



Australian Government

Takeovers Panel

Reasons for Decision

**Benjamin Hornigold Limited 05, 06 & 07
[2019] ATP 18**

Catchwords:

Declaration – orders – circumventing Panel orders – lock-up device – independent expert’s report – supplementary target’s statement

Corporations Act 2001 (Cth), sections 203D, 249F, 602(a)(i), 640, 646, 650F(1), 657A, 657C, 657D(2)(a), 657D(2)(d) 670C(2)

Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 16

Guidance Note 4: Remedies General, Guidance Note 7: Lock-up devices, Guidance Note 22: Recommendation and Undervalue Statements

Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311, Glencore International AG v Takeovers Panel [2006] FCA 274, ACI Operations Pty Ltd v Berri Ltd (2005) 15 VR 312, Re Village Roadshow Limited 02 (2004) 22 ACLC 1332

Aurora Absolute Return Fund [2019] ATP 14, Benjamin Hornigold Limited 02 and Henry Morgan Limited 02 [2019] ATP 1, Finders Resources Limited 03R [2018] ATP 11, Strategic Minerals Corporation NL 02R, 03R, 04R and 05R [2018] ATP 5, Molopo Energy Limited 01 & 02 [2017] ATP 10, The President’s Club Limited 02 [2016] ATP 1, Austral Coal Limited 03 [2005] ATP 14, Sirtex Medical Limited [2003] ATP 22

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

INTRODUCTION

1. The Panel, Christian Johnston, John Sheahan QC (sitting President) and Sharon Warburton, made a declaration of unacceptable circumstances in relation to the affairs of Benjamin Hornigold Limited because the placement of foreign currency banknotes by Benjamin Hornigold with King’s Currency Exchange Pty Ltd effectively replaced a loan the subject of a previous order of the Panel and, individually and in conjunction with an extension of the period for the return of all banknotes placed by Benjamin Hornigold with King’s Currency, operated as a lock-up device in relation to John Bridgeman’s off-market takeover bid for Benjamin Hornigold.

2. In these reasons, the following definitions apply.

- 2018 Bid** has the meaning given in paragraph 5
- 2019 Bid** has the meaning given in paragraph 13
- Bartholomew Roberts or BRL** Bartholomew Roberts Pty Ltd
- Benjamin Hornigold or BHD** Benjamin Hornigold Limited
- Benjamin Hornigold Limited 02** *Benjamin Hornigold Limited 02 and Henry Morgan Limited 02 [2019] ATP 1*

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BHD Application	the application by Benjamin Hornigold dated 8 August 2019
CIO	Chief Investment Officer
Court Proceeding	has the meaning given in paragraph 14
Diagram	the diagram in paragraph 64
Foreign Currency Transactions	means the placement of foreign currency banknotes by Benjamin Hornigold with King's Currency referred to in paragraphs 67, 69, 71 and 72
Henry Morgan or HML	Henry Morgan Limited
IER	has the meaning given in paragraph 16
JB Financial Group or JBFG	JB Financial Group Pty Ltd
JBFG Facility	has the meaning given in paragraph 10
JBL Application	the application by John Bridgeman dated 8 August 2019
JBL Loan	has the meaning given in paragraph 6
John Bridgeman or JBL	John Bridgeman Limited
King's Currency or KC	King's Currency Exchange Pty Ltd
Partners for Growth	Partners for Growth V, L.P.
Repayment Order	has the meaning given in paragraph 7
Request Letter	has the meaning given in paragraph 73
s249F Meeting	has the meaning given in paragraph 12
Services Agreement	has the meaning given in paragraph 8, including as amended by variation deeds dated 31 July 2018, 17 September 2018 and the Variation Deed (as the context requires)
Supplementary Opinion	has the meaning given in paragraph 23
Supplementary Target's Statement	has the meaning given in paragraph 22
Variation Deed	has the meaning given in paragraph 19
Variation Request	the request by Benjamin Hornigold dated 24 July 2019

FACTS

3. Benjamin Hornigold is an ASX listed investment company (ASX code: BHD). Trading in Benjamin Hornigold securities has been suspended since 30 July 2018. Benjamin Hornigold has no employees.

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4. John Bridgeman is an NSX listed company (NSX code: JBL). Trading in John Bridgeman securities has been suspended since 10 April 2019.
5. On 10 September 2018, John Bridgeman announced an intention to make an off-market bid for all of the securities in Benjamin Hornigold. John Bridgeman's bidder's statement was lodged with ASIC on 6 November 2018 and offers under the takeover bid opened on 9 November 2018 (**2018 Bid**).
6. On 28 December 2018, certain Benjamin Hornigold shareholders¹ made applications to the Panel seeking declarations of unacceptable circumstances in relation to the affairs of Benjamin Hornigold² and the Panel made a declaration of unacceptable circumstances in relation to the affairs of Benjamin Hornigold on 25 January 2019.³ The Panel made the declaration on the basis that (in combination with other things) on or about 17 September 2018 a \$4.5 million receivable due to Benjamin Hornigold from John Bridgeman was converted into an unsecured loan with a term of 18 months (**JBL Loan**). This diminished the value of important assets of Benjamin Hornigold making Benjamin Hornigold less attractive to an acquirer and less likely to attract competing proposals (and as a result, diminished the value of Benjamin Hornigold if shareholders did not accept the 2018 Bid), in effect operating as a lock-up device.⁴
7. On 8 February 2019, the Panel made orders in relation to the affairs of Benjamin Hornigold,⁵ including order 6 (the **Repayment Order**) which required John Bridgeman to repay the JBL Loan (with any interest) by 6 March 2019.
8. Through a series of transactions made after the date of the Repayment Order, John Bridgeman (as exclusive investment manager for Benjamin Hornigold) directed Benjamin Hornigold to place approximately \$5.46 million in foreign currency banknotes with King's Currency⁶ (increasing the total balance of foreign currency banknotes placed to approximately \$7.12 million as at 31 May 2019) for management and on-trading pursuant to a services agreement dated 21 February 2018⁷ between Benjamin Hornigold and King's Currency (**Services Agreement**) (discussed in paragraph 64 to paragraph 75).

¹ Mr 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

² See *Benjamin Hornigold Limited 02 and Henry Morgan Limited 02* [2019] ATP 1 at [11]. Applications were also made seeking declarations of unacceptable circumstances in relation to the affairs of Henry Morgan

³ The Panel also made a declaration in relation to the affairs of Henry Morgan

⁴ See *Benjamin Hornigold Limited 02 and Henry Morgan Limited 02* [2019] ATP 1 at [62]

⁵ The Panel also made orders in relation to the affairs of Henry Morgan

⁶ All placements of foreign currency banknotes by Benjamin Hornigold were accounted for as cash transfers in Australian dollars to King's Currency

⁷ As amended by variation deeds dated 31 July 2018 and 17 September 2018

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9. On 5 March 2019, John Bridgeman announced that it had determined not to proceed with the 2018 Bid and all previous acceptances of the 2018 Bid were cancelled and the 2018 Bid would lapse.
10. On 6 March 2019, JB Financial Group provided an unsecured loan facility to John Bridgeman for up to \$7.0 million (**JBFG Facility**). On 7 March 2019, John Bridgeman drew down \$3.0 million of the JBFG Facility for the purpose of repaying Benjamin Hornigold in accordance with the Repayment Order and repaid \$3.0 million of the amount due under the Repayment Order to Benjamin Hornigold.
11. On 8 March 2019, John Bridgeman drew down a further \$1.5 million of the JBFG Facility for the purposes of repaying Benjamin Hornigold and repaid the remaining \$1.5 million in principal due under the Repayment Order to Benjamin Hornigold (albeit late).
12. On 22 March 2019, Benjamin Hornigold announced that it had received from certain Benjamin Hornigold shareholders a notice under ss249F⁸ and 203D of an intention to call a general meeting of Benjamin Hornigold shareholders to consider resolutions to remove and appoint directors (**s249F Meeting**). The s249F Meeting was later called to be held on 13 June 2019.
13. At a John Bridgeman board meeting held on 1 April 2019, the board considered that it may be the appropriate time for it to proceed with a new takeover bid for Benjamin Hornigold and resolved to commence preparation of a new bidder's statement. On 26 April 2019, John Bridgeman announced its intention to make a new off-market takeover bid for all of the securities in Benjamin Hornigold. The proposed consideration was 1 JBL share for each BHD share and 0.5 JBL option for each BHD option. At a John Bridgeman board meeting held on 30 April 2019, the board resolved to finalise the preparation and lodgement of the new bidder's statement which was ultimately lodged with ASIC on 3 May 2019 (at which stage its voting power in Benjamin Hornigold was 0.47%). Offers under the new takeover bid opened on 17 May 2019 (**2019 Bid**).
14. On 26 May 2019, Benjamin Hornigold commenced proceedings in the Supreme Court of Queensland seeking to restrain the s249F Meeting from proceeding (**Court Proceeding**).
15. On 28 May 2019, John Bridgeman announced that it had resolved to increase the consideration offered under the 2019 Bid from 1 JBL share per BHD share to 1.5 JBL shares per BHD share. The consideration for BHD options remained unchanged.
16. On 30 May 2019, Benjamin Hornigold lodged its target's statement in relation to the 2019 Bid with ASIC. The target's statement included a recommendation by the

⁸ 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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‘Voting Directors’ of Benjamin Hornigold (Messrs Peter Aardoom and Bryan Cook) that Benjamin Hornigold securityholders should accept the 2019 Bid, in the absence of a superior proposal. The target’s statement was accompanied by an independent expert’s report dated 30 May 2019 that opined that John Bridgeman’s offer to acquire BHD shares was ‘fair and reasonable’⁹ to BHD shareholders and the offer to acquire BHD options was ‘not fair but reasonable’ to BHD optionholders (IER).

17. On 3 June 2019, evidence was served in the Court Proceeding that indicated a strong likelihood that the resolutions to remove the directors of Benjamin Hornigold would be carried by a majority at the s249F Meeting. A copy of the evidence was sent by Benjamin Hornigold’s legal adviser to the directors (including Mr Stuart McAuliffe) and company secretary of Benjamin Hornigold late on 3 June 2019. The Court Proceeding was dismissed with costs on 4 June 2019.
18. On 12 June 2019, John Bridgeman gave notice under s650F(1) that the 2019 Bid had been freed from all defeating conditions and that its voting power in Benjamin Hornigold was 17.02%.
19. Also on 12 June 2019, Benjamin Hornigold and King’s Currency amended the Services Agreement under a variation deed dated 12 June 2019 (**Variation Deed**) to (among other things) increase the minimum return to Benjamin Hornigold and provide that all banknotes placed by Benjamin Hornigold are not returnable until 12 November 2019 (see paragraph 74).¹⁰
20. Following the resignation of all of the directors of Benjamin Hornigold and the company secretary at 7:45pm on 12 June 2019 (see paragraph 75), Benjamin Hornigold announced on 13 June 2019 that the newly appointed directors were considering the 2019 Bid and advised Benjamin Hornigold shareholders to ‘take no action’ in relation to the 2019 Bid (withdrawing the ‘accept’ recommendation of the former ‘Voting Directors’ made on 30 May 2019).
21. On 17 June 2019, Benjamin Hornigold’s independent expert sent a letter to Benjamin Hornigold advising that it was considering (among other things) certain matters that had arisen since the date of the IER to assess any implications on the conclusions reached in the IER.
22. On 23 July 2019, Benjamin Hornigold lodged its first supplementary target’s statement with ASIC (**Supplementary Target’s Statement**). The Supplementary Target’s Statement contained a recommendation from the board of Benjamin Hornigold that BHD securityholders should ‘reject’ the 2019 Bid.
23. The Supplementary Target’s Statement was accompanied by a supplementary opinion from the independent expert dated 19 July 2019 (**Supplementary Opinion**) that withdrew its opinion in the IER on the basis that it was unable to form an

⁹ To ‘BHD Non-Associated Shareholders’, in the absence of a superior proposal

¹⁰ The Variation Deed was executed before the resignation of all of the directors of Benjamin Hornigold and the company secretary at 7:45pm on 12 June 2019 (see paragraph 75)

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opinion on the fairness or reasonableness of John Bridgeman’s offer to acquire BHD shares given:

- (a) the degree of uncertainty regarding the value of a BHD share and very significant degree of uncertainty regarding the value of a JBL share and
- (b) the limited information currently available to the independent expert meant that the range of potential values it considered reasonable for each BHD security was too wide to provide useful analysis.

