



Australian Government

Takeovers Panel

**Reasons for Decision
Benjamin Hornigold Limited 12
[2023] ATP 10**

Catchwords:

Decline to conduct proceedings – association – evidence – substantial holding – relevant interest – voting power

Corporations Act 2001 (Cth), sections 12, 249D, 249F, 602, 606, 610, 671B

Corporate Law Economic Reform Program Bill 1998 (Cth)

Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 20

ASIC Regulatory Guide 128: Collective action by investors

Agua Resources Limited [2019] ATP 13, Indiana Resources Limited [2017] ATP 8, Resource Generation Limited [2015] ATP 12, Dragon Mining Limited [2014] ATP 5, Mount Gibson Iron Limited [2008] ATP 4, Orion Telecommunications Ltd [2006] ATP 23, Dromana Estate 01R [2006] ATP 8, Pacific Magnesium Corporation Ltd [2005] ATP 12

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	NO	NO	NO	NO

INTRODUCTION

1. The Panel, Con Boulougouris, Michelle Jablko (sitting President) and John McGlue, declined to conduct proceedings on an application by Dawney in relation to the affairs of BHD. The application concerned certain conduct of the Directors of BHD and their respective related entities, which Dawney submitted constituted an undisclosed association between those parties. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

2020 Trading Policy has the meaning given in paragraph 32

2021 Trading Policy has the meaning given in paragraph 33

ASX Australian Securities Exchange

BHD Benjamin Hornigold Limited

Convening Shareholders has the meaning given in paragraph 5

Dawney Dawney & Co Ltd

Directors Mr Sulieman Ahmad Sulieman Ravell, Mr Michael Xavier Glennon and Mr Gary Desmond Miller

GC1 Glennon Small Companies Limited

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Glennon Capital	Glennon Capital Pty Ltd
Glennon Entities	Glennon Capital and GC1
Glennon Submissions	has the meaning given in paragraph 28
GTM	GTM Family Super Pty Ltd as trustee for GTM Super Fund
Miller Submissions	has the meaning given in paragraph 40
R4 Trading	R4 Trading Pty. Ltd.
Ravell Entities	R4 Trading, S4 Super, S4 Family and Wealth Focus
Ravell Submissions	has the meaning given in paragraph 25
Requisition	the requisition submitted by Dawney pursuant to section 249D ¹ for the Directors to convene a general meeting to seek to place BHD into voluntary liquidation
S4 Family	S4 Family Services Pty Ltd as trustee for S4 Family Trust
S4 Super	S4 Super Pty Ltd as trustee for S4 Super Fund
Sale Shares	has the meaning given in paragraph 18(c)
Sell Order	the sell order placed on 27 April 2021 for 2,000,000 BHD shares for \$0.35 per share
Unanimous Recommendation	the unanimous recommendation of the Directors to vote against the proposed resolutions sought in the Requisition
Wealth Focus	Wealth Focus Pty. Ltd.

FACTS

3. BHD is an ASX listed company (ASX code: BHD) with issued capital of 24,155,241 ordinary shares.
4. Dawney is the second largest shareholder of BHD with a relevant interest in 2,907,892 BHD shares, representing voting power of approximately 12.04%.
5. On 12 April 2019, Mr Ravell, Wealth Focus (an entity associated with Mr Ravell), Mr Miller, GTM (an entity associated with Mr Miller) and other associated BHD shareholders (**Convening Shareholders**) lodged an initial substantial holder notice disclosing a relevant interest in 1,748,338 BHD shares, representing voting power in approximately 7.238% of BHD shares. As disclosed in the notice, the shareholders were “[a]ssociates by nature of discussions held considering the board composition of BHD with the intent of calling a meeting of shareholders of BHD under section 249F of the Corporations Act”.

¹ 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)

