2019, John Bridgeman drew down a further \$1.5 million of the JBFG Facility for the purposes of repaying the loan in accordance with the Repayment Order. On the same day, John Bridgeman repaid the remaining \$1.5 million in principal due under the Repayment Order to Benjamin Hornigold.
19. On 22 March 2019, Benjamin Hornigold announced that it had received from certain Benjamin Hornigold shareholders a notice under ss249F¹⁸ and 203D of an intention to call a general meeting to consider resolutions to remove and appoint directors of Benjamin Hornigold (**s249F Meeting**). The s249F Meeting was later called to be held on 13 June 2019.
20. Through a series of additional transactions occurring after 27 March 2019, the total amount Benjamin Hornigold was directed by John Bridgeman to place in foreign currency banknotes with King's Currency increased to approximately \$7.12 million in aggregate as at 31 May 2019. The total amount placed by Benjamin Hornigold with King's Currency after the date of the Repayment Order was approximately \$5.46 million (see paragraphs 11, 15, 17 and this paragraph 20).
21. At a John Bridgeman board meeting held on 1 April 2019, the board considered that it may be the appropriate time for it to proceed with a new takeover bid for Benjamin Hornigold and resolved to commence preparation of a new bidder's statement.
22. On 26 April 2019, John Bridgeman announced its intention to make a new off-market takeover bid for all of the securities in Benjamin Hornigold (**2019 Bid**). At a John Bridgeman board meeting held on 30 April 2019, the board resolved to finalise the preparation and lodgement of the new bidder's statement. The

¹⁸ 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)

bidder's statement was lodged with ASIC on 3 May 2019 and offers under the 2019 Bid opened on 17 May 2019.

23. On 26 May 2019, Benjamin Hornigold commenced proceedings in the Supreme Court of Queensland seeking to restrain the s249F Meeting from proceeding (**Court Proceeding**). On 3 June 2019, evidence was served in the Court Proceeding that indicated a strong likelihood that the resolutions to remove the directors of Benjamin Hornigold would be carried by a majority at the s249F Meeting. The Court Proceeding was dismissed with costs on 4 June 2019.
24. On 6 June 2019, King's Currency sent a letter to Benjamin Hornigold requesting that amendments be made to the Services Agreement (**Request Letter**). The Request Letter stated that "*King's is in the process of establishing an external financial facility with a bank or non-bank institution to supply funds for physical banknote trading.*" The following amendments were requested "*to provide King's Currency with sufficient time to finalise the establishment of the facility*":
 - (a) increase the minimum return to Benjamin Hornigold of the capital value of the banknotes to 9.65% per annum (from 5.0% per annum)
 - (b) extend the period of notice for the return of the banknotes from 30 days to 8 months and
 - (c) extend the term of the agreement to 21 February 2021.
25. The Request Letter was considered at board meetings of Benjamin Hornigold held on 6 June 2019 and 7 June 2019 and amendments to the Services Agreement were approved by Benjamin Hornigold at a board meeting held at 7:00am (Brisbane time) on 12 June 2019.¹⁹ A deed of variation was executed by King's Currency and Benjamin Hornigold later on 12 June 2019 (**Variation Deed**) to increase the minimum return to Benjamin Hornigold to 9.65% per annum and to provide that all banknotes placed by Benjamin Hornigold were not returnable until 12 November 2019. At a second board meeting of Benjamin Hornigold convened at 7:30pm (Brisbane time) on 12 June 2019, all of the directors of Benjamin Hornigold (including Mr McAuliffe) and the company secretary resigned, and three new directors were appointed.
26. On 18 June 2019, Partners for Growth provided JBFG with a "Notice of Default and Reservation of Rights" letter alleging the following events of default (among others):
 - (a) JB Financial Group had "*failed to comply with the King's Currency and Mercantile Agency EBITDA Covenant...in respect of the testing periods ending*

¹⁹ As a director of Benjamin Hornigold, Mr Stuart McAuliffe was present at all times during this meeting but abstained from voting. Mr Bryan Cook was one of two directors that approved the amendments to the Services Agreement

December 2018, January 2019, February 2019 and March 2019, and is therefore in breach of its obligation to comply with the Financial Covenants...” and

- (b) JB Financial Group had “recently advised that it entered into a further loan agreement with JBL dated on or about 6 March 2019, as amended by the parties in 1 May 2019, pursuant to which the Borrower [JB Financial] made available a cash advance facility of A\$10,000,000 in aggregate to JBL...”²⁰

27. The Panel considers that the material provided by the parties during the proceedings supports an inference (among other things) that John Bridgeman:
- (a) was responsible for and made Benjamin Hornigold’s investment decisions, including the decisions to place foreign currency notes with King’s Currency and
 - (b) had influence over JB Financial Group and its wholly owned subsidiary, King’s Currency in relation to relevant transactions (particularly given John Bridgeman’s various relationships with the interrelated entities²¹, its role as investment manager of Benjamin Hornigold²², and the uncommercial nature of the JBFG Facility²³).
28. The Panel considers that the material provided by the parties during the proceedings, including the circumstances and process in relation to which decisions were made to place the foreign currency notes and enter into the Variation Deed, supports an inference that these decisions were not commercial or made on an arm’s length basis.
29. The Panel considers that, in relation to the affairs of Benjamin Hornigold, the following transactions (individually and in conjunction, both of which occurred after the Panel made the Repayment Order) effectively replaced the loan subject of the Repayment Order and diminished the value of a material and important asset of Benjamin Hornigold, making it less attractive to a potential acquirer and less likely to attract competing proposals to the 2019 Bid (and as a result, diminished the value of Benjamin Hornigold if securityholders do not accept the 2019 Bid), in effect operating as a lock-up device:
- (a) the placement by Benjamin Hornigold of approximately \$5.46 million in aggregate in foreign currency banknotes with King’s Currency (see paragraph 20) and

²⁰ JB Financial Group and King’s Currency submitted that they disputed “any purported default notice issued by” Partners for Growth

²¹ See paragraphs 5 – 6

²² See paragraphs 3 - 4

²³ See paragraphs 14 and 26(b)

- (b) the extension of the period for the return of all banknotes placed by Benjamin Hornigold with King's Currency²⁴ pursuant to the terms of the Variation Deed (see paragraph 25).

EFFECT

- 30. It appears to the Panel that the acquisition of control over voting shares in Benjamin Hornigold has not taken place in an efficient, competitive and informed market.

CONCLUSION

- 31. It appears to the Panel that the circumstances are unacceptable circumstances:
 - (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Benjamin Hornigold or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Benjamin Hornigold
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in s602.
- 32. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in s657A(3).

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Benjamin Hornigold.

Tania Mattei
Counsel
with authority of Richard Hunt
President of the sitting Panel
Dated 8 October 2019

²⁴ \$7.12 million in aggregate as at 31 May 2019 – see paragraph 20