



Australian Government

Takeovers Panel

Reasons for Decision

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

Catchwords:

Review of ASIC decisions – affirmed ASIC decisions – extension of time to lodge target’s statement – independent expert’s reports

Corporations Act 2001 (Cth), sections 5C, 633, 650D, 650E, 655A, 656A

ASIC Regulations 2001 (Cth), Regulation 16(a), Acts Interpretation Act 1901 (Cth), section 36

Guidance Note 2: Reviewing Decisions, ASIC Regulatory Guide 9: Takeover Bids

Lion-Asia Resources Pte Ltd [2009] ATP 25, Taipan Resources NL 05 [2000] ATP 14

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

INTRODUCTION

1. The Panel, Yasmin Allen, James Dickson (President) and Bruce McLennan affirmed decisions of ASIC to refuse relief under s655A(1)¹ to Benjamin Hornigold Limited and Henry Morgan Limited to extend the time for the dispatch of their target’s statements and, in the alternative, to permit them to lodge incomplete target’s statements.

2. In these reasons, the following definitions apply.

BHD	Benjamin Hornigold Limited
Bid Implementation agreements	Bid implementation agreements entered into by JBL with each of BHD and JBL dated 10 September 2018
HML	Henry Morgan Limited
JBL	John Bridgeman Limited
Relief Applications	Applications under s655A to ASIC by BHD and HML dated 14 and 20 November described in paragraphs 8 and 9.

FACTS

3. BHD and HML are ASX listed investment companies (ASX codes: BHD and HML respectively). JBL is an investment management company listed on the NSX (NSX Code: JBL). JBL manages the investments of BHD and HML.

4. On 10 September 2018, JBL announced an intention to make separate off-market scrip takeover offers to acquire (a) all the shares and options in BHD that JBL did not currently own and (b) all the shares in HML that JBL did not currently own. Copies

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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of the Bid Implementation Agreements were attached to the announcement. The agreements included consent for early dispatch of bidder's statements by each of BHD and HML. Neither bid was conditional on the other.

5. On 19 September 2018, BHD and HML made separate announcements stating that their respective independent directors had engaged an independent expert (they appointed the same expert).
6. On 22 October 2018, JBL released its annual report.
7. On 31 October 2018, JBL lodged its bidder's statements in relation to BHD and HML. On 9 November 2018, JBL announced that it had completed dispatch of the bidder's statements and offers in relation to both bids. Under items 11 and 12 of s633,² BHD and HML were required to lodge and dispatch their respective target's statements by 26 November 2018.
8. On 14 November 2018, BHD and HML made separate applications to ASIC seeking in effect an extension of time for lodgement and dispatch of their respective target's statements (with accompanying respective expert's reports) to 10 December 2018.
9. On 20 November 2018, BHD and HML made separate applications to ASIC seeking relief to lodge an incomplete target's statement, in the event that ASIC was not minded to give relief to extend time for the lodgement of the target's statements.
10. On 21 November 2018, ASIC advised BHD and HML that it had reached an in-principle decision to refuse the Relief Applications. On 22 November 2018, ASIC advised BHD and HML that it had refused the Relief Applications and provided reasons for its decisions.
11. On 23 November 2018, JBL extended the offer period for its bids for BHD and HML to 14 January 2019 and provided further disclosure in supplementary bidder's statements. 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 under ss650D(1)(a)(ii) and 650E.

APPLICATION

12. By separate similarly worded applications dated 22 November 2018, BHD and HML applied for a review of ASIC's decisions in response to the Relief Applications. They submitted (among other things) that:
 - (a) The delay in dispatching compliant target's statements was caused by the independent expert not being able to produce a compliant independent expert's report in time, which in turn was due to the delay in lodgment of JBL's annual report. This was beyond the control of BHD and HML.
 - (b) By not giving relief, ASIC was directly depriving BHD's and HML's shareholders of enough information to enable them to assess the merits of the offer.

² And the operation of s36 of the *Acts Interpretation Act 1901* (Cth) as is applied by s5C of the *Corporations Act 2001* (Cth)

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- (c) If the Panel is not minded to give relief to extend the time for lodgment of the target's statements, they submitted that relief should be given to allow for the dispatch of incomplete target's statements, noting that they were willing to comply with any conditions, including a recommendation that their shareholders take no action until provision of the relevant independent expert's report.