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6. On 12 June 2019, each of the Directors were appointed as directors of BHD.²
7. On 9 July 2019, the Convening Shareholders lodged a ceasing to be a substantial holder notice.
8. On 9 June 2020, Mr Ravell was appointed as a director of GC1 (an entity associated with Mr Glennon). Mr Ravell and Mr Glennon make up two of the three directors of GC1.
9. On 27 April 2021 at approximately 2.08pm, Dawney acquired 650,828 BHD shares on-market. Following the on-market purchase by Dawney:
 - (a) the Sell Order was placed at approximately 2.32pm
 - (b) for approximately 8 minutes following placement of the Sell Order, trades were executed for 292,623 BHD shares at an average price of \$0.299
 - (c) the Sell Order was withdrawn at approximately 2.40pm and
 - (d) approximately 30 seconds after the Sell Order was withdrawn, a further 349,500 shares traded between \$0.305 and \$0.31.
10. On 28 April 2021, Glennon Capital disclosed by way of a substantial holder notice that it had acquired 1,513,150 BHD shares on-market between 26 April 2021 and 29 April 2021 at an average price of approximately \$0.30 per share. Mr Glennon also disclosed by way of an Appendix 3Y that Glennon Capital had acquired the 1,513,150 BHD shares on-market on two separate dates, being 22 April 2021 at an average price of \$0.275 per share and 27 April 2021 at an average price of \$0.3041 per share.
11. On 26 July 2021, a former director of BHD, Mr Stuart McAuliffe, disclosed by way of an initial substantial holder notice that he had acquired a relevant interest in 1,282,767 BHD shares, representing voting power of 5.31% in shares of BHD, following acquisitions made between 10 May 2021 and 22 July 2021. The Directors each purchased BHD shares between 2 June 2021 and 19 August 2021 following the acquisitions by Mr McAuliffe.
12. On 6 June 2023, BHD received the Requisition from Dawney pursuant to section 249D to consider placing BHD into voluntary liquidation. The Directors convened the meeting to be held on 2 August 2023. The Directors provided their Unanimous Recommendation that shareholders vote against the proposed resolutions.
13. Between June 2019 and May 2023, each of the Directors made various acquisitions of BHD shares. As a result of those acquisitions, each of the Directors (through their respective related entities) have a relevant interest and voting power in BHD shares as follows:

² The Directors were appointed (and the existing directors of BHD resigned) the day before the section 249F meeting was due to be held on 13 June 2019 based on support received for the Directors nominated by the Convening Shareholders and general frustrations around ongoing suspension of BHD shares from trading. The convened meeting was held to allow shareholders to meet with the Directors, although the resolutions proposed to be put to shareholders were all withdrawn

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- (a) Mr Glennon has a relevant interest in 5,170,174 BHD shares, representing voting power of approximately 21.4%
- (b) Mr Ravell has a relevant interest in 1,490,567 BHD shares, representing voting power of approximately 6.17% and
- (c) Mr Miller has a relevant interest in 1,207,130 BHD shares, representing voting power of approximately 4.99%.

APPLICATION

Declaration sought

14. By application dated 7 July 2023, Dawney sought a declaration of unacceptable circumstances. Dawney submitted that (among other things) the Directors were, and continue to be at all relevant times, undisclosed associates by virtue of:
- (a) the Directors making various acquisitions of BHD shares between June 2019 and May 2023
 - (b) the Directors being appointed as directors of BHD on 12 June 2019 as nominated by the Convening Shareholders
 - (c) the common directorship of the Directors with respect to BHD, and in relation to Mr Glennon and Mr Ravell, common directorship with respect to GC1 and
 - (d) the Directors providing the Unanimous Recommendation with respect to the general meeting convened pursuant to the Requisition to consider BHD being placed into voluntary liquidation.
15. Dawney submitted that the above circumstances had been used by the Directors to increase their collective voting power in BHD, entrench themselves as directors of BHD and otherwise obtain control of BHD.
16. Dawney submitted that the circumstances were unacceptable because they resulted in (among other things):
- (a) an acquisition of control over the voting shares in BHD that was not taking place in an efficient, competitive and informed market and
 - (b) one or more contraventions of Chapter 6, including:
 - (i) by failing to give notice of a substantial holding pursuant to section 671B(1) and
 - (ii) by acquiring a relevant interest in BHD shares in circumstances where a person's voting power increased from 20% or below to more than 20%, contrary to section 606(1).

Interim orders sought

17. Dawney sought interim orders to the effect that (among other things):
- (a) each of BHD, the Directors, the Glennon Entities, the Ravell Entities and GTM disclose details of, and documents relating to, any associations, including

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(among other things) with respect to acquisitions of BHD shares, the Sell Order, the Requisition, the Unanimous Recommendation and the affairs of BHD and

- (b) each of the Directors, the Glennon Entities, the Ravell Entities and GTM be prevented from acquiring, transferring or disposing of BHD shares, or exercising any votes attached to BHD shares,

pending determination of its application.

