



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP19/11

Tuesday, 12 February 2019

Benjamin Hornigold Limited 02 and Henry Morgan Limited 02 - Correction

It has come to our attention that the declaration of unacceptable circumstances for Henry Morgan Limited attached to the Panel's earlier media release [TP19/04](#) contains some cross-referencing errors.

A corrected declaration is attached to this media release.

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Australian Government

Takeovers Panel

**CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

HENRY MORGAN LIMITED 02

CIRCUMSTANCES

1. John Bridgeman Limited (**JBL**) is an NSX listed company.
2. Benjamin Hornigold Limited (**BHD**) and Henry Morgan Limited (**HML**) are ASX listed investment companies. Trading in BHD and HML shares is suspended.
3. JBL and HML have voting power of approximately 51.71% and 30.12% respectively in Bartholomew Roberts Pty Limited (**BRL**). JBL, HML and BRL have voting power of approximately 7.43%, 19.87% and 32.86% respectively in JB Financial Group Pty Ltd (**JBFG**). JBFG has a number of subsidiaries including JB Trading House Pty Ltd (**JB Trading**).
4. JBL is the manager for BHD, HML and BRL under investment management agreements. Mr Stuart McAuliffe is the Managing Director of JBL, HML, BHD and BRL and the Group Chief Executive Officer of JBFG. Mr John McAuliffe is the Chairman and non-executive director of JBL and BRL and the Chairman of HML. Mr Peter Aardoom is a director of BHD and JBFG. Mr Ross Patane is a director of JBL, HML and BRL. JBL, HML and BHD have the same two company secretaries.
5. Mr Stuart McAuliffe also has voting power of 22.58% in JBL and has an outstanding \$1 million loan to JBL (as a part of a \$2.5 million loan facility).
6. On 4 January 2018, JBL announced that it had made an offer to all shareholders in JBFG to acquire their shares for shares and options in JBL, subject to conditions. Offers are still open but not all conditions have been fulfilled.
7. On 3 August 2018, 536,585 JBL shares held by BHD were bought back by JBL for approximately \$1.1 million (\$2.05 per share). Also on 3 August 2018, 1,398,573 JBL shares held by HML were bought back by JBL for approximately \$2.8 million (\$2.05 per share).
8. On 8 August 2018, BHD and HML each made unsecured loans to JBL for a term of one year at 11.5% interest for \$1,134,000 and \$2,411,000 respectively.
9. On 5 September 2018, the boards of BHD and HML each considered confidential non-binding letters of intent from JBL for the proposed acquisition of all of the issued

share capital in BHD and HML respectively. BHD and HML's boards each appointed a sub-committee to consider JBL's bid.

10. On 9 September 2018, BHD's board sub-committee approved entering into a bid implementation agreement with JBL. On 10 September 2018, HML's board sub-committee approved entering into a bid implementation agreement with JBL.
11. On 10 September 2018, JBL announced its intention to make scrip off-market takeover bids to acquire:
 - (a) all of the issued shares and options in BHD that it did not currently own and
 - (b) all the issued shares of HML that it did not currently own,

attaching signed bid implementation agreements. The announcement stated:

"If appropriate, following their consideration of HML's due diligence in relation to the HML Offer and their assessment of the independent expert report to be commissioned by them to consider the fairness and reasonableness of the offer, the HML independent directors have undertaken to recommend the HML Offer to HML shareholders in the absence of a superior proposal."

"Following their due diligence in respect of the BHD Offer, and the advice of an independent expert engaged by them to consider the fairness and reasonableness of the BHD Offer, the independent directors have undertaken to recommend the BHD Offer to BHD shareholders in the absence of a superior proposal."

The announcement also included a statement (towards the end) that BHD and HML shareholders should carefully consider the target's statements before deciding whether to accept the bids.

12. In the bid implementation agreements, each of BHD and HML represented that their respective voting directors¹ would unanimously recommend the bids in the absence of a superior proposal and subject to consideration of due diligence, matters detailed in any independent expert's report and the assessment of the bid by the expert. They also agreed to early dispatch of JBL's bidder's statements. The bid implementation agreements provided that parties would use best endeavours to comply with a timetable which included dispatch of BHD's and HML's target's statements and independent expert's reports at the same time as the bidder's statements (which, as noted below, did not occur).
13. JBL's bids for BHD and HML were not inter-conditional. Each bid was initially subject to a waivable 50.1% minimum acceptance condition.
14. On 17 September 2018, BHD's board agreed to amend the terms of a \$2.3 million convertible loan to JBFG, including extending the expiry date from 10 September 2018 to 11 March 2020.

¹ In the case of BHD – Messrs Aardoom and Cook. In the case of HML – Mr Ziegler and Ms Gunner

15. On 17 September 2018, BHD's board agreed to convert a receivable it was owed by JBL into an unsecured loan of up to \$4.5 million at an interest rate of 11.50% per annum repayable within 18 months.
16. On 16 October 2018, the boards of BHD and HML extended the loans to JBL (referred to in paragraph 8) for six months.
17. On 31 October 2018, JBL lodged bidder's statements in relation to its bids for BHD and HML. The bidder's statement for BHD stated on the first page:

"BHD'S VOTING DIRECTORS UNANIMOUSLY RECOMMEND THAT YOU ACCEPT THIS OFFER IN THE ABSENCE OF A SUPERIOR PROPOSAL"

The bidder's statement for HML stated on the first page:

"HML'S VOTING DIRECTORS UNANIMOUSLY RECOMMEND THAT YOU ACCEPT THIS OFFER IN THE ABSENCE OF A SUPERIOR PROPOSAL"