BENJAMIN HORNIGOLD’S REQUEST

Variation Request

24. By request dated 24 July 2019 (**Variation Request**), Benjamin Hornigold submitted that John Bridgeman had effectively circumvented the effect of the Repayment Order by directing Benjamin Hornigold to place foreign currency banknotes with King’s Currency pursuant to the Services Agreement.
25. Benjamin Hornigold submitted that the effect of the alleged circumvention of the Repayment Order was to deprive Benjamin Hornigold of more than \$4.5 million cash at bank which, together with the Variation Deed, operated to lock-up the cash with John Bridgeman controlled entities until 12 November 2019.

Variation sought

26. Benjamin Hornigold sought a variation to the Repayment Order, in effect, to require King’s Currency to provide the “*Banknotes*”¹¹ or other foreign currency with equal value, to Benjamin Hornigold within 20 days after the date of the variation to the Repayment Order.

Preliminary submissions

27. John Bridgeman made a preliminary submission in relation to the Variation Request. It submitted (among other things) that a variation of the Repayment Order was not appropriate because:
 - (a) the 2018 Bid, to which the orders made in relation to Benjamin Hornigold in *Benjamin Hornigold Limited 02* (including the Repayment Order) related, was no longer on foot
 - (b) the individual commercial transactions to which the Variation Request related were transactions between Benjamin Hornigold and entities other than John Bridgeman and
 - (c) the variation to the Repayment Order in the form sought by Benjamin Hornigold:
 - (i) requested that the Panel “*instate a new substantive order (which is not contemplated by the existing orders) rather than varying the existing orders*” and

¹¹ Defined to mean the physical notes or currency used in a specified country as specified in the Services Agreement

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- (ii) was unfairly prejudicial to John Bridgeman in circumstances where it has already been required to comply (and has complied) with the terms of the Repayment Order.
28. John Bridgeman submitted that, in the circumstances, should Benjamin Hornigold wish to raise the matters set out in the Variation Request with the Panel, it would be more appropriate that this occur by way of a separate application.
29. King's Currency also made a preliminary submission, submitting (among other things):
- (a) matters to the effect of those submitted by John Bridgeman in paragraphs 27(a) and 27(b)
 - (b) that variations to the Services Agreement (including the Variation Deed) were negotiated, agreed and authorised by the King's Currency directors and, to the knowledge of King's Currency, negotiated, agreed and appropriately authorised by Benjamin Hornigold, and then subsequently documented and
 - (c) as a consequence of the Variation Deed, the foreign currency banknotes the subject of the Services Agreement were not returnable until 12 November 2019.
30. Before deciding how to proceed with the Variation Request, we invited Benjamin Hornigold to indicate whether it intended to make a new application for a declaration and orders under s657C¹² (to be potentially considered at the same time as the Variation Request under Regulation 16 of the *Australian Securities and Investments Commission Regulations 2001* (Cth)). It responded in the affirmative. John Bridgeman confirmed that it intended to lodge its own application in relation to the affairs of Benjamin Hornigold.

BENJAMIN HORNIGOLD'S APPLICATION

Declaration sought

31. By application dated 8 August 2019, Benjamin Hornigold sought a declaration of unacceptable circumstances in relation to the affairs of Benjamin Hornigold (**BHD Application**). Benjamin Hornigold submitted (among other things) that:
- (a) John Bridgeman and Benjamin Hornigold have circumvented the effect of the Repayment Order, which interferes with the efficiency and competitiveness of the market
 - (b) the Variation Deed in effect diminished the value of material assets of Benjamin Hornigold by locking-up approximately \$7.12 million in cash (being the total amount of foreign currency banknotes placed by Benjamin Hornigold with King's Currency pursuant to the Services Agreement). Together, the placement of foreign currency banknotes and the Variation Deed made Benjamin

¹² We considered that the preliminary submissions made by John Bridgeman and King's Currency expressly or impliedly suggested that (i) we may not have jurisdiction or power to make the variation to the Repayment Order and (ii) the matters in the Variation Request should be considered by way of a new application

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Hornigold a less attractive acquisition target (and in turn made it less likely to attract competing proposals), which interferes with the efficiency and competitiveness of the market and

- (c) the withdrawal of the opinion in the IER was a material development and that Benjamin Hornigold shareholders have not been given enough information to enable them to assess the merits of the proposal such that shareholders that have already accepted the 2019 Bid should be entitled to withdraw their acceptance.

Final orders sought

- 32. Benjamin Hornigold sought final orders including:
 - (a) reversing the foreign currency transactions between Benjamin Hornigold and King's Currency described in paragraphs 69 and 71 and that \$4.59 million be paid to Benjamin Hornigold
 - (b) declaring the Variation Deed to be void and
 - (c) offering withdrawal rights to Benjamin Hornigold shareholders that have accepted the 2019 Bid.

Preliminary submissions

- 33. John Bridgeman made a preliminary submission in relation to the BHD Application, submitting (among other things) that:
 - (a) John Bridgeman was not a party to the relevant commercial transactions between Benjamin Hornigold and King's Currency
 - (b) Benjamin Hornigold has not been deprived of a 'crown jewel' given that the foreign currency banknotes constitute an investment which is consistent with the investment mandate of Benjamin Hornigold as a listed investment company
 - (c) the Variation Deed does not operate in a manner which affects the value of Benjamin Hornigold and the extension of the maturity date of the foreign currency banknotes does not alter the substance of the assets held by Benjamin Hornigold and
 - (d) it is the obligation of Benjamin Hornigold (as the target in relation to the 2019 Bid) and not John Bridgeman to procure the independent expert's report for the target's statement.

JOHN BRIDGEMAN'S APPLICATION

Declaration sought

- 34. By application also dated 8 August 2019, John Bridgeman sought a declaration of unacceptable circumstances in relation to the affairs of Benjamin Hornigold (**JBL Application**). John Bridgeman submitted that:
 - (a) the withdrawal of the opinion in the IER caused Benjamin Hornigold's target's statement (as supplemented by the Supplementary Target's Statement) to contravene s640 and

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- (b) the Supplementary Target's Statement does not include all of the information that Benjamin Hornigold shareholders and their professional advisers would require to make an informed assessment as to whether or not to accept the 2019 Bid.

35. John Bridgeman submitted that the effect of the circumstances was that:

- (a) Benjamin Hornigold shareholders did not have sufficient information to enable them to assess the merits of the 2019 Bid in light of the change of the Benjamin Hornigold directors' recommendation on 23 July 2019 (see paragraph 22) and
- (b) Benjamin Hornigold has omitted material from the Supplementary Target's Statement,

which prevented an efficient, competitive and informed market in BHD shares in contravention of s602(a)(i).

Interim order sought

36. John Bridgeman sought an interim order to the effect that the directors of Benjamin Hornigold release to the market a recommendation that BHD shareholders 'take no action' in respect of the 2019 Bid,¹³ and make no further recommendation pending determination of the JBL Application.

37. On 16 August 2019, we decided not to make the interim orders sought by John Bridgeman because (among other things) we were satisfied that any unacceptable circumstances could be adequately remedied by final relief.¹⁴

Final orders sought

38. John Bridgeman sought final orders to the effect that Benjamin Hornigold:

- (a) commission a supplementary independent expert's report which addresses whether, in the opinion of the expert, the 2019 Bid is 'fair and reasonable' and
- (b) provide a supplementary target's statement which contains the recommendation of the directors of Benjamin Hornigold in relation to the 2019 Bid, having regard to the opinion of the expert and the supplementary independent expert's report referred to in paragraph 38(a).

Preliminary submissions

39. Benjamin Hornigold made a preliminary submission in relation to the JBL Application, submitting (among other things) that:

- (a) the alleged deficiencies in the Supplementary Target's Statement were not likely to mislead Benjamin Hornigold shareholders and that the level of information provided in the Supplementary Target's Statement was sufficient in the context in which the statements were made and

¹³ To replace the recommendation on 23 July 2019 that BHD securityholders should 'reject' the 2019 Bid (see paragraph 22)

¹⁴ See Guidance Note 4: *Remedies General* at [12(c)]

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- (b) Benjamin Hornigold was not in contravention of s640 by virtue of the independent expert withdrawing the opinion in the IER, as following the changes to the composition of the Benjamin Hornigold board on 12 June 2019, there ceased to be a common director on the boards of both John Bridgeman (as bidder) and Benjamin Hornigold (as target).

DISCUSSION

40. We have considered all the material, but address only specifically that part of the material we consider necessary to explain our reasoning.

Decision to make inquiries and conduct proceedings

41. On reading the Variation Request, the BHD Application, the JBL Application, the preliminary submissions and accompanying material, we were concerned about:
- (a) the circumstances in relation to the Foreign Currency Transactions and the execution of the Variation Deed (including John Bridgeman's involvement in those matters in its capacity as Benjamin Hornigold's investment manager)
 - (b) in relation to the withdrawal of the opinion in the IER, whether:
 - (i) this was a material development
 - (ii) Benjamin Hornigold had provided sufficient guidance as to the value of Benjamin Hornigold¹⁵ and
 - (iii) Benjamin Hornigold had contravened s640 and
 - (c) whether Benjamin Hornigold securityholders had all of the information in Benjamin Hornigold's target's statement (as supplemented by the Supplementary Target's Statement) that Benjamin Hornigold securityholders and their professional advisers would require to make an informed assessment as to whether or not to accept the 2019 Bid.
42. We decided to make inquiries in relation to the Variation Request and conduct proceedings in relation to the BHD Application and JBL Application, and hear each of the matters together pursuant to Regulation 16 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).¹⁶

Lock-up device

John Bridgeman is responsible for making investment decisions for Benjamin Hornigold

43. As part of our consideration of Benjamin Hornigold's investments in foreign currency banknotes, we considered John Bridgeman's role as investment manager and the particular circumstances leading to the decision to make the various investments.
44. John Bridgeman is the exclusive investment manager for Benjamin Hornigold pursuant to the terms of a management services agreement dated 29 March 2017 and

¹⁵ See Guidance Note 22: *Recommendation and Undervalue Statements* at [18] (and the case cited therein)

¹⁶ After receiving no objections from the parties to doing so

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a services agreement dated 1 October 2016. John Bridgeman is also the investment manager for Henry Morgan and Bartholomew Roberts under agreements with those respective entities.

