



Australian Government

Takeovers Panel

# MEDIA RELEASE

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No: TP19/04

Friday, 25 January 2019

## Benjamin Hornigold Limited 02 and Henry Morgan Limited 02 - Declaration of Unacceptable Circumstances

The Panel has made declarations of unacceptable circumstances (Annexure A) in response to applications dated 28 December 2018 by shareholders<sup>1</sup> of Benjamin Hornigold Limited (ASX: BHD) (**BHD**) and Henry Morgan Limited (ASX:HML) (**HML**) in relation to the affairs of each company (see [TP18/80](#)).

### Background

On 10 September 2018, John Bridgeman Limited (NSX: JBL) (**JBL**) announced its intention to make scrip off-market takeovers bids to acquire all of the issued capital in BHD and HML, attaching signed bid implementation agreements. The bids were not inter-conditional.

In the bid implementation agreements, each of BHD and HML represented that their respective voting directors would unanimously recommend the bids in the absence of a superior proposal and subject to, among other things, consideration of matters detailed in an independent expert's report. BHD and HML also agreed to early dispatch of the bidder's statements without qualification.

After the bids were announced, BHD agreed to:

- convert the repayment of a receivable it was owed by JBL into an unsecured loan of up to \$4.5 million repayable within 18 months and
- extend the terms of certain loans to JBL and JB Financial Group Pty Ltd (**JBFG**),

(the **Loan Arrangements**).

On 31 October 2018, JBL lodged bidder's statements for its bids for BHD and HML which stated on the first page and throughout "*[HML's/BHD's] Voting Directors*

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<sup>1</sup> In relation to both applications - Jonathan Allan Dixon, Ms Wendy Lynn Cowan, Mrs Susan Jean Dixon ATF Dixon Super Fund, GM Enterprises Australia Pty Ltd ATF GTM Super Fund and Inspired Asset Management Pty Ltd



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*unanimously recommend that you accept this offer in the absence of a superior proposal”*. JBL did not amend these statements to reflect the conditionality of the recommendations, despite BHD and HML requesting this occur.<sup>2</sup>

On 22 November 2018, following discussions with ASIC, JBL lodged supplementary bidder’s statements and offered withdrawal rights to BHD and HML shareholders who had previously accepted the bids.

On 27 November 2018, the voting directors of BHD and HML each 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. On 6 December 2018, BHD and HML lodged their target’s statements which each contained an independent expert’s report concluding that the relevant bid is not fair but reasonable.

#### **Declaration**

The Panel considers that the circumstances in relation to each company are unacceptable based on a number of factors in combination, including:

- the bidder’s statements (as supplemented) did not adequately disclose information material to the acceptance of the bids, including the various relationships and transactions between JBL, BHD, HML and JBFG and the financial position of JBL and JBFG
- in relation to BHD, the Loan Arrangements diminished the value of important assets of BHD making BHD less attractive to an acquirer and less likely to attract competing proposals
- BHD and HML agreed in advance and without qualification to early dispatch of the bidder’s statements
- JBL, BHD and HML failed to promptly correct the misrepresentation of the conditions of the voting director’s recommendation in the bidder’s statements and
- BHD and HML delayed in giving clear advice to shareholders to take no action in relation to the bids before considering the target’s statement and independent expert’s report.

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<sup>2</sup> On 9 November 2018, JBL released an announcement “clarifying” that these statements must be read in the context of its announcement on 10 September 2018 (but did not retract the statements)



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The Panel decided to extend time under s657C for the making of the application.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).

**Orders**

The Panel is considering what final orders it will make and will publish details in due course.

On 31 December 2018, the Panel made interim orders that JBL and all officers, agents or persons acting on its behalf must not take any further steps to process any acceptances received under each bid. The interim orders remain in effect.

The sitting Panel was Yasmin Allen, James Dickson (sitting President) and Bruce McLennan.

The Panel will publish its reasons for the decision in due course on its website [www.takeovers.gov.au](http://www.takeovers.gov.au).

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## **ANNEXURE A**

### **CORPORATIONS ACT SECTION 657A**

### **DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

**BENJAMIN HORNIGOLD 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 6 June 2018, BHD announced that its board had approved in principle entering into an exclusive trading arrangement with JB Trading, with JB Trading issuing to BHD a \$13.5 million convertible note as consideration for entering into the exclusive trading arrangement (**JB Trading Transaction**).



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8. On 30 June 2018, JBL issued a tax invoice to BHD of \$4,169,237 (excluding GST), which included performance fees, based on the impact on net tangible assets of the issue of convertible notes under the JB Trading Transaction. The amount referred to in the invoice was paid by BHD before the date of the invoice. The JB Trading Transaction was ultimately terminated.<sup>1</sup> BHD's preliminary final report<sup>2</sup> stated that:

*"Due to a timing adjustment in relation to the proposed convertible note transaction with JB Trading House Pty Ltd and the subsequent exercise by the ASX of their discretion to require the Company to seek shareholder approval for the proposed convertible note transaction, fees of \$4,553,773 (which had been calculated on the basis that the transaction had been implemented at that time) were paid to the Investment Manager at 30 June 2018 and are now refundable."*

9. 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).
10. 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.
11. 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.
12. 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.
13. 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,

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<sup>1</sup> On 24 October 2018, BHD announced JB Trading had given notice to BHD terminating the JB Trading Transaction

<sup>2</sup> Released on ASX on or about 3 September 2018



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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.