18. The statements referred to in paragraph 17 were repeated throughout JBL's bidder's statements for BHD and HML. Prior to lodgement,² BHD and HML had asked JBL to amend these statements to reflect the conditionality of the recommendation. JBL did not make the requested amendments.
19. On 9 November 2018, JBL announced that it had completed dispatch of its bidder's statements for both BHD and HML. At the time of dispatch, JBL had voting power of 0.19% in BHD and 11.07% in HML respectively. On the same day JBL also released an announcement "*clarifying*" (but not retracting) the statements referred to in paragraph 17 stating "*these statements must be read in the context of JBL's announcement of 10 September 2018 and other information provided in the Bidder's Statements despatched by JBL*".
20. On 22 November 2018, JBL:
 - (a) following discussions with ASIC, lodged supplementary bidder's statements in relation to its bids for BHD and HML. These supplementary bidder's statements, among other things, retracted the statements referred to in paragraph 17 and
 - (b) extended the offer period for its bids for BHD and HML to 14 January 2019.³ The extensions of the offer period for JBL's bids for BHD and HML triggered a right of withdrawal for BHD and HML shareholders who had accepted the bid before the date of the supplementary bidder's statement under ss650D(1)(a)(ii) and 650E of the *Corporations Act 2001* (Cth) (**Act**).
21. As at 22 November 2018, JBL had voting power in BHD and HML of 40.69% and 57.02% respectively.

² On 22 October 2018

³ The offer period has since been extended to 11 February 2019

22. On 26 November 2018, the same day that BHD and HML were required to lodge and dispatch their respective target's statements, the Panel affirmed earlier decisions of ASIC to refuse relief to BHD and HML to either (a) extend time for the dispatch of their target's statements or (b) permit them to lodge incomplete target's statements.⁴
23. On 27 November 2018, the voting directors of BHD and HML, in separate announcements, recommended to their shareholders for the first time that they take no action in relation to the JBL bids prior to the release of their respective target's statements.
24. On 6 December 2018, BHD and HML lodged their respective target's statements. Each target's statement:
 - (a) contained an independent expert's report concluding that the relevant bid is not fair but reasonable and
 - (b) included a statement that the voting directors recommend that shareholders accept the bid in the absence of a superior proposal.
25. The independent expert stated in its report on JBL's bid for HML, as a factor in determining that the bid is reasonable, that:

"JBL has a relevant interest in HML in excess of 50% (subject to any withdrawals of acceptances) which may allow JBL to determine future investment decisions of HML in addition to control of the management rights of HML. JBL's existing interest in HML is also likely to preclude any other takeover offers for HML or other corporate activity from a third party"
26. On 24 December 2018, JBL announced that it had obtained shareholder approval for its bids for BHD and HML to proceed and declared both bids free of conditions.
27. JBL's bidder's statement in relation to its bid for HML (as supplemented) does not adequately disclose:
 - (a) the various relationships, and transactions, between JBL, BHD, HML, BRL, JBFG, JB Trading and their associates, noting that as the investment manager for BHD, HML and BRL, JBL had all the material information on this issue
 - (b) the risk that HML shareholders will receive materially less value if JBL only obtains voting power of 50% or less in either or both BHD and HML
 - (c) the financial position of JBL and JBFG, including that audit opinions in both their most recent accounts refer to material uncertainty regarding going concern and

⁴ See *Benjamin Hornigold Limited and Henry Morgan Limited* [2018] ATP 23

- (d) the financial effect of the transactions referred to in paragraphs 8, 14 and 15 and how they may impact on HML shareholders' decision whether to accept the JBL bid.
28. JBL's supplementary bidder's statement in relation to its bid for HML did not adequately deal with ASIC's disclosure issues in a way that was accessible to HML shareholders. HML shareholders who had accepted the bid prior to the issue of JBL's supplementary bidder's statement were not adequately protected by the disclosure in the supplementary bidder's statement and the ability to withdraw their acceptances.
29. The above disclosure issues have not been adequately remedied by the issue of HML's target's statement and independent expert's report.
30. The following in combination (among other things) indicate that HML shareholders were denied sufficient time and information to assess the merits of JBL's bid and did not have the benefit of appropriate and sufficiently timely advice in relation to JBL's bid:
- (a) HML agreeing in advance and without qualification, in the bid implementation agreement, to early dispatch of the bidder's statement
 - (b) HML and JBL not ensuring that the target's statement and independent expert's report were dispatched at the same time as the bidder's statement, as envisaged in the bid implementation agreement timetable that each party agreed to use its best endeavours to comply with
 - (c) JBL and HML's directors' failure to promptly alert HML shareholders of their concerns regarding JBL's bidder's statement including the fact that statements in the bidder's statement misrepresented the conditionality of the voting directors' recommendation (referred to in paragraphs 17 and 18)
 - (d) HML dispatching its target's statement and independent expert's report late, in contravention of items 11 and 12 of s631(1) of the Act
 - (e) HML's directors' failure to clearly advise its shareholders prior to 27 November 2018 to take no action in relation to the JBL bid before considering the target's statement and independent expert's report and
 - (f) the almost identical responses of both BHD and HML to JBL's bids.

EFFECT

31. It appears to the Panel that:
- (a) the acquisition of control over voting shares in HML has not taken place in an efficient, competitive and informed market and
 - (b) the holders of shares in HML have not been given enough information to enable them to assess the merits of JBL's bid.

CONCLUSION

32. 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 HML or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in HML
- (b) in the alternative, in relation to the effect the circumstances have had, are having, will have or are likely to have in relation to HML, having regard to the purposes of Chapter 6 set out in section 602 of the Act and
- (c) in the further alternative, because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6 of the Act.

DECLARATION

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

Bruce Dyer
Counsel
with authority of James Dickson
President of the sitting Panel
Dated 25 January 2019