45. Mr Stuart McAuliffe is the Managing Director and Chief Investment Officer of John Bridgeman. As CIO, Mr McAuliffe has the primary responsibility for the investment decisions of John Bridgeman, including investment decisions made in John Bridgeman's capacity as investment manager for Benjamin Hornigold.¹⁷
46. The scope of the investment decisions John Bridgeman can make for Benjamin Hornigold in its capacity as investment manager is broad. For example, John Bridgeman submitted (among other things) that:
- (a) *"BHD's stated investment objective in its 2017 prospectus is to:*
- (a) seek to increase the value of the Portfolio by allocating capital to a limited number of investments in which the investment manager has the highest conviction;*
- (b) provide exposure to global markets as well as domestic listed and unlisted investment opportunities to which investors may not otherwise have access; and*
- (c) provide investors with moderate to high portfolio appreciation over the medium to long term."*
- (b) *"BHD's investment strategy [as set out in its Investment Policy] was deliberately crafted to allow BHD to invest in a portfolio of investments which were not restricted by 'particular sectors, geographical regions, financial products or benchmarks. Instead, investment decisions will be based on the level of conviction [of the Investment Manager]'."*
47. In relation to the particular circumstances leading to John Bridgeman directing Benjamin Hornigold to make the Foreign Currency Transactions, John Bridgeman submitted that:
- "As markets flattened during February, JBL determined to lower BHD's exposure and exit its positions in equity and currency markets. The positions were closed out, and profits were booked. Once the positions were closed, funds were returned to BHD's bank account with Saxo, which earned interest of between 0 – 1%. Excess cash in the Saxo account which was not required as margins for futures trading, was subsequently directed to BHD's bank account. It was then placed with King's Currency under the BHD Services Agreement to earn a more attractive return than [sic] would be earned if it were held as cash at bank. Stuart McAuliffe was not involved in decisions regarding the placement of the funds after closing out BHD's trading positions on-market."*
48. It is unclear from the above quote whether Mr McAuliffe was involved in the decision to make the Foreign Currency Transactions before *"closing out BHD's trading positions on-market"*. In any event, as CIO of John Bridgeman, he remained

¹⁷ In his capacity as CIO of John Bridgeman, Mr McAuliffe receives support from various investment professionals who are employed by John Bridgeman or engaged as external advisers

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responsible for the investment decisions made by John Bridgeman in relation to Benjamin Hornigold at a time during which he was a director of both John Bridgeman and Benjamin Hornigold, and was CEO of JB Financial Group (see paragraph 53).

49. We are satisfied that the matters above and material provided during the course of proceedings supports an inference that John Bridgeman was responsible for and made Benjamin Hornigold's investment decisions, including the decisions to make the Foreign Currency Transactions.

John Bridgeman has influence over JB Financial Group and King's Currency

50. Having reviewed the material, we became aware of the existence of shareholdings and common officers and employees (including Mr McAuliffe) across various interrelated entities (including John Bridgeman and Benjamin Hornigold). We were concerned that these relationships may give John Bridgeman control¹⁸ or influence over some of the interrelated entities, including in particular in relation to the JBFG Facility and Foreign Currency Transactions.
51. In terms of various shareholdings across the interrelated entities, we note that as at 8 February 2019:
- (a) Mr McAuliffe held a deemed 22.97% relevant interest in John Bridgeman,¹⁹ a 6.77% interest in BRL and a 8.92% interest in JB Financial Group
 - (b) John Bridgeman held a 11.07% interest in Henry Morgan,²⁰ a 51.71% direct interest in Bartholomew Roberts and a 7.63% direct interest in JB Financial Group
 - (c) Henry Morgan held a 30.12% interest in Bartholomew Roberts and a 19.87% interest in JB Financial Group
 - (d) Bartholomew Roberts held a 32.86% interest in JB Financial Group and
 - (e) King's Currency was a wholly owned subsidiary of JB Financial Group.²¹
52. In relation to JB Financial Group, ASIC submitted that it understood that *"if the total number of directly held shares in JBFG by Mr McAuliffe, BRL, HML and JBL were voted together, it would represent 69% of the voting power in JBFG."*

¹⁸ As that term is defined in s50AA

¹⁹ Consisting of shares held directly and indirectly through various entities

²⁰ John Bridgeman's off-market takeover bid for all of the securities in Henry Morgan was announced on 10 September 2018 and closed on 15 April 2019, at which time John Bridgeman held a relevant interest in 46.12% of Henry Morgan

²¹ Paragraph 51 does not set out all holdings (direct or indirect), relevant interests or voting powers for each of the relevant entities

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53. The table below sets out common officers and employees (including Mr McAuliffe) across various interrelated entities during the period 8 February 2019 to 12 June 2019 (inclusive).²²

	JBL	BHD	HML	BRL	JBFG	KC
Stuart McAuliffe	Managing Director CIO	Executive Chairman ²³	Managing Director	Director	CEO	N/A
John McAuliffe	Chairman	N/A	Director	Director ²⁴	N/A	N/A
Ross Patane	Director	Director ²⁵	Director	Director ²⁶	N/A	N/A
Peter Aardoom	N/A	Director ²⁷	N/A	N/A	Director	Director
Peter Ziegler	N/A	Director ²⁸	Director	N/A	N/A	N/A
James Stewart-Koster	N/A	N/A	N/A	N/A	Compliance Officer (Group) CEO (Retail FX)	CEO
Rachel Weeks	Chief Operating Officer	N/A	N/A	N/A	Chief Operating Officer	N/A
Jody Wright²⁹	Company Secretary	Company Secretary	Company Secretary	Company Secretary	Company Secretary	Director

54. We had some concerns in relation to whether these various relationships between the interrelated entities had some bearing on the JBFG Facility being provided to John Bridgeman on an unsecured basis (as noted in paragraphs 10 and 11, the JBFG Facility was used for repayment under the Repayment Order). We asked John Bridgeman and JB Financial Group to explain why the JBFG Facility was unsecured

²² The table does not name all common officers and employees of each of the interrelated entities

²³ Mr McAuliffe resigned as a director of Benjamin Hornigold at a Benjamin Hornigold board meeting held on 12 June 2019 (effective 7:45pm)

²⁴ Mr John McAuliffe resigned as a director of BRL on 16 April 2019

²⁵ Mr Patane was appointed as a director of Benjamin Hornigold on 10 June 2019 and resigned as a director at a Benjamin Hornigold board meeting held on 12 June 2019 (effective 7:45pm)

²⁶ Mr Patane resigned as a director of BRL on 16 April 2019

²⁷ Mr Aardoom resigned as a director of Benjamin Hornigold at a Benjamin Hornigold board meeting held on 12 June 2019 (effective 7:45pm)

²⁸ Mr Ziegler was appointed as a director of Benjamin Hornigold on 28 May 2019 and resigned as a director at a Benjamin Hornigold board meeting held on 12 June 2019 (effective 7:45pm)

²⁹ The co-company secretary of JBL, BHD, HML, BRL and JBFG and the company secretary of KC resigned as company secretary of each entity on 10 May 2019

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and asked all parties whether we should infer that John Bridgeman exercised some degree of control over JB Financial Group given the JBFG Facility was unsecured.

55. In relation to why the JBFG Facility was unsecured, John Bridgeman submitted that:

“Initial negotiations between JBL and JBFG regarding the terms of the JBFG Facility included a discussion on whether or not JBL would be required to provide security for the loan facility.

Both parties obtained separate external advice on the terms of the proposed transaction, and made enquiries as to the commercial terms.

Following negotiations, it was determined that the interest rate on the JBFG Facility would be increased above the rate originally proposed, on the basis that the facility would be unsecured. If JBL were later to provide security for the facility, the rate would be revisited by both parties and potentially decreased depending on the circumstances at the time.”

56. John Bridgeman submitted that we should not draw anything or make any inferences in relation to control from the fact the JBFG Facility was unsecured on the basis that *“JBFG required an increase to the interest rate initially proposed on the basis that the JBFG Facility was unsecured. If JBL had been able to exercise control over JBFG, the interest rate would not have increased.”*

57. JB Financial Group submitted that the JBFG Facility was initially proposed to be provided on a secured basis, but following arm’s length negotiations, John Bridgeman and JB Financial Group agreed an unsecured loan on the basis that *“(a) JB Financial Group formed the view that the risk of default was low and (b) The facility would be subject to a higher interest rate.”*

58. JB Financial Group also submitted that we should not draw any inferences in relation to control, submitting that:

“[The JBFG Facility] was the subject of robust negotiation between the parties and that the interest rate under the loan agreement between John Bridgeman and JB Financial Group was increased as the loan was unsecured. The fact that the loan is unsecured does not imply that John Bridgeman has exercised some degree of control over JBFG but merely indicates that the parties, through their negotiation, reached a commercial agreement as to those terms.”

59. John Bridgeman and JB Financial Group did not provide supporting material of the expert advice obtained on the terms of the JBFG Facility or material demonstrating that the JBFG Facility was subject to *“robust negotiation”*.

60. Benjamin Hornigold submitted that *“the fact that the JBFG Facility was unsecured is indicative of JBL having a controlling influence over JBFG”* and accordingly we should draw an inference that John Bridgeman exercised some degree of control over JB Financial Group having regard to the financial situation of John Bridgeman and JB Financial Group at the time, noting (among other things) that:

(a) *“JBFG loaned funds to JBL at a time and in circumstances where both JBL and JBFG’s ongoing financial viability appeared questionable. Indeed, the Panel noted the*

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uncertainty regarding the financial position of both JBL and JBFG in its decision in Benjamin Hornigold Limited 02 and Henry Morgan Limited 02 [2019] ATP 1 and is something that was taken into account in the Panel's deliberations in those proceedings."

- (b) John Bridgeman's financial report for the half year ended 31 December 2018 highlighted uncertainty as to the ability of John Bridgeman and JB Financial Group to operate as a going concern for the second consecutive reporting period, a matter that was noted in the IER (we note that the accounts of JB Financial Group and King's Currency³⁰ are consolidated into John Bridgeman's group accounts).
61. ASIC submitted that it is open to us to infer that John Bridgeman exercised some degree of control over JB Financial Group on the basis that the JBFG Facility was unsecured, also submitting (among other things) that the unsecured loan should be examined in its context, including in particular having regard to:
- (a) *"...funds that had been earmarked to expand the business of King's Currency appear to have been lent to JBL on an unsecured basis"* and
- (b) *"...at the time of the discussions referred to by JBL and JBFG [see paragraphs 55 and 58], JBL's auditor had recently identified material uncertainty about [JBL's] ability to continue as a going concern and the agreement struck needs to be examined in this context."*
62. We consider that:
- (a) the various relationships existing between the interrelated entities³¹ (including that the aggregate direct holdings of Mr McAuliffe, John Bridgeman, Bartholomew Roberts and Henry Morgan represent 69% of JB Financial Group) and
- (b) the fact the JBFG Facility was provided on an unsecured basis at a time during which there was uncertainty as to the ability of John Bridgeman and JB Financial Group to operate as a going concern,
- supports an inference that John Bridgeman had (and continues to have) influence over JB Financial Group and, in turn, its wholly owned subsidiary, King's Currency, including at the time of the Foreign Currency Transactions and the execution of the Variation Deed.
63. We did not consider it necessary to determine whether John Bridgeman controlled JB Financial Group or King's Currency in finding that the circumstances in relation to Benjamin Hornigold are unacceptable.

