



Australian Government

Takeovers Panel

**Reasons for Decision
Henry Morgan Limited 05
[2019] ATP 6**

Catchwords:

Variation of orders

Corporations Act 2001 (Cth), sections 657D

Benjamin Hornigold Limited 02 and Henry Morgan Limited 02 [2019] ATP 1

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NA	NA	NA	NA	YES	NA

INTRODUCTION

1. The Panel, Robert McKenzie (sitting President), Bruce McLennan and Karen Phin made a variation and correction to the final orders made in *Benjamin Hornigold Limited 02 and Henry Morgan Limited 02 [2019] ATP 1* in relation to the affairs of Henry Morgan Limited, including to extend the time period for John Bridgeman Limited to dispatch its replacement bidder's statement.

2. In these reasons, the following definitions apply.

Cancellation Order	has the meaning given in paragraph 9 of these reasons
Dispatch Order	has the meaning given in paragraph 7 of these reasons
Half Year Accounts	has the meaning given in paragraph 13(a) of these reasons
Original Applicants	the Applicants in the Substantive Proceedings
Original Orders	the orders of the Original Panel in relation to HML dated 8 February 2019
Original Panel	Yasmin Allen, James Dickson (sitting President) and Bruce McLennan
Replacement Bidder's Statement	the replacement bidder's statement referred to in the Dispatch Order
Substantive Proceedings	<i>Benjamin Hornigold Limited and Henry Morgan Limited 02 [2019] ATP 1</i>

3. Unless otherwise defined, capitalised terms used in these reasons have the same meaning given in the reasons for the Substantive Proceedings.

FACTS

4. The facts are set out in the Original Panel's reasons in the Substantive Proceedings, as supplemented below.

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5. On 25 January 2019, the Original Panel made a declaration of unacceptable circumstances in relation to the affairs of HML.¹
6. On 8 February 2019, the Original Panel made orders in relation to the affairs of HML² (**Original Orders**).
7. Order 6 of the Original Orders provided that:

Within 30 days after the Commencement Date, JBL must dispatch either of the following to HML shareholders:

 - (a) *a Replacement Bidder's Statement complying with Order 8 (in a form acceptable to ASIC) or*
 - (b) *a supplementary bidder's statement (in a form acceptable to ASIC) stating that its takeover offer for HML is closed or has been cancelled in accordance with [the] orders*

(the **Dispatch Order**).
8. In effect, the definition of "Commencement Date" in the Original Orders required JBL to complete dispatch under the Dispatch Order by Saturday, 16 March 2019.
9. Order 7 of the Original Orders had the effect that offers under JBL's bid would be cancelled if JBL did not dispatch the Replacement Bidder's Statement in accordance with the Dispatch Order and its bid remained open for acceptance (the **Cancellation Order**).

APPLICATION

10. By application dated 12 March 2019, JBL sought a variation of the Dispatch Order under s657D(3)³ to extend the date for dispatch from 16 March 2019 to no later than 20 March 2019.⁴ By rebuttal submissions dated 14 March 2019, JBL sought a further extension to the time for dispatch under the Dispatch Order to 22 March 2019.
11. JBL submitted (among other things) that:
 - (a) it did not realistically consider that it would be in a position to dispatch the Replacement Bidder's Statement within the time period specified in the Dispatch Order
 - (b) it had been advised:
 - (i) by its share registry that in order to achieve dispatch within the time period specified in the Dispatch Order, having regard to printing and other requirements, it required the finalisation of the Replacement

¹ The Original Panel also made a declaration of unacceptable circumstances in relation to the affairs of BHD

² The Original Panel also made orders in relation to the affairs of BHD

³ 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)

⁴ As the Substantive Proceedings had been completed, the substantive President of the Panel appointed us under s184 of the *Australian Securities and Investments Commission Act 2001* (Cth) to consider this request

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Bidder's Statement by no later than 12 March 2019 (ie the date of its variation application) and

- (ii) by ASIC that ASIC may be unable to finalise its review of the draft Replacement Bidder's Statement within the time period specified in the Dispatch Order⁵ and
- (c) the Dispatch Order should be varied by deleting the words "Within 30 days after the Commencement Date" and replacing those words with "By no later than 22 March 2019".

12. JBL also submitted that:

- (a) "[g]iven the timing to date and the relatively unprecedented nature of both the volume and additional requested disclosure and particularities of certain of those disclosure items, where ASIC's approval of the Replacement Bidder's Statement goes beyond 14 March 2019... it is appropriate that the Panel be involved in settling any final terms" and
- (b) the Dispatch Order should be varied to require approval by the Panel instead of ASIC.