Final orders sought

18. Dawney sought final orders to the effect that (among other things):

- (a) the Glennon Entities, the Ravell Entities and GTM be required to make a takeover bid for BHD
- (b) the Directors, the Glennon Entities, the Ravell Entities and GTM disclose any association between them and lodge a substantial holder notice in a form acceptable to the Panel
- (c) all BHD shares held by each of the Directors, the Glennon Entities, the Ravell Entities and GTM in contravention of section 606 be vested in ASIC for sale (**Sale Shares**) and
- (d) none of the Directors, the Glennon Entities, the Ravell Entities and GTM be permitted to transfer or dispose of BHD shares until the Sale Shares are vested in ASIC and disposed of.

DISCUSSION

19. We have considered all the material presented to us in coming to our decision, but only specifically address those things that we consider necessary to explain our reasoning.

20. The Panel's starting point for an association matter is that it is for the applicant to demonstrate a sufficient body of evidence of association and to convince the Panel as to that association, albeit with proper inferences being drawn (see *Mount Gibson Iron Limited*³).

21. This test was discussed in *Dragon Mining Limited*⁴:

We are conscious of the risk that some people may read this decision as signalling a raising of the 'association hurdle'. This is not our intention. Our decision in this matter was based purely on the evidence that was submitted to us.

Dromana Estate Limited 01R acknowledges the difficulties that an applicant faces in gathering evidence in association matters. In deciding whether to conduct proceedings on an association case, this must be kept in mind. However, the Panel has limited investigatory powers which means, before we decide to conduct proceedings, an applicant must do more than make allegations of association and rely on us to

³ [2008] ATP 4 at [15]

⁴ [2014] ATP 5 at [59]-[60] (excluding footnotes)

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substantiate them. An applicant must persuade us by the evidence it adduces that we should conduct proceedings.

22. In its application, Dawney submitted that the Directors, the Glennon Entities, the Ravell Entities and GTM were, and continue to be at all relevant times, associates and “...are attempting to acquire control in circumstances where the accumulation of voting power did not occur in an efficient, competitive and informed market in that the voting power was accumulated in secret and was not disclosed, and continues not to be disclosed, in accordance with Chapter 6.”
23. For the reasons set out below, we have declined to conduct proceedings in this matter.

Prior collaborative conduct

24. Dawney submitted that the appointment of the Directors as directors of BHD following their nomination by the Convening Shareholders demonstrated prior collaborative conduct between Mr Ravell (including Wealth Focus) and Mr Glennon for the purposes of controlling or influencing the composition of the BHD board.
25. In the preliminary submissions of Mr Ravell and the Ravell Entities (**Ravell Submissions**), it was submitted that, at the time of the meeting, Mr Ravell only held an interest in 1 BHD share, Mr Miller held an interest in 56,699 BHD shares and Mr Glennon did not hold an interest in any BHD shares. Relying on *Indiana Resources Limited*⁵, it was submitted that merely agreeing to stand for election as a director does not necessarily evidence an association between a nominee and a requisitioning shareholder.
26. We are not satisfied that the simultaneous appointment of the Directors following their nomination by the Convening Shareholders is sufficient evidence in support of an association. In particular, we note that:
- (a) Dawney relied on the appointment of the Directors to demonstrate an association between Mr Ravell and Mr Glennon, despite the fact that it was Mr Ravell and Mr Miller (and their respective related entities) that were associated at the time the Directors were nominated by the Convening Shareholders as disclosed in the substantial holder notice and
 - (b) the appointment of the Directors to the board of BHD occurred back in 2019, and the disassociation of the Convening Shareholders as disclosed in their ceasing to be a substantial holder notice⁶ has not been questioned until now.⁷

Structural links

27. Dawney submitted that the common directorships that exist in relation to BHD (as applicable to all the Directors) and GC1 (as applicable to Mr Glennon and Mr Ravell) are indicative of an association between the Directors, the Glennon Entities and the Ravell Entities. In its submissions, Dawney relied on the concept that “...common

⁵ [2017] ATP 8

⁶ See paragraph 7

⁷ See paragraph 50 regarding Dawney’s reliance on historical circumstances in its application

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directorships may, in appropriate circumstances be a factor which, in combination with other probative material, supports an inference of association” as stated by the Panel in Orion Telecommunications⁸.

28. In relation to GC1, in the preliminary submissions of Mr Glennon and the Glennon Entities (**Glennon Submissions**) it was submitted that Glennon Capital, as the manager of GC1, makes the investment decisions of GC1 and such decisions do not require the approval of the board of directors of GC1 nor are they discussed with the board of directors of GC1. Further, it was submitted in the Glennon Submissions that there is no common director of BHD and GC1 who is the “controlling mind” of both entities, and that the two entities operate separately and distinctively.
29. The Ravell Submissions further provided that while Mr Ravell will sometimes receive notifications from GC1 of its dealings in BHD shares and other business updates, he does not play an active role in relation to, or have any control over, the day-to-day investments or operations of GC1.
30. Although common directorships can be evidence of an association between individuals, it is not apparent in this case that Mr Ravell as a director of GC1 has any ability to control or influence the activities of GC1, given investment decisions are made by Glennon Capital as the investment manager. As such, we are not satisfied that the mere appointment of Mr Ravell to the board of GC1 is sufficient evidence to support an inference of association.