³⁰ As a wholly owned subsidiary of JB Financial Group, King's Currency's accounts are necessarily consolidated into JB Financial Group's accounts, which are in turn consolidated into John Bridgeman's group accounts

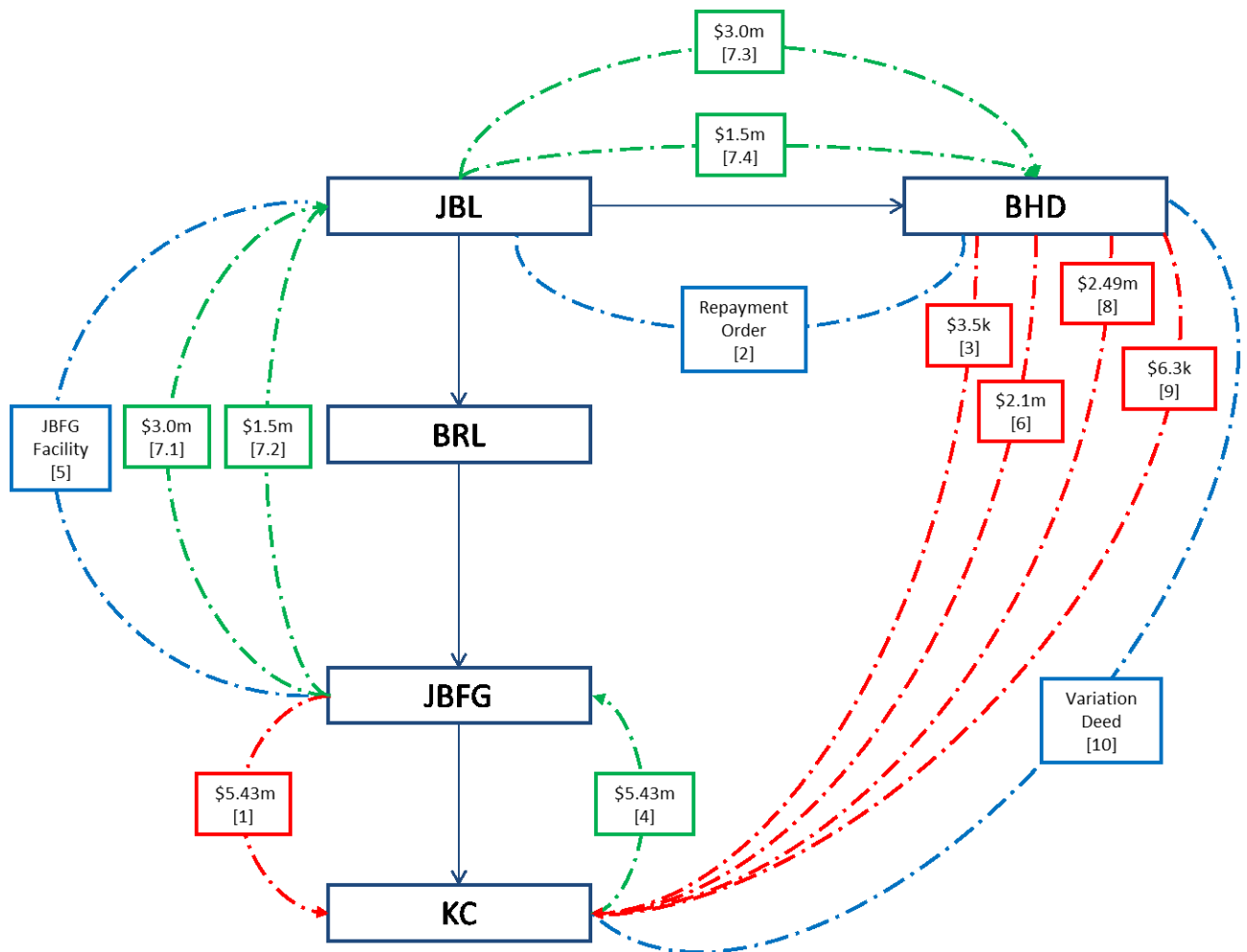
³¹ See the various shareholdings in paragraph 51 and the common officers and employees in paragraph 53, including in particular John Bridgeman's role as investment manager of Benjamin Hornigold (see paragraph 49) and Mr McAuliffe's roles as CIO of John Bridgeman and CEO of JB Financial Group

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Circumstances in relation to the Foreign Currency Transactions and execution of the Variation Deed

64. Based on the material provided during the proceedings, we were concerned about the following circumstances in relation to the Foreign Currency Transactions and the execution of the Variation Deed which are depicted in the diagram below (**Diagram**).



65. On 3 December 2018, JB Financial Group placed approximately \$5.43 million³² in foreign currency banknotes with King's Currency (see item [1] in the Diagram).³³
66. As noted in paragraph 7, the Panel made the Repayment Order on 8 February 2019 (see item [2] in the Diagram).
67. On 28 February 2019, John Bridgeman directed Benjamin Hornigold to place \$350,000 of foreign currency banknotes with King's Currency³⁴ for management and on-

³² All references to amounts of foreign currency placed with King's Currency are to the Australian dollar equivalent

³³ JB Financial Group had previously made a series of investments in King's Currency since February 2017

³⁴ All placements of foreign currency banknotes by Benjamin Hornigold occurred by way of cash transfers in Australian dollars to King's Currency

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trading pursuant to the Services Agreement (see item [3] in the Diagram). Under the terms of the Services Agreement in effect at the time, Benjamin Hornigold was to receive a return of 5.0% per annum on the capital value of the banknotes. The placement by Benjamin Hornigold on 28 February 2019 increased the total amount of physical foreign currency banknotes placed with King's Currency to approximately \$1.95 million.

68. Through a series of transactions completed by early March 2019, JB Financial Group fully recalled all of the \$5.43 million of foreign currency banknotes it had placed with King's Currency in December 2018 (see item [4] in the Diagram).³⁵
69. On 6 March 2019 (the day that JB Financial Group provided the JBFG Facility, see item [5] in the diagram above), John Bridgeman directed Benjamin Hornigold to place \$2.1 million of foreign currency banknotes with King's Currency (see item [6] in the Diagram), increasing the total amount placed by Benjamin Hornigold with King's Currency to approximately \$4.0 million.
70. As noted in paragraphs 10 and 11, John Bridgeman drew down **\$4.5 million** of the JBFG Facility in two tranches on 7 March 2019 and 8 March 2019 (see items [7.1] and [7.2] in the Diagram) and made the repayment of principal due under the Repayment Order in two tranches on 7 March 2019 and 8 March 2019 (see items [7.3] and [7.4] in the Diagram).
71. Through a series of transactions between 7 March 2019 and 27 March 2019, John Bridgeman directed Benjamin Hornigold to place an additional \$2.49 million of foreign currency banknotes with King's Currency (see item [8] in the Diagram), increasing the total amount placed by Benjamin Hornigold in foreign currency banknotes with King's Currency to approximately \$6.49 million by 27 March 2019. The amounts placed between 6 March 2019 (see paragraph 69) and 27 March 2019 totalled **\$4.59 million**.
72. Through a series of additional foreign currency transactions occurring after 27 March 2019, the balance of the total amount Benjamin Hornigold was directed by John Bridgeman to place in foreign currency banknotes with King's Currency increased to approximately \$7.12 million as at 31 May 2019 (see item [9] in the Diagram). The total amount placed by Benjamin Hornigold with King's Currency after the date of the Repayment Order was approximately \$5.46 million (paragraphs 67, 69, 71 and this paragraph 72).
73. On 6 June 2019, King's Currency sent a letter to Benjamin Hornigold requesting that amendments be made to the Services Agreement (**Request Letter**). The Request Letter stated that "*King's is in the process of establishing an external financial facility with a bank or non-bank institution to supply funds for physical banknote trading*" and

³⁵ Some of the transactions recalling foreign currency banknotes occurred as early as December 2018

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requested the following amendments “to provide King’s Currency with sufficient time to finalise the establishment of the facility”:

- (a) Increase the minimum return to Benjamin Hornigold of the capital value of the banknotes to 9.65% per annum (from 5.0% per annum).
- (b) Extend the period of notice for the return of the banknotes from 30 days to 8 months.
- (c) Extend the term of the agreement to 21 February 2021.

74. The Request Letter was considered at Benjamin Hornigold board meetings held on 6 June 2019, 7 June 2019 and at 7:00am (Brisbane time) on 12 June 2019. Amendments to the Services Agreement were approved at the board meeting on 12 June 2019 and the Variation Deed was executed by Benjamin Hornigold and King’s Currency later on 12 June 2019 (see item [10] in the Diagram) to:

- (a) increase the minimum return to Benjamin Hornigold to 9.65% per annum and
- (b) provide that, notwithstanding any other provision of the Services Agreement (including the termination provisions and the 30 day notice period for the return of the banknotes), all banknotes placed by Benjamin Hornigold were not returnable until 12 November 2019.

75. At a second board meeting of Benjamin Hornigold convened at 7:30pm (Brisbane time) on 12 June 2019, all of the directors of Benjamin Hornigold and the company secretary resigned (effective 7:45pm), and three new directors were appointed. As noted in paragraph 18, John Bridgeman freed the 2019 Bid from all defeating conditions on 12 June 2019.

The Foreign Currency Transactions and Variation Deed effectively replaced the JBL Loan subject of the Repayment Order

76. In the BHD Application, Benjamin Hornigold submitted (among other things) that:

“Whilst the JBL Loan was repaid to BHD, BHD concurrently purchased from King’s Currency foreign currency banknotes of almost the exact same value as the JBL Loan.

The net effect of this transaction and the timing of the purchases meant that BHD was again deprived of the ‘cash at bank’ represented by the Orders [made in Benjamin Hornigold Limited 02] and placed BHD shareholders in effectively the same position as when that money had been tied up in the JBL Loan.

...

[I]t appears that the decision to purchase the bank notes between 6 and 27 March 2019 was an attempt by the directors of BHD at that time, which had strong connections to various JBL and various JBL controlled entities, to circumvent the Orders [made in Benjamin Hornigold Limited 02] as part of an arrangement to (a) continue to deprive

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BHD of the benefit of the \$4.5 million 'cash at bank'; and (b) keep those funds deployed within an entity control [sic] by JBL and for the benefit of JBL..."