DISCUSSION

13. ASIC submitted that it agreed with the proposed extension of the date for dispatch of the Replacement Bidder's Statement (in a form acceptable to ASIC) to 22 March 2019, stating (among other things) that:

- (a) it considered it "critical that the financial information and analysis contained in JBL's 31 December 2018 half year accounts (**Half Year Accounts**) be sufficiently reflected in the Replacement Bidder's Statement and be released to the market prior to the dispatch of the Replacement Bidder's Statement"
- (b) it did not consider that it will be in a position to determine whether the Replacement Bidder's Statement is in a form acceptable to it until it had been given the opportunity to review the contents of the Half Year Accounts and provide JBL with any additional comments that arose from this review and
- (c) since it received JBL's first draft Replacement Bidder's Statement on 26 February 2019, the transaction had materially changed⁶ which required the disclosure in the first draft Replacement Bidder's Statement to be updated and additional information to be provided (including the Half Year Accounts referred to above).

14. HML also supported the proposed extension.

15. The Original Applicants opposed the proposed extension, submitting that if we granted the variation it would (among other things):

- (a) undermine the purpose and intention of the Original Orders

⁵ Including for the reasons summarised at paragraph [13(a)] and [13(b)]

⁶ On 4 March 2019, JBL advised that it would not be proceeding with the acquisition of JB Financial Group and on 5 March 2019, JBL advised that the concurrent bid for BHD was to be abandoned

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- (b) likely cause confusion in the market and
 - (c) undermine the certainty afforded by the Original Orders.
16. After considering all of the available material and having regard to all of the circumstances presently existing, we consider that a variation to the Dispatch Order to extend the date for dispatch to 22 March 2019 is appropriate.
17. We are satisfied that an extension is appropriate given:
- (a) ASIC's support for the extension
 - (b) the material change to the transaction since ASIC had started its review of the first draft Replacement Bidder's Statement, which had resulted in ASIC requiring updates to the disclosure before ASIC could be satisfied that the Replacement Bidder's Statement was in a form acceptable to it
 - (c) ASIC requiring the Half Year Accounts to be released to the market prior to the dispatch of the Replacement Bidder's Statement and
 - (d) JBL's share registry not being in a position to achieve dispatch within the time period specified in the Dispatch Order (having regard to printing and other requirements).
18. We disagree with the Original Applicants submission that granting an extension would undermine the purpose and intention of the Original Orders or cause confusion or uncertainty.
19. We did not consider it appropriate or necessary in the circumstances for the Panel to replace ASIC and "be involved in settling any final terms" in the Replacement Bidder's Statement.

DECISION

20. For the reasons above, we decided to vary and correct the Dispatch Order as set out in Annexure A.⁷
21. We gave parties, persons to whom the Original Orders are directed and ASIC an opportunity to make submissions, as required by s657D(3).
22. We are satisfied that:
- (a) neither the variation, nor the Original Orders as varied, unfairly prejudice any person⁸ and

⁷ The order also corrects a typographical error, for the avoidance of doubt, in the definition of "Commencement Date".

⁸ See s657D(1)

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- (b) the Original Orders as varied are appropriate under s657D(2)(a) or s657D(2)(b) for reasons similar to those given by the Original Panel.^{9, 10}

**Robert McKenzie
President of the sitting Panel
Decision dated 16 March 2019
Reasons given to parties 21 March 2019
Reasons published 25 March 2019**

⁹ See, in particular, [2019] ATP 1 at [72]-[78]

¹⁰ The Original Applicants also submitted that a costs order was appropriate in the circumstances. We are satisfied that no costs order is appropriate given that the extension was supported by ASIC and JBL had not placed an unduly onerous burden on the Original Applicants or caused the Original Applicants to incur any costs other than those incurred in relation to responding to the extension request

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Advisers

Party	Advisers
Original Applicants	Kardos Scanlan
Henry Morgan Limited	AJ & Co Lawyers
John Bridgeman Limited	McCullough Robertson
JB Financial Group Pty Ltd	Thomson Geer



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Annexure A

**CORPORATIONS ACT
SECTION 657D
VARIATION OF ORDERS**

Henry Morgan Limited 05

Pursuant to sections 657D(2) and 657D(3) of the *Corporations Act 2001* (Cth)

THE PANEL ORDERS

The final orders made in Henry Morgan Limited 02 on 8 February 2019 are:

1. varied by replacing "Within 30 days after the Commencement Date" in Order 6 with "By no later than 22 March 2019" and
2. corrected by replacing "2018" in the definition of "Commencement Date" in Order 12 with "2019".

Bruce Dyer
Counsel
with authority of Robert McKenzie
President of the sitting Panel
Dated 16 March 2019