Shared goal or purpose

31. Dawney submitted that a number of circumstances were indicative of a shared goal or purpose as between the Directors (and their respective related entities as applicable).

Securities trading policy

32. Dawney submitted that:
 - (a) in accordance with BHD’s securities trading policy adopted by the board of BHD on 6 July 2020 (**2020 Trading Policy**), various BHD share acquisitions by the Directors (through their respective related entities) would have been discussed between them
 - (b) the 2020 Trading Policy required any “Restricted Person” (which included a director and any company, trusts or nominees that person controlled) to notify BHD of any dealing in BHD securities, and where the company secretary and chairman of BHD were the same person (being in this case, Mr Glennon) the “Restricted Person” was to notify two other directors of BHD of the dealings and
 - (c) Mr Ravell appeared to have dealt in BHD securities during “Closed Periods” (as defined in the 2020 Trading Policy) on several occasions, and that such

⁸ [2006] ATP 23 at [102]

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dealings would have been discussed with and sanctioned by Mr Glennon in accordance with the 2020 Trading Policy.

33. In the Glennon Submissions, it was submitted that Dawney had referred to an outdated trading policy, being the 2020 Trading Policy, and that under the current trading policy of BHD adopted by the board of BHD on 29 March 2021 (**2021 Trading Policy**), Mr Ravell had not acquired any BHD shares during a “Prohibited Period” (as defined in the 2021 Trading Policy) and the acquisitions by Mr Ravell were notified to BHD in accordance with the 2021 Trading Policy.
34. We are of the view that discussing acquisitions at a board level in accordance with a trading policy is not necessarily indicative of an association. Given Dawney did not provide any further evidence with respect to the application of the 2020 Trading Policy or 2021 Trading Policy, we are not satisfied that the circumstances set out support an inference of an association.

Share acquisitions and Sell Order

35. Dawney submitted in its application that the Directors (through their respective related entities) have made various BHD share acquisitions between June 2019 and May 2023 with a shared goal to entrench themselves as directors of BHD and obtain control of BHD.
36. In particular, the Directors (through their respective related entities) each purchased BHD shares following the acquisition of shares and lodgement of an initial substantial holder notice by Mr McAuliffe (a former director of BHD) which Dawney submitted would have been discussed between the Directors pursuant to the 2020 Trading Policy.
37. Furthermore, Dawney submitted that following Dawney’s purchase of BHD shares on 27 April 2021, the Sell Order was placed and then withdrawn within an approximate 8-minute period. The Sell Order was in excess of the high for the BHD share price that day, and during the 8-minute period between placement and withdrawal of the Sell Order, trades were executed with respect to BHD shares and it appeared that Glennon Capital acquired at least a portion of those shares (based on the subsequent substantial holder notice that was lodged by Glennon Capital). It was submitted by Dawney that the Sell Order was placed by Glennon Capital to create an “...*illusion that approximately 8.3% of the issued capital of BHD Shares was for sale, imposing downward pressure on the price for BHD Shares*” and ultimately prevented the trading of BHD shares in an efficient, competitive and informed market.
38. In the Glennon Submissions, it was submitted that:
 - (a) the Sell Order was placed by Glennon Capital, but that Mr Glennon and the Glennon Entities are investors who are primarily in the business of investing and trading in securities, and the Sell Order and subsequent trading was in line with normal trading practice and
 - (b) in relation to the acquisition of BHD shares following Mr McAuliffe’s acquisition, the trading was again in line with normal trading practice and did not require approval as it was conducted outside a “Prohibited Period”.