77. As noted in paragraph 71, the total amount of foreign currency banknotes placed between 6 March 2019 and 27 March 2019 totalled \$4.59 million (ie items [6] and [8] in the Diagram). In its Variation Request, Benjamin Hornigold submitted that the total amount owing to Benjamin Hornigold under the Repayment Order was \$4.50 million in principal (ie items [7.3] and [7.4] in the Diagram) plus approximately \$94,000.00 interest (ie approximately \$4.594 million in total). We were concerned about the similarity between these amounts and asked the parties if there was anything that we should draw or infer from this.
78. John Bridgeman submitted that it did not believe there is anything untoward in the Foreign Currency Transactions, submitting that each transaction was a completely separate arrangement between Benjamin Hornigold and King's Currency which was commercially rational and on terms which were fair in the circumstances. John Bridgeman also submitted that the dates of 6 March 2019 and 27 March 2019 appeared to have been intentionally selected by Benjamin Hornigold to make the amounts appear similar, when in fact there were a number of transactions that occurred on either side of these dates (see for example paragraphs 67 and 72).³⁶
79. JB Financial Group and King's Currency made a joint submission that we should not draw or infer anything, submitting that Benjamin Hornigold's investment in the foreign currency banknotes was on commercial terms and consistent with its mandate as a listed investment company and that any amounts owing and repaid as between Benjamin Hornigold and John Bridgeman do not concern King's Currency or JB Financial Group.
80. Given the similarities between the amounts described in paragraph 77, we asked the parties whether certain of the transactions in paragraphs 65 to 74 effectively replaced the JBL Loan that was subject of the Repayment Order as submitted by Benjamin Hornigold.
81. John Bridgeman submitted (among other things) that *"JBL fails to understand how these transactions could be interpreted as replacing another entirely separate transaction being a repayment arrangement between JBL and BHD for \$4.5 million. The parties to each of these transactions, and the commercial rationale for each of these transactions, are separate and distinct."* JB Financial Group and King's Currency made similar submissions, stating that they *"view the transactions to which they are a party as independent and separate commercial transactions, completely disconnected from any Takeovers Panel orders."*
82. We acknowledge that King's Currency was not a party to the JBL Loan and that John Bridgeman was not a party to the Foreign Currency Transactions³⁷ or the Variation Deed. However, these matters do not have any bearing on the effect of those transactions (individually and in conjunction).

³⁶ Which John Bridgeman submitted showed that the instrument was regularly traded preceding and subsequent to the repayment of the JBL Loan

³⁷ Other than in its capacity as investment manager

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83. As noted above we infer (at paragraph 49) that John Bridgeman was responsible for and made Benjamin Hornigold's investment decisions, including the decisions to direct Benjamin Hornigold to make the Foreign Currency Transactions (at paragraph 62) and that John Bridgeman had (and continues to have) influence over JB Financial Group and King's Currency. In light of this and the similar amounts involved, we also infer that in effect the approximately \$5.46 million in foreign currency banknotes placed by Benjamin Hornigold with King's Currency after the date of the Repayment Order (see paragraph 72) in effect replaced the JBL Loan the subject of the Repayment Order.
84. In addition to our concerns with the similarities between the amounts described in paragraph 77, we also note that the \$5.46 million of foreign currency banknotes placed by Benjamin Hornigold with King's Currency after the Repayment Order (see paragraph 72 and items [3], [6], [8] and [9] in the Diagram) closely resembles the \$5.43 million of foreign currency banknotes placed by JB Financial Group with King's Currency which were placed in December 2018 and fully recalled by March 2019 (see paragraphs 65 and 68 and items [1] and [4] in the Diagram).
85. Having reviewed the terms of the Services Agreement, we were also concerned about the nature of the agreement and the effect of the Variation Deed.
86. Clause 2.1(e)(ii) of the Services Agreement provides that:
- (a) banknotes provided by Benjamin Hornigold to King's Currency remain the property of Benjamin Hornigold³⁸
 - (b) Benjamin Hornigold will bear any exchange gain or loss on the currency mix in the parcel of banknotes provided and
 - (c) if King's Currency through trading activities is exposed to exchange rate variations in different currencies that variation is for the account of King's Currency.
87. Item 4 of the Schedule to the Services Agreement (as executed on 21 February 2018) provided in effect that:
- (a) King's Currency will manage and on-trade the banknotes in such a way to generate a return to Benjamin Hornigold of 9.0% of the capital value of the banknotes
 - (b) in consideration for its services, King's Currency will be entitled to be paid an amount equal in value to the return on capital generated on the banknotes in excess of 9.0% and
 - (c) if King's Currency does not generate a return of at least 9.0% on the capital value of the banknotes, it is not entitled to be paid any fees for services and

³⁸ Item 3 of the Schedule to the Services Agreement also provides (among other things) that "*Nothing in [the Services Agreement] is to be construed to nor will be effective to transfer ownership of the Banknotes to [King's Currency]*"

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instead, it must pay Benjamin Hornigold an amount to ensure that Benjamin Hornigold receives a minimum of 9.0%.

88. The Services Agreement was amended by variation deeds on:
- (a) 31 July 2018 to reduce the rate of return from 9.0% to 5.0%
 - (b) 17 September 2018 to extend the term by a further 24 months and
 - (c) 12 June 2019 (ie the Variation Deed) to (among other things) increase the rate of return to 9.65% and in effect extend the term for the return of foreign currency banknotes from 30 days' to 12 November 2019 (see paragraph 74).
89. In our view, the terms of the Services Agreement summarised in paragraphs 86 and 87 (as amended by the variation deeds in paragraph 88) operated such that:
- (a) Benjamin Hornigold was entitled to a specified rate of return at the same time it was exposed to any exchange gain or loss on the parcel of banknotes it provided to King's Currency
 - (b) King's Currency was entitled to "*on-trade*" the banknotes in its business, by which means Benjamin Hornigold's property in the banknotes might be lost, in which event its rights against King's Currency would be contractual and not proprietary and
 - (c) King's Currency was entitled to any amount generated in excess of the specified return (if any).
90. We consider that the Services Agreement and the placement of foreign currency banknotes under that agreement may have in effect operated as an unsecured loan³⁹ by Benjamin Hornigold to King's Currency:
- (a) prior to the execution of the Variation Deed, given the unlikelihood that the banknotes would be called on 30 days' notice due to John Bridgeman's role as investment manager for Benjamin Hornigold and its influence over JB Financial Group and King's Currency (see also paragraphs 116 to 118) and
 - (b) upon the execution of the Variation Deed, pursuant to the extension of the term for the return of the foreign currency banknotes (noting that King's Currency's Request Letter requested the extension while it established an external financing facility).
91. The fact that Benjamin Hornigold was exposed to the currency risk without any security over the banknotes is of concern given King's Currency's obligation described in paragraph 87(c) to pay a minimum return to Benjamin Hornigold (which happens to be equal to the maximum return).
92. For the reasons above, we are satisfied that, in relation to the affairs of Benjamin Hornigold and in the context of the 2019 Bid, the Foreign Currency Transactions and

³⁹ We make no finding as to whether the arrangement was legally a loan

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the Variation Deed in effect replaced the JBL Loan that was subject of the Repayment Order.

The Foreign Currency Transactions and Variation Deed diminished the value of a material and important asset of BHD and made it less attractive to a potential acquirer and less likely to attract competing proposals to the 2019 Bid

93. Benjamin Hornigold submitted in effect that the placement of foreign currency banknotes and the Variation Deed had the effect of depriving Benjamin Hornigold of approximately \$7.12 million (see paragraph 72) in cash at bank which was (and is) a material and valuable asset of Benjamin Hornigold (representing approximately 57% of its total net assets) which is not available to Benjamin Hornigold.
94. Further, Benjamin Hornigold submitted that the execution of the Variation Deed increased the total of Benjamin Hornigold's net assets that were invested in illiquid investments to 94% (of which approximately \$7.12 million related to the foreign currency banknotes placed with King's Currency), at a time when Benjamin Hornigold had less than \$100,000 in working capital and less than \$250,000 in other liquid assets. Benjamin Hornigold submitted that this is contrary to its 2017 prospectus which described Benjamin Hornigold's investment objectives in terms of being "*able to realise at least 90% of its portfolio assets under normal market conditions at the value ascribed to those assets within five trading days.*"
95. We are satisfied that the foreign currency banknotes placed by Benjamin Hornigold with King's Currency, consisting of 57% of Benjamin Hornigold's total net assets, is a material asset to Benjamin Hornigold.
96. Benjamin Hornigold's 2017 prospectus provides that the portfolio construction of Benjamin Hornigold provides (among other things) for the following allocation ranges:
 - (a) foreign exchange contracts: 20% to 80% and
 - (b) global exchange traded futures contracts including equity market indices, currency and interest rate futures: 10% to 85%.
97. It is not clear to us that the services provided by King's Currency under the Services Agreement constitute foreign exchange contracts. Even if they did, an investment of 57% of Benjamin Hornigold's total net assets in foreign currency banknotes managed and on-traded pursuant to the Services Agreement would likely give rise to significant concentration risk which, in addition to the unsecured nature and illiquidity of this investment, would need to be reflected in the expected return.
98. Benjamin Hornigold submitted that in the context of the 2019 Bid the effect of the transactions was "*to diminish the value of a material and important asset of BHD, rendering BHD a less attractive acquisition target and making it less likely to attract competing proposals from potential acquirers (and as a result diminish the value of BHD if shareholders do not accept the bid), in effect operating as a lock up device that materially diminished the value of BHD.*"

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99. John Bridgeman disputed that the transactions had the effect of diminishing the value of Benjamin Hornigold (and correspondingly of producing the necessary coercive or anti-competitive effect for the arrangements to constitute a lock-up device), submitting that:

“Any argument to the contrary appears to be predicated upon an assumption that cash at bank is of greater value to BHD than the return being generated by BHD on the current transaction. JBL notes that a \$5.43 million cash deposit with Westpac fixed for 12 months, with interest paid annually, would attract an interest rate of 1.55% and interest earned over that 12 month period would be \$84,165. JBL notes that this observably would be of significantly less benefit to BHD than the certainty of a 9.65% per annum return over the balance of the repayment term of the foreign banknotes, which would return \$523,995. This is more than six times larger return than cash at bank.”

100. Indeed, John Bridgeman submitted that “[r]ather than ‘locking up’ BHD, JBL is of the view that the arrangement should make BHD attractive to a potential competing bid.”
101. We accept that an investment of 57% of total net assets in cash at bank and a deposit of foreign currency banknotes on the terms of the Services Agreement as varied are very different investments. The returns under the latter *may* be greater. However the risks are also very materially greater, and the liquidity effects are starkly different. Taking those matters into account our experience would suggest that the rate of return under the Services Agreement (as amended) is likely below market.⁴⁰ Certainly, neither King’s Currency nor John Bridgeman attempted, whether by evidence or argument, to support a finding that when allowance was made for risk and liquidity the return was adequate. And they were best placed to do so, given that King’s Currency was in the business of trading with foreign currency banknotes and the original investment was at the insistence of John Bridgeman as Benjamin Hornigold’s investment manager.
102. In the circumstances of the matters before us, we are satisfied that in the context of the 2019 Bid the differences to which we have referred have a negative impact on the value of Benjamin Hornigold, in particular to a potential competing bidder.
103. ASIC questioned the relevance of John Bridgeman’s submission comparing the rates of return under the Services Agreement (as amended by the Variation Deed) and a fixed cash deposit with Westpac, submitting that *“it is unlikely investors would consider an investment in a low-interest bank term deposit as an appropriate investment alternative to be pursued by a listed investment company given that investors could invest in a term deposit themselves (and without having to pay management fees).”*
104. We agree with ASIC. We also consider that the risk profile of the two investments is significantly different (noting that despite the Services Agreement specifying a rate of return, Benjamin Hornigold remains the bearer of the foreign currency risk, see paragraph 86).