DISCUSSION

Introduction

13. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.
14. We decided to direct that both matters be considered in the one Panel proceedings under Regulation 16(a) of the *ASIC Regulations 2001* (Cth), after receiving submissions from the parties on that question.
15. As noted in Guidance Note 2: Reviewing Decisions (at [10]),³ the Panel treats an application for review of an ASIC decision as a de novo consideration on the merits. We have considered the matter on its merits and have considered (among other things):
- (a) the relevant ASIC policy and whether it was applied
 - (b) the applications for review of ASIC's decisions and the material provided
 - (c) the reasons for ASIC's decisions
 - (d) events that occurred after ASIC refused the Relief Applications, including JBL extending its bid and the requirement to offer withdrawal rights to BHD and HML shareholders and
 - (e) submissions and rebuttals to the Panel's brief.

Extension of time to lodge the target's statements

16. ASIC's Regulatory Guide 9: Takeover Bids states that:

RG 9.464 We may give case-by-case relief to extend the time in which the target must send its target's statement to holders under a bid. We will consider giving this relief if: (a) the factors that have led to delay in preparing the target's statement are beyond the target's control; (b) the target's statement is sent to holders more than 10 business days before the offers are scheduled to close; and (c) if the target is listed – the target informs the market of the extension of time and, where appropriate, recommends that holders do not accept offers or make any final decisions in relation to the bid until they have read the target's statement.

RG 9.465 In addition to requiring the target to advise the market of the extension of time, we may also require the target to immediately inform the market of significant information that is already in the target's possession and that holders require in deciding whether to accept offers under the bid.

³ See also *Lion-Asia Resources Pte Ltd* [2009] ATP 25 at [21]

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RG 9.466 *We will not give this relief if we consider that the target already has all the material information that a holder needs to assess the merits of a bid.*

RG 9.470 *If the target cannot reasonably be expected to dispatch its target's statement to holders more than 10 business days before the close of the bid: (a) the target may ask the bidder to extend its bid; or (b) the target may apply for the relief discussed at RG 9.471 to dispatch an incomplete target's statement.*

17. ASIC's reasons for refusal to give extension of time relief included (among other things) that:
- (a) it was open to BHD and HML to engage a new well-resourced expert to satisfy the timetable
 - (b) BHD and HML consented to early dispatch of the bidder's statements and therefore the due date for the target's statements had been brought forward by their own actions
 - (c) BHD and HML agreed to the timetable set down for the bids when they entered into the Bid Implementation Agreements and
 - (d) giving relief would be inconsistent with the principles in s602 because (among other things) BHD and HML did not appear to provide the customary 'take no action' statements, a significant number of shareholders had already accepted the bid and the extension would mean that their shareholders would not have a copy of the target's statement and expert's reports prior to their annual general meetings (scheduled for BHD on 30 November 2018 and HML on 29 November 2018).
18. BHD and HML submitted (in a joint submission) that:
- (a) each of BHD and HML do not have employees and management services are outsourced solely to JBL
 - (b) the expert requested material from them individually on 11 September 2018 but did not receive that material prior to the lodgement of the accounts of each of HML, BHD and JBL
 - (c) the expert had informed ASIC on 19 November 2018 that it had "*in the last couple of days*" received all the information that it required to commence substantive work on the independent expert's report
 - (d) JBL's accounts were lodged late (on 22 October 2018) and there were queries of JBL's and HML's accounts from the NSX and ASX respectively and
 - (e) HML's main asset is an investment in JB Financial Group Pty Ltd. That company lodged a financial report as a large proprietary company on 2 November 2018.
19. BHD and HML submitted that consenting to early dispatch of the bidder's statements was not contemplated to cause delay and was not the cause of the delay. They submitted that it was reasonable for the independent directors of BHD and HML to assume that "*a bidder would not delay in the provision of material requested by an independent expert because such an event would ultimately be to the bidder's detriment*".