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39. The Ravell Submissions noted that “[t]he Ravell Entities have bought shares on market since the shares returned to trading on the ASX. The fact it has done so in no way shows collaborative buying with any other entities that have also bought since the shares returned to trading.”
40. The preliminary submissions made by Mr Miller and GTM (**Miller Submissions**) noted that the last time GTM had purchased BHD shares was in August 2021, and GTM is a self-managed super fund with different investment objectives to that of the Glennon Entities and the Ravell Entities.
41. Putting aside the issue of Dawney’s reliance on the outdated 2020 Trading Policy⁹, most circumstances relied on by Dawney above occurred some time ago. In particular, we note that:
- (a) Glennon and the Glennon Capital Entities, and Miller and GTM, have not increased their relevant interest in BHD shares since October 2022 and August 2021 respectively. Ravell and the Ravell Entities last increased their relevant interest in May 2023 and
 - (b) the share acquisitions made following the Sell Order and Mr McAuliffe being disclosed as a substantial holder were made in 2021, and prior to these proceedings, such acquisitions have not been raised as unacceptable conduct.¹⁰
42. We do not make any comment as to whether or not the Sell Order and subsequent acquisitions are in line with Glennon Capital’s normal trading practice (as submitted in the Glennon Submissions), but we do not consider that, on the material provided to us, those circumstances are suggestive of any association.

Unanimous Recommendation

43. Dawney submitted that the fact that the Directors made the Unanimous Recommendation is further evidence of a shared goal or purpose between the alleged associated parties.
44. In the Glennon Submissions, it was noted that “[a] mere common intention to vote in favour of a particular resolution at a general meeting of a company does not cause investors to become associates of one another”, relying on the Panel’s decision in *Pacific Magnesium Corporation Ltd*¹¹. It was disclosed that the Directors discussed the Unanimous Recommendation as directors of BHD and in their capacity as shareholders, but that no shareholder was bound to vote in a certain way with respect to the proposed resolutions, citing ASIC Regulatory Guide 128: *Collective action by investors* and the Panel’s decision in *Resource Generation Limited*¹².
45. We were not convinced that the discussions that occurred between the Directors in their capacity as shareholders is enough to evidence an association. It is often the case that directors of a company (who may also be shareholders of that company)

⁹ See paragraph 34

¹⁰ See paragraph 50 regarding Dawney’s reliance on historical circumstances in its application

¹¹ [2005] ATP 12 at [25]

¹² [2015] ATP 12 at [106]

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will provide recommendations to shareholders to vote in a particular way, and this does not necessarily mean an association exists between those individuals. In addition, it is not often the case that a board will support recommendations put forward by requisitioning shareholders pursuant to section 249D. Dawney also did not provide any evidence as to why a recommendation to vote against voluntary liquidation would be an inappropriate recommendation to give in the circumstances.

46. Further, we did not consider the fact that the Directors collectively hold a material interest (being 32.57%) in BHD to be a relevant factor when considering the impact of discussing the Unanimous Recommendation in their capacity as shareholders (on the basis that that we considered that the alleged association did not evidence a wider control purpose with respect to BHD).

The Mount Gibson hurdle and tactical applications

47. In its application, Dawney submitted that “*the circumstances of association between the Common Directors, the Common Directors [sic], the Glennon Capital Entities, the Ravell Entities and GTM is one which can be proved with the assistance of the Panel and accordingly, in these submissions the Applicant asks the panel to draw certain inferences.*” It also requested that the Panel exercise its “*...commercial skill, knowledge and practice to look more broadly at the circumstances leading to the position of BHD and investigate the Applicant’s concerns...*”.
48. The Glennon Submissions, Ravell Submissions and Miller Submissions submitted that Dawney had not provided sufficient evidence to establish an association between the Directors, the Glennon Entities, the Ravell Entities and GTM.
49. As noted in *Dragon Mining Limited*¹³, the Panel has limited investigatory powers, and as such, an applicant must do more than make allegations of association and rely on the Panel to substantiate them. Having considered all the material, we do not consider that Dawney has provided sufficient probative material to justify us making further enquiries in relation to the alleged associations.
50. With regards to the historic circumstances relied on by Dawney in its application, it appears to us that Dawney may have been able to lodge an application earlier if it indeed held concerns about the conduct of the Directors. We are of the view that there was undue delay by Dawney in lodging the application and, accordingly, we are concerned that the timing of the application may have been tactical. As explained in the explanatory memorandum to the *Corporate Law Economic Reform Program Bill 1998 (Cth)*, “[t]he Panel was rejuvenated in 2000 to deal with tactical litigation in takeover bids...”¹⁴. We consider timing of the Panel application and the Requisition to be relevant factors to take into account in deciding whether to conduct proceedings.

¹³ [2014] ATP 5 at [59]-[60]

¹⁴ See also *Agua Resources Limited* [2019] ATP 13 at [24]

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DECISION

51. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

52. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Michelle Jablko

President of the sitting Panel

Decision dated 18 July 2023

Reasons given to parties 8 August 2023

Reasons published 9 August 2023

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Advisers

Party	Advisers
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