⁴⁰ Particularly given the foreign currency risk, the financial concerns noted in paragraph 60(b) and the interrelationships between the parties (see paragraph 62)

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105. For the reasons above, we consider that the value of Benjamin Hornigold was diminished by the Foreign Currency Transactions and the amendments under the Variation Deed (individually and in conjunction) because:
- (a) the investment in foreign currency banknotes deprived Benjamin Hornigold of a material asset (see paragraph 95), placing the asset with an entity that John Bridgeman had influence over (see paragraph 62)
 - (b) the amendments made under the Variation Deed resulted in approximately 94% of Benjamin Hornigold's net assets being in illiquid investments, including 57% of Benjamin Hornigold's net assets being concentrated in foreign currency banknotes placed with King's Currency (see paragraphs 94 and 97) and
 - (c) the rate of return under the Services Agreement (as amended) was, in the circumstances, likely to be inadequate when allowance is made for risk and liquidity effects (see paragraph 101).
106. We disagree with John Bridgeman's submission that the transactions made Benjamin Hornigold a more attractive target to potential bidders. Drawing on our experience, we consider that the matters in paragraph 105 had the effect of rendering Benjamin Hornigold a less attractive acquisition target and making it less likely to attract competing proposals to the 2019 Bid from potential acquirers.
107. In light of our inference (at paragraph 62) that John Bridgeman had (and continues to have) influence over JB Financial Group and King's Currency, we also have concerns in relation to whether the Foreign Currency Transactions occurred, and the Variation Deed was negotiated, on an arm's length basis. We would have determined the circumstances in relation to Benjamin Hornigold are unacceptable whatever our view on this question. However, we are satisfied that the Foreign Currency Transactions and the negotiations were not relevantly at arm's length.
108. In *ACI Operations Pty Ltd v Berri Ltd* (2005) 15 VR 312 at [233] Dodds-Streeton J summarised the effect of the authorities as follows:
- [A]n arm's length relationship is that of strangers, or parties who are unaffected by existing mutual duties, liabilities, obligations, cross-ownership of assets, or identity of interests which might: (a) enable either party to influence or control the other; or (b) induce either party to serve that common interest in such a way as to modify the terms on which strangers would deal.*
- Having regard to the network of shareholdings, office holding and contractual relationships discussed above, in our view the relevant Foreign Currency Transactions and negotiations could not be described as "arm's length".
109. In addition, we are not aware of any safeguards as to conflicts that were put in place (other than a due diligence committee established by the Benjamin Hornigold board in relation to the 2019 Bid) and no material was provided in relation to expert advice that was obtained in relation to the transactions (see paragraph 59). However, we were provided material that demonstrated Benjamin Hornigold had received legal advice on 10 June 2019 that "BHD could inadvertently be creating unacceptable circumstances" in relation to a transaction discussed in paragraph 133.

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The Foreign Currency Transactions and Variation Deed operated as a lock-up device

110. Guidance Note 7: *Lock-up devices* (last updated in February 2010) provides at [1] to [2] (footnotes omitted):

This guidance note has been prepared to assist market participants understand the Panel's approach to lock-up devices. It applies in control transactions, including takeovers. For convenience, the terms 'bid', 'bidder' and 'target' are used. The types of lock-up devices addressed might also be referred to as 'deal protection' measures.

The principles discussed in the note are of general application and can be applied to any arrangement which has the effect of fettering the actions of a target, a bidder or a substantial shareholder.

111. We consider that in the peculiar circumstances of the matter (in particular, the relationships between the interrelated entities and the influence of John Bridgeman in relation to those transactions), Guidance Note 7 is relevant to our consideration of whether the arrangements constitute a 'lock-up device'⁴¹. While lock-up devices are not unacceptable as such, they may deter rival bidders.⁴²

112. To guide the Panel in considering whether an 'asset lock-up'⁴³ agreement gives rise to unacceptable circumstances, Guidance Note 7 sets out at [32] a number of factors for the Panel to have regard to. These factors include:

- (a) the commercial reason for it
- (b) the size or strategic value of the asset involved
- (c) whether the agreement was negotiated on an arms-length basis
- (d) the safeguards in place
- (e) whether the agreement is at a fair price. This includes whether any expert advice or sufficient evidence was obtained by the target on the appropriateness of any fixed price, or price formula, in the agreement
- (f) its effect on the amount of, or distribution of benefits to, shareholders in the target in connection with the takeover and
- (g) the timing of entry into the agreement and the length of the lock-up.

113. We discuss each of the above factors in relation to the Foreign Currency Transactions and the amendments made in the Variation Deed below, having considered the factors in an objective manner with a focus on the effect of the alleged lock-up device.

⁴¹ Defined in Guidance Note 7 as "an arrangement that encourages or facilitates a control transaction and potentially hinders another actual or potential control transaction")

⁴² See Guidance Note 7 at [6]

⁴³ Defined in Guidance Note 7 as "an arrangement between a bidder and a target for the sale, purchase or encumbrance of an asset in exchange for (a) proposing a bid or other control transaction or (b) a period of exclusivity or the opportunity to undertake due diligence for a control transaction"

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114. In terms of John Bridgeman’s commercial reasons for the transactions, we note that John Bridgeman explained, in relation to its role and involvement in the transactions, that:

“BHD received unexpected expedited repayment of \$4.5 million plus interest from JBL in early March 2019 [ie the amount repaid under the Repayment Order]. Under the terms of the [management services agreement], JBL as investment manager has an obligation to invest BHD’s funds in such a way as to provide an appropriate return to BHD. Given anticipated market volatility at the time, JBL directed BHD’s excess cash into physical banknotes with King’s Currency to reduce its market exposure and generate a more certain and higher return for BHD than could be achieved onmarket in the short-term or if held as cash at bank.

JBL’s role, as BHD’s investment manager, extended to the original decision to invest in foreign currency banknotes from time to time in accordance with the terms of the Services Agreement between King’s Currency and BHD. It was otherwise not part of any decision-making process regarding the amendments to the Services Agreement in June 2019.”

115. In terms of the size or strategic value of the asset involved, we are satisfied that the foreign currency banknotes are a material asset (consisting of approximately 57% of Benjamin Hornigold’s total net assets).⁴⁴ In addition, we consider the fact that, as a result of the investment and Variation Deed, approximately 94% of Benjamin Hornigold’s net assets were in illiquid investments,⁴⁵ is strategically significant in the context of the 2019 Bid.
116. King’s Currency made submissions in effect that over the past 19 months it had placed reliance on the terms of the Services Agreement and that if foreign currency banknotes were called to be returned in a single tranche by one client, there was a risk that this *“would decrease the company’s capital, thereby slowing down its business plans and impacting its business performance.”* Given that banknotes provided by Benjamin Hornigold under the Services Agreement were to remain the property of Benjamin Hornigold and were to be on-traded by King’s Currency to generate a return to Benjamin Hornigold (see paragraphs 86 and 87), we have concerns as to how King’s Currency may have been using (or planned to use) these banknotes if their recall could (in any material way) slow down King’s Currency’s business plans and impact its business performance.
117. In addition, King’s Currency submitted in effect that it sought the variations described in the Request Letter (see paragraph 73) in order to:

“(a) document what had historically been occurring and ensure that the banknotes placed with it would not be called in one tranche on 30 days’ notice; and

(b) document a longer earliest date for return of the Banknotes (or foreign currency with an equal value of such Banknotes) to allow King’s Currency/JB Financial Group time to negotiate and establish additional external finance arrangements to ensure that

⁴⁴ See paragraph 95

⁴⁵ See paragraph 94

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it had certainty around a funding line, rather than a more volatile trading arrangement as with BHD.”

118. We consider that King’s Currency’s submissions in relation to the unlikelihood that the banknotes would not be called in one tranche on 30 days’ notice to be further evidence that the Services Agreement was in effect an illiquid investment that operated in effect as an unsecured loan prior to the execution of the Variation Deed (see also paragraph 90). This would likely reflect the circumstance that up to the date of execution of the Variation Deed, Benjamin Hornigold’s board was not independent of John Bridgeman. Thereafter, the Variation Deed cemented the *de facto* illiquidity of the investment by a contractual obligation that would survive the resignation of the board of Benjamin Hornigold that took place later the same day.
119. In relation to the effect of the Foreign Currency Transactions and Variation Deed, we consider that they (individually and in conjunction):
 - (a) for the reasons in paragraphs 76 to 92, effectively replaced the JBL Loan to be repaid under the Repayment Order and
 - (b) for the reasons in paragraphs 93 to 106, rendered Benjamin Hornigold a less attractive acquisition target and made it less likely to attract competing proposals to the 2019 Bid from potential acquirers.
120. In terms of timing in relation to the transactions, we note that:
 - (a) at least approximately \$6.49 million of foreign currency banknotes had been placed by Benjamin Hornigold with King’s Currency before John Bridgeman announced the 2019 Bid
 - (b) approximately \$5.46 million was placed after the date of the Repayment Order and
 - (c) the Variation Deed executed by Benjamin Hornigold on 12 June 2019 significantly extended the illiquidity of the foreign currency investment from being returnable on 30 days’ notice to not being returnable before five months (ie until 12 November 2019).
121. John Bridgeman submitted (among other things) that the transactions do “*not in any way restrict, fetter or inhibit any other bidder from making a competitive bid for shares in BHD*” and that “*[i]t is open for any other bidder to make a competing bid...*” Even if the transactions do not restrict or fetter a competing bid per se, based on our experience we are satisfied that the effect of the transactions as described in paragraph 106 rendered Benjamin Hornigold a less attractive acquisition target and made it less likely to attract competing proposals to the 2019 Bid from potential acquirers. We consider that this is likely to have inhibited potential competing proposals to the 2019 Bid, preventing the acquisition of control of Benjamin Hornigold taking place in an efficient, competitive and informed market.
122. John Bridgeman also submitted that the transactions have had no effect on the 2019 Bid, noting that it is the second bid that John Bridgeman has made for Benjamin Hornigold, and that no third party has made or announced a competing offer or

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indicated an interest to increase its holding in Benjamin Hornigold (including during the period between the lapse of the 2018 Bid and the announcement of the 2019 Bid). While this may be the case as a matter of fact, we do not consider this to be evidence that the transactions do not have the effect as described in paragraph 106 and it is of course possible that this effect is indeed precisely the reason that no competing proposal has been forthcoming. Further, ASIC disputed the notion that there has been no third party interest in Benjamin Hornigold, citing in its submissions an unsuccessful attempt to spill the board of Benjamin Hornigold under s249D by Ramcap Limited in early June 2019.

123. For the reasons above, we are satisfied that (individually and in conjunction) the Foreign Currency Transactions and the Variation Deed diminished the value of a material and important asset of Benjamin Hornigold, making it less attractive to a potential acquirer and less likely to attract competing proposals to the 2019 Bid (and as a result, diminished the value of Benjamin Hornigold if securityholders do not accept the 2019 Bid), operating in effect as a lock-up device in relation to the affairs of Benjamin Hornigold.