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20. ASIC submitted that:
- (a) the full year audited accounts for BHD and HML were released 7 weeks ago on 1 October 2018 and the audited JBL accounts were released 4 weeks ago on 22 October 2018
 - (b) ASX and NSX queries in relation to the BHD and HML accounts did not result in any restatement or revisions of those accounts
 - (c) BHD and HML have released to the market monthly, price sensitive, net tangible asset disclosures (the most recent disclosure was made on 14 November 2018) presumably with the assistance of JBL. It would be unusual if BHD and HML did not prepare comprehensive working papers supporting these material net tangible asset disclosures and there is no readily apparent factor that would explain why the expert could not have relied on these working papers held by BHD and HML. In addition, HML must have been in possession of detailed information about JB Financial Group Pty Ltd to value its investment for the purposes of its net tangible asset disclosure.
21. The extension of JBL's bid means that one aspect of ASIC's policy has been satisfied. If relief was given BHD and HML would be required to dispatch their target's statements more than 10 business days before the close of JBL's bids.
22. However we are not satisfied that the delay in preparing BHL's and HML's target's statement was beyond the control of each. We agree with ASIC that there was sufficient time for the expert to assess JBL's accounts and BHL and HML could have provided the expert with the same information they obtained from JBL for the purposes of preparing net tangible asset disclosures.
23. BHD and HML had a greater capacity to provide information to the expert than in the case of a target subject to a hostile bid.⁴ We agree with ASIC that it is relevant that they agreed to early dispatch of JBL's bidder's statements, leaving them and their expert less time to consider those documents. In addition, the Bid Implementation Agreements envisaged that the bidder's and target's statement would be lodged with ASIC and ASX on 24 September 2018. After that deadline had passed, BHL and HML should have been on notice that there may be issues in obtaining information from JBL.

Relief to allow for the lodgement of incomplete target's statements

24. ASIC's Regulatory Guide 9: Takeover Bids states that:

[9.471] *In limited circumstances, we may grant relief to allow a target to dispatch an incomplete target's statement to holders. For example, we may grant relief on condition that the target: (a) advises its holders of the nature, extent and significance of the relevant deficiencies in the target's statement; and (b) undertakes to provide a supplementary target's statement which remedies all the deficiencies mentioned in RG 9.471(a) as soon as practicable.*

⁴ For an example of the Panel affirming an ASIC decision to give a modification under s655A to extend the time for the lodgement of target's statement, in the case of a target subject to a hostile bid, see *Taipan Resources NL 05* [2000] ATP 14

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25. ASIC's reasons for refusal for relief permitting lodgement of incomplete target's statements included (among other things) that:
- (a) the issues referred to in paragraphs 17(b) and 17(c)
 - (b) it would be unlikely if relief was given that the incomplete target's statements would provide meaningful disclosure
 - (c) it is not uncommon in a takeover context for experts to be called upon to report without complete information (for example, a hostile bid) and
 - (d) any action by ASIC to modify the requirements in Chapter 6 would not result in the provision of important statutory disclosure in a shorter time frame, it would simply relieve the applicants from any contraventions of the Act and, accordingly, the regulatory detriment did not outweigh the commercial benefit that would flow from giving the relief.
26. In the circumstances of JBL's bids for BHD and HML, including NSX's queries regarding JBL's accounts,⁵ we consider it is not appropriate to give relief to allow for the lodgement of incomplete target's statements.

Other matters

27. BHD and HML made the following submission:

ASIC has refused relief. Practically, this will force the Applicants to dispatch incomplete target's statements or not at all. The Applicants have no doubt ASIC will subsequently lodge a statement of unacceptable circumstances which will likely bring the transaction to an end, nullifying the purpose of completing the IER.

28. We consider that this submission misunderstands the effect of the refusal of the Relief Applications. Our decision should not be understood to excuse BHD or HML from lodging and dispatching target's statements (and accompanying expert's reports) which comply with Chapter 6 and relevant ASIC policy as soon as they are able to do so.
29. JBL submitted that it was willing to accommodate a proposal, implicitly on the basis relief was given, to extend withdrawal rights for shareholders who accepted the bids following the release of the supplementary bidder's statement but prior to the release of BHD's and HML's target's statements. It is possible that such withdrawal rights would require an exemption or modification under s655A, in which case that would be a matter for ASIC. Our decision does not preclude JBL offering such withdrawal rights (or seeking ASIC relief, if required).

⁵ The query related to a statement in JBL's independent auditor's report which included the following: "We draw attention to Note 2, "Going Concern" in the Financial Report. The conditions disclosed in Note 2, indicate a material uncertainty exists that may cast significant doubt on the Group's ability to continue as a going concern and, therefore, whether it will realise its assets and discharge its liabilities in the normal course of business, and at the amounts stated in the Financial Report."

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DECISION

30. For the reasons above, we affirm the decision of ASIC not to grant relief as sought in the Relief Applications.

James Dickson

President of the sitting Panel

Decision dated 26 November 2018

Reasons given to parties 4 December 2018

Reasons published 5 December 2018

Advisers

Party	Advisers
BHD and HML	AJ & Co Lawyers