14. In the bid implementation agreements, each of BHD and HML represented that their respective voting directors<sup>3</sup> 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).
15. JBL’s bids for BHD and HML were not inter-conditional. Each bid was initially subject to a waivable 50.1% minimum acceptance condition.
16. 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.
17. On 17 September 2018, BHD’s board agreed to convert the repayment of performance fees referred to in paragraph 8 into an unsecured loan of up to \$4.5 million at an interest rate of 11.50% per annum repayable within 18 months. Mr Stuart McAuliffe participated in this board decision.

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<sup>3</sup> In the case of BHD – Messrs Aardoom and Cook. In the case of HML – Mr Ziegler and Ms Gunner



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18. On 16 October 2018, the boards of BHD and HML extended the loans to JBL (referred to in paragraph 10) for six months.
19. 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"*

20. The statements referred to in paragraph 19 were repeated throughout JBL's bidder's statements for BHD and HML. Prior to lodgement,<sup>4</sup> BHD and HML had asked JBL to amend these statements to reflect the conditionality of the recommendation. JBL did not make the requested amendments.
21. 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 19 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*".
22. 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 19 and
  - (b) extended the offer period for its bids for BHD and HML to 14 January 2019.<sup>5</sup> 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

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<sup>4</sup> On 24 October 2018

<sup>5</sup> The offer period has since been extended to 11 February 2019



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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**).

23. As at 22 November 2018, JBL had voting power in BHD and HML of 40.69% and 57.02% respectively.
24. 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.<sup>6</sup>
25. 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.
26. 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.
27. The independent expert stated in its report on JBL's bid for BHD, as factors in determining that the bid is reasonable, that:
  - (a) *"BHD's current trading suspension, JBL's current relevant interest in BHD and BHD's significant exposure to JBL (through existing loans and convertible instruments) are likely to act as impediments to investors realising returns through distributions or capital appreciation in the near-term"*
  - (b) *"JBL's existing interest in BHD would likely act as a significant impediment to any third party considering a takeover offer for BHD as well as limit the ability of BHD Non-Associated shareholders who do not accept the BHD Offer to change investment manager in order to implement an alternative investment strategy"*

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<sup>6</sup> See *Benjamin Hornigold Limited and Henry Morgan Limited* [2018] ATP 23





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- (c) *“JBL has a relevant interest in BHD in excess of 40% (subject to any withdrawals of acceptances) which may allow JBL to determine future investment decisions of BHD in addition to control of the management rights of BHD. JBL’s relevant interest is also likely to preclude any other takeover offers for BHD or other corporate activity from a third party”* and
- (d) *“Due to the significant loans made by BHD to JBL and JBFG, BHD has a dependency on JBL to be able to realise its investments in JBFG. BHD is unlikely to be able to realise the value of its loans other than in conjunction with JBL”*.
28. 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.
29. The following transactions, which occurred after the announcement of JBL’s bid, diminish the value of important assets of BHD making BHD less attractive to an acquirer and less likely to attract competing proposals (and as a result diminish the value of BHD if shareholders do not accept JBL’s bid), in effect operating as a lock up device:
- (a) the loan provided by BHD to JBL described in paragraph 17
- (b) the extension of the convertible loan to JBFG described in paragraph 16 and
- (c) the extension of the loan to JBL described in paragraph 18.
30. JBL’s bidder’s statement in relation to its bid for BHD (as supplemented) did 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 BHD 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



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- (d) the financial effect of the transactions referred to in paragraphs 10, 16, 17 and 18 and how they may impact on BHD shareholders' decision whether to accept the JBL bid.
31. JBL's supplementary bidder's statement in relation to its bid for BHD did not adequately deal with ASIC's disclosure issues in a way that was accessible to BHD shareholders. BHD 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.
32. The above disclosure issues have not been adequately remedied by the issue of BHD's target's statement and independent expert's report.
33. The following in combination (among other things) indicate that BHD 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) BHD agreeing in advance and without qualification, in the bid implementation agreement, to early dispatch of the bidder's statement
  - (b) BHD 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 BHD's directors' failure to promptly alert BHD 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 19 and 20)
  - (d) BHD 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) BHD'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.



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**EFFECT**

34. It appears to the Panel that:

- (a) the acquisition of control over voting shares in BHD has not taken place in an efficient, competitive and informed market
- (b) the holders of shares in BHD have not been given enough information to enable them to assess the merits of JBL's bid and
- (c) as a result of the lock up device referred to in paragraph 29, the holders of shares in BHD have been denied a reasonable and equal opportunity to participate in the benefits of JBL's bid.

**CONCLUSION**

35. 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 BHD or
  - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in BHD
- (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 BHD, 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 BHD.

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



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**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.



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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 directors<sup>1</sup> 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

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



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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.
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,<sup>2</sup> 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

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<sup>2</sup> On 22 October 2018



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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.<sup>3</sup> 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.
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.<sup>4</sup>
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.

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<sup>3</sup> The offer period has since been extended to 11 February 2019

<sup>4</sup> See *Benjamin Hornigold Limited and Henry Morgan Limited* [2018] ATP 23



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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
  - (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.





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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:



**Australian Government**

**Takeovers Panel**

- (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**