Intentions and motivations

124. Our conclusions that the Foreign Currency Transactions and the Variation Deed (individually and in conjunction) effectively replaced the JBL Loan that was the subject of the Repayment Order and operated as a lock-up device was drawn on the basis of what we determined to be the effect (or likely effect) of those transactions, and not what we determined or inferred to be the intentions or motivations of the relevant entities for those transactions.
125. However, we did make a number of inquiries of the parties and certain non-parties in relation to the decision-making processes regarding the Foreign Currency Transactions and the execution of the Variation Deed, including the timing of those transactions which caused us concern (including in relation to the conduct of various officers of John Bridgeman and former officers of Benjamin Hornigold).
126. In relation to the various placements of foreign currency banknotes with King's Currency, we note:
- (a) the amounts placed in December 2018 and fully recalled by JB Financial Group by early March 2019 are remarkably similar to the amounts placed by Benjamin Hornigold after the Repayment Order (see paragraph 84)
 - (b) the amounts placed by Benjamin Hornigold between 6 March 2019 and 27 March 2019 and the amount ordered to be repaid under the Repayment Order are remarkably similar (see paragraph 77) and
 - (c) on the basis of the proximity of the Foreign Currency Transactions up to 27 March 2019 in relation to the authorisation of the preparation of a new bidder's statement on 1 April 2019, we infer that John Bridgeman was likely to have been contemplating making a new takeover bid at the same time as directing Benjamin Hornigold to place foreign currency banknotes with King's Currency (see paragraph 13).

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127. In relation to the execution of the Variation Deed on 12 June 2019, we note the proximity of:
- (a) the evidence filed in the Court Proceeding and provided to the directors of Benjamin Hornigold on 3 June 2019
 - (b) the receipt of the Request Letter on 6 June 2019
 - (c) the Benjamin Hornigold board meetings held on 6 June 2019, 7 June 2019 and at 7:00am on 12 June 2019 at which (among other things) the Receipt Letter amendments to the Services Agreement were considered. Indeed, we note that while Mr McAuliffe abstained from voting, he remained present during the Benjamin Hornigold board meeting held on 12 June 2019 at which amendments to the Services Agreement were approved
 - (d) the resignation of Benjamin Hornigold directors and company secretary at 7:45pm on 12 June 2019
 - (e) the freeing of the 2019 Bid from all defeating conditions on 12 June 2019 and
 - (f) the scheduled date for the s249F Meeting (being 13 June 2019).
128. The Panel has previously noted that it expects directors to comply with directors' statutory and fiduciary duties, but that the Panel's primary focus is to determine whether unacceptable circumstances have arisen, rather than whether those duties have been breached.⁴⁶ In *Strategic Minerals Corporation NL 02R, 03R, 04R and 05R*, the Panel noted that *"It is clear that breach of those duties can give rise to unacceptable circumstances, and there may be cases where the Panel needs to make a finding as to whether there has been a breach, even though that finding would not be conclusive."*⁴⁷ While we made a number of inquiries in relation to these matters, we did not consider it necessary in this case to make such a finding as we were satisfied unacceptable circumstances had arisen regardless and any such finding (if made) would not make a difference to the orders we think appropriate.
129. That said, having regard to the considerations in paragraphs 101 to 106 above, the timing of the transactions, their size, and the fact that relevant decisions and negotiations were not at arm's length, and the poverty of the justifications offered for them, we are satisfied that the Foreign Currency Transactions and the variation to the Services Agreement are not explained merely by ordinary commercial considerations for Benjamin Hornigold.

Policy implications

130. In accordance with s657A(4), we provided an opportunity for submissions to be made in relation to a draft of the declaration in Annexure A.

⁴⁶ See *Strategic Minerals Corporation NL 02R, 03R, 04R and 05R* [2018] ATP 5 at [20] and the authorities cited therein

⁴⁷ [2018] ATP 5 at [20] and the authorities cited therein

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131. John Bridgeman submitted that the making of the declaration, on the basis that the foreign currency banknotes constitute a lock-up device, misconceives the nature of the role of an investment manager. John Bridgeman stated that:

“The foreign bank notes are an investment of BHD’s funds – once returned, the funds will comprise part of BHD’s investment portfolio which would be invested again by JBL in accordance with the management services agreement.

The making of the Declaration has the potential to give rise to the presumably unintended consequence that any decision made by any investment manager during the course of a takeover bid could constitute a lock-up device, which is inconsistent with the responsibilities of an investment manager and may stifle the legitimate commercial activities of both an investment manager and the portfolios which it manages.”

132. We disagree. The making of a declaration relates to the unacceptability of the particular circumstances of the matter before us (as set out in these reasons). We would expect John Bridgeman to have regard to the effect of any future investment of Benjamin Hornigold’s funds made in accordance with the management services agreement. Indeed, we would also expect John Bridgeman to have regard to the influence that its involvement as investment manager of Benjamin Hornigold may have in relation to any future bid for Benjamin Hornigold securities and to manage any potential conflicts of interest and duty to ensure that investment decisions made in relation to Benjamin Hornigold do not operate as a lock-up.

Additional transactions

133. Throughout the course of proceedings, material was made available in relation to additional transactions which Benjamin Hornigold submitted also form part of the lock-up device the subject of the declaration.
134. As these matters were not raised by Benjamin Hornigold in the Variation Request or BHD Application, we make no findings in relation to these transactions.

Withdrawal of the opinion in the IER

135. The BHD Application and JBL Application both sought declarations in relation to the withdrawal of the opinion of the IER (see paragraphs 31(c) and 34(a)). We discuss both of these matters together, firstly by considering whether a supplementary independent expert’s report is required under s640 and secondly, by considering whether the withdrawal of the IER is a material development in the context of the 2019 Bid.

136. Section 640 provides:

(1) *If:*

(a) *the bidder's voting power in the target is 30% or more; or*

(b) *for a bidder who is, or includes, an individual--the bidder is a director of the target; or*

(c) *for a bidder who is, or includes, a body corporate--a director of the bidder is a director of the target;*

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a target's statement given in accordance with section 638 must include, or be accompanied by, a report by an expert that states whether, in the expert's opinion, the takeover offers are fair and reasonable and gives the reasons for forming that opinion.

(2) In determining whether the bidder's voting power in the target is 30% or more, calculate the bidder's voting power at the time the bidder's statement is sent to the target.

(3) An offence based on subsection (1) is an offence of strict liability.

137. In the JBL Application, John Bridgeman submitted that:

"[A]s the Supplementary Target's Statement is to be read together with the original target's statement dated 30 May 2019 that it supplements, the withdrawal of the Expert's opinion by virtue of the Supplementary Target's Statement has the effect of causing the target's statement to contravene section 640. This is unacceptable as it constitutes a contravention of a provision of Chapter 6.

JBL acknowledges that as at the date of the Supplementary Target's Statement, no director of JBL was a director of BHD; however, JBL submits it is consistent with subsection 640(2) (regarding calculation of a bidder's voting power as at the date that a bidder's statement is sent to the target) to consider that if an independent expert report would be required as at the date that a bidder's statement is sent to the target, that requirement, with respect to a target's statement, is not displaced by a subsequent alteration to the board of the bidder or target."

138. We asked the parties whether Benjamin Hornigold was required to provide a supplementary independent expert's report under s640.

139. Citing the Panel in *Sirtex Medical Limited* [2003] ATP 22 at [65], Benjamin Hornigold submitted that "*[t]he purpose of Section 640 of the Act is to address the risk or perceived risk that target directors will not provide a properly independent and critical target's statement, in certain cases where there are facts which are a danger to their independence, and to require an alternative assessment.*" We agree.

140. In relation to the circumstances of the 2019 Bid, Benjamin Hornigold explained that:

"An independent expert's report was originally required in relation to the JBL offer owing to the existence at the time of the common directorship of Mr. Stuart McAuliffe on the boards of both JBL (as bidder) and BHD (as target). However, following the changes to the BHD board's composition on 12 June 2019, an independent expert's report was no longer required pursuant to s 640, as there ceased to be a common director on the boards of both JBL (as bidder) and BHD (as target). It is also contended that from 12 June 2019, the independence of the BHD board ceased to be an issue vis-à-vis the JBL offer."

141. Further, Benjamin Hornigold disagreed with John Bridgeman's "*suggestion that s640(2) supports an interpretation of s 640(1) such that a subsequent alteration of a target board would not displace the requirement for an independent expert's report where a common director existed at the date of the bidder's statement*", submitting that:

"Section 640(2) deals with very different circumstances. Section 640(2) clearly and exclusively deals with the timing of the calculation of the bidder's voting power for the

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purpose of determining when an independent expert's report is required. It bears no relation to the common director trigger."

142. We agree that an independent expert's report was no longer required under s640 once there ceased to be a common director on the boards of Benjamin Hornigold and John Bridgeman upon the resignation of the directors on 12 June 2019.
143. In addition, we do not agree with John Bridgeman's submission that s640(2) or s646 (which provides that a supplementary target's statement is taken to be the original target's statement together with the supplementary statement) required an independent expert's report in relation to the 2019 Bid notwithstanding the resignation of Benjamin Hornigold directors on 12 June 2019. ASIC submitted that:
- (a) *"[s670C(2)] imposes an obligation on the expert to notify the target in writing if the expert becomes aware that during the bid period (a) a material statement made in the report is misleading or deceptive or (b) there has been a significant change affecting information included in the report" and*
 - (b) *"...once an expert report is prepared under s640 and is included in or accompanies a target statement given under s638, s670C(2) is the relevant provision governing any need for the expert to update its opinion or report."*
144. We agree with ASIC that s670C(2) provides the procedure to be followed in the circumstances, which we are satisfied was followed by the independent expert on 17 June 2019 (see paragraph 21) and 19 July 2019 (see paragraph 23).
145. For the reasons above, we are not satisfied Benjamin Hornigold has contravened s640 or that the withdrawal of the IER was otherwise unacceptable.
146. In addition, having reviewed the Supplementary Opinion which summarises the reasons for the withdrawal of the IER, we are not satisfied that Benjamin Hornigold shareholders have not been given enough information to enable them to assess the merits of the proposal. If we were wrong in relation to question of compliance with s640 we would nevertheless see no reason to make a declaration of unacceptable circumstances on that ground or to grant any other relief.
147. John Bridgeman also raised concerns with the conduct of Benjamin Hornigold with respect to the 2019 Bid in relation to the change of the directors' recommendation and withdrawal of the opinion in the IER, including Benjamin Hornigold's entry into transactions following 12 June 2019 which it submitted have diminished the value of Benjamin Hornigold and the refusal to provide material to the independent expert. We are not satisfied that an independent expert's report was required after 12 June 2019. And in any event we do not consider the conduct of Benjamin Hornigold in relation to the withdrawal of the IER or the alleged refusal to provide material to the independent expert to amount to unacceptable circumstances in this case. We were also not satisfied that the directors' change of recommendation was unacceptable or that the material demonstrated that Benjamin Hornigold's entry into transactions following 12 June 2019 had diminished the value of Benjamin Hornigold.

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Supplementary Target's Statement disclosure

148. In the JBL Application, John Bridgeman submitted that (in addition to the withdrawal of the IER) the Supplementary Target's Statement omits material which Benjamin Hornigold shareholders and their professional advisers may reasonably require in order to make an informed assessment of the 2019 Bid, including in relation to:
- (a) the objectives and intentions of the Benjamin Hornigold board
 - (b) the risk that John Bridgeman's relevant interest in Benjamin Hornigold may make it difficult for the directors of Benjamin Hornigold to achieve their objectives
 - (c) the prospects of lifting Benjamin Hornigold's suspension from trading on ASX and
 - (d) the possible termination of the management services agreement between John Bridgeman and Benjamin Hornigold.
149. Benjamin Hornigold rejected each of the alleged deficiencies in the Supplementary Target's Statement. ASIC submitted that while disclosure of the matters raised by John Bridgeman would be preferable, it submitted that some of the matters are known to the market and *"the issues identified are marginal in the overall context of the bid and accordingly their omission does not give rise to a strong argument that the disclosure provided to BHD shareholders in the supplementary target's statement is misleading or deceptive or denies them the information needed to make an informed assessment of the merits of the bid."*
150. We consider that the disclosure concerns are not material given the development of the 2019 Bid.

Extension of time

151. Section 657C(3) provides that:

An application for a declaration under section 657A can be made only within:

- (a) two months after the circumstances have occurred; or*
- (b) a longer period determined by the Panel.*

152. We asked the parties whether we should extend the time under s657C(3) for Benjamin Hornigold to make the BHD Application. Benjamin Hornigold was the only party to make submissions on this issue.
153. Benjamin Hornigold submitted that the Variation Request and the BHD Application were made in respect of the same circumstances, the subject of which *"can be considered to have commenced on 28 February 2019, being the first placement of foreign currency notes by BHD following the Panel's orders in Benjamin Hornigold Limited 02 and Henry Morgan Limited 02 [2019] ATP 1..."* However, Benjamin Hornigold submitted that the circumstances should be looked at in their entirety and as an ongoing endeavour, which culminated in the Benjamin Hornigold board meeting held on 12

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June 2019. As such, Benjamin Hornigold submitted that the application period should run from 12 June 2019 and accordingly no extension is required.

154. Alternatively, Benjamin Hornigold submitted that if an extension is required, we should exercise our discretion to extend time because significant information which formed the basis of the Variation Request and BHD Application did not come to light fully until after the current board of Benjamin Hornigold was appointed.
155. The Panel in *Benjamin Hornigold Limited 02* stated at [69] that the following factors are relevant in considering whether to extend time under s657C(3):
- (a) the discretion to extend time should not be exercised lightly⁴⁸
 - (b) whether the application made credible allegations of clear and serious unacceptable circumstances, the effects of which are ongoing⁴⁹
 - (c) whether it would be undesirable for a matter to go unheard, because it was lodged outside the 2 month time limit, if essential matters supporting it first came to light during the 2 months preceding the application⁵⁰
 - (d) whether there is an adequate explanation for any delay, and whether parties to the application or third parties will be prejudiced by the delay.⁵¹
156. We are satisfied given the factors described above that the time for Benjamin Hornigold to make the BHD Application should be extended. Among other things, the application made credible allegations of clear and serious unacceptable circumstances which related to matters and transactions that had occurred prior to the appointment of the new board of Benjamin Hornigold on 12 June 2019. We consider that the timing of the making of the Variation Request and BHD Application was reasonable given the date of the appointment of the new board of Benjamin Hornigold.
157. We consider that any extension under s657C(3) for the making of the BHD Application be made to the relevant circumstances commencing after the date of the Repayment Order, being 28 February 2019 when John Bridgeman first directed Benjamin Hornigold to place foreign currency banknotes with King's Currency.

DECISION

Declaration

158. It appears to us that the circumstances are unacceptable:
- (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 Benjamin Hornigold or

⁴⁸ *Austral Coal Limited 03* [2005] ATP 14 at [18]

⁴⁹ *Austral Coal Limited 03* [2005] ATP 14 at [19] and *The President's Club Limited 02* [2016] ATP 1 at [143]

⁵⁰ *Molopo Energy Limited 01 & 02* [2017] ATP 10 at [248]

⁵¹ *Molopo Energy Limited 01 & 02* [2017] ATP 10 at [249]

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(ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Benjamin Hornigold

(b) in the alternative, having regard to the purposes of Chapter 6 set out in s602.

159. Accordingly, we made the declaration set out in Annexure A and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

Extension of time

160. We decided to give an extension of time for Benjamin Hornigold to make the BHD Application under s657C(3) to 28 February 2019 for the reasons discussed in paragraphs 151 to 157.

Orders

161. Following the declaration, we made the final orders set out in Annexure B.

162. The Panel is empowered to make 'any order'⁵² under s657D if 4 tests are met:

- (a) it has made a declaration under s657A. This was done on 6 September 2019.
- (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, we are not satisfied that our orders unfairly prejudice any person.
- (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done by way of supplementary brief dated 10 September 2019 and invitation dated 19 September 2019. Each party made submissions and rebuttals in response to the supplementary brief. Each party and Partners for Growth (as a non-party) made submissions in response to the invitation.
- (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons, or ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred. The orders do this by:
 - (i) requiring King's Currency to return all foreign currency banknotes placed with King's Currency by Benjamin Hornigold pursuant to the Services Agreement (or other foreign currency with an equal value) and pay all amounts accrued under that agreement
 - (ii) prohibiting John Bridgeman, JB Financial Group and King's Currency from proposing or making a change of control transaction for Benjamin Hornigold until all of the banknotes are returned (unless in the circumstances described in paragraph 184)

⁵² Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

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- (iii) offering cancellation rights to Benjamin Hornigold securityholders that have accepted the 2019 Bid and
 - (iv) requiring John Bridgeman to pay costs incurred by Benjamin Hornigold and ASIC in the course of the proceedings.
163. A finding of unacceptable circumstances under s657A does not automatically mandate that a particular order be made. It is for us to exercise our “*wide discretion, as experts in the field,*”⁵³ to make orders under s657D(2) that we are satisfied are appropriate and not unduly or unfairly prejudicial by weighing the object of protecting rights or interests affected by the unacceptable circumstances against the prejudice that would flow to any person from the making of an order.⁵⁴
164. We asked parties whether any orders were necessary given that all foreign currency banknotes placed by Benjamin Hornigold with King’s Currency are returnable on 12 November 2019.
165. John Bridgeman submitted that no orders were necessary because:
- (a) the 2019 Bid was scheduled to close on 13 September 2019 and John Bridgeman did not intend to extend the offer period further
 - (b) John Bridgeman anticipated to hold less than 20% of Benjamin Hornigold at the conclusion of the 2019 Bid and an “*interest in voting power of this degree is not an interest which is regulated by Chapter 6 in the ordinary course*”⁵⁵
 - (c) where no bid (or other control transaction) is on foot, the arrangements do not attract the operation of Guidance Note 7 and
 - (d) the effluxion of time will remedy the matters giving rise to those circumstances.
166. John Bridgeman in effect submitted that if we disagreed and considered that an order should be made, an order requiring King’s Currency to return all foreign currency banknotes placed after the date of the Repayment Order was the most appropriate order to make in respect of the relevant circumstances.
167. JB Financial Group and King’s Currency also submitted that no orders were necessary, submitting that:
- (a) *The notes are returnable on or after 12 November 2019 in any event, consistent with existing contractual obligations and the date King’s Currency has diligently been working towards in order to put in place the appropriate external finance to provide certainty of funding, as opposed to the now volatile trading arrangements with Benjamin Hornigold...*
 - (b) *It is difficult to see what prejudice Benjamin Hornigold suffers which would require any earlier return of those notes, given the minor practical difference between the dates*

⁵³ *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [187]

⁵⁴ *Glencore International AG v Takeovers Panel* [2006] FCA 274

⁵⁵ Citing *Re Village Roadshow Limited* 02 (2004) 22 ACLC 1332 at [34]

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in the Services Agreement and the Variation Deed and especially having regard to the increased rate of interest that must also be paid under the Variation Deed.”

168. Benjamin Hornigold submitted that “irrespective of the return date of 12 November 2019 under the amended Services Agreement, it is of critical importance that the Panel makes appropriate orders in the present proceedings.” Benjamin Hornigold submitted that orders should be made because (among other things):
- (a) the 2019 Bid was (at the time) still on foot and open for acceptances
 - (b) the recall date of 12 November 2019 was (at the time) still two months away and accordingly Benjamin Hornigold and its securityholders would continue to be deprived of a material and valuable asset if no orders were made (especially while the 2019 Bid remained open)
 - (c) there is no guarantee that the foreign currency banknotes will be returned by King’s Currency on 12 November 2019 and
 - (d) “...there is a genuine need to send a strong and unequivocal message to the market that the type of behavior that has been engaged in by JBL and [REDACTED] will not be tolerated.”
169. Further, Benjamin Hornigold submitted that the closure of the 2019 Bid does not change the effect of the lock-up device on the value of Benjamin Hornigold, Benjamin Hornigold securityholders or the likelihood of Benjamin Hornigold attracting competing further proposals from third parties. Benjamin Hornigold submitted that so long as the lock-up device remains in place it will have the effect of lessening competition in the market involving potential bidders for Benjamin Hornigold.
170. ASIC also submitted that it is “necessary and appropriate for us to make orders remedying the unacceptable circumstances declared,” submitting (among other things) that (footnotes omitted):
- “...it is not preferable for the Panel to allow the effluxion of time to ameliorate the unacceptable circumstances, particularly where the Panel’s wide discretion to make orders imbues it with the capacity to remedy the unacceptable circumstance in a timelier way, which in ASIC’s view is the approach that reflects the ordinary application of the principles in Guidance Note 4 and is also consistent with the principles in s602 which the Panel found to have been infringed. Furthermore, an order of the Panel gives greater certainty that the outcome desired by the Panel will be achieved. This is particularly so because it is an offence under s657F to contravene a Panel order and s657G provides an avenue for parties (including ASIC) to make application to the Court to secure compliance with the orders. This is not the case in circumstances where the Panel allows the ordinary operation of the relevant contract to remedy the unacceptable circumstances.”*
171. We are satisfied that it is appropriate for us to make orders in the circumstances (notwithstanding that the 2019 Bid was scheduled to close, and did in fact close, on 13 September 2019) so that the effect of the unacceptable circumstances described in paragraph 123 does not continue.

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Orders to protect rights or interests

172. Section 657D(2)(a) provides us with the power to make orders (among other things) to protect rights or interests of persons affected by the unacceptable circumstances. To determine whether we are satisfied rights or interests have been affected we must engage in a degree of speculation and draw on our commercial expertise.⁵⁶

Return of foreign currency banknotes

173. ASIC submitted that “the central consideration that the Panel ought to have regard for in framing the orders is the need for BHD to be placed, promptly and without delay, back in the position it would have been in had the relevant transactions not been entered.” Given our conclusion in paragraph 123 as to effects of the Foreign Currency Transactions and Variation Deed (individually and in conjunction), we are satisfied that orders to reverse these effects are appropriate to protect the rights and interests of Benjamin Hornigold and its securityholders. The orders do this by requiring King’s Currency to:

- (a) return all foreign currency banknotes to Benjamin Hornigold (ie approximately \$7.12 million) within 10 days and
- (b) pay to Benjamin Hornigold all amounts due under the Services Agreement as accrued up to the day the banknotes are returned.

174. In relation to a possible order requiring the return of foreign currency banknotes, King’s Currency and JB Financial Group submitted:

“...King’s Currency and JB Financial Group reiterate that the [Variation Request] and the [BHD Application] only complain about those notes placed in March 2019 and the [BHD Application] only seeks orders in relation to the notes placed on 6, 7, 8, 11, 26 and 27 March in the sum of \$4.69 million. The transactions that the Panel considered to operate as a lock-up device are the notes placed following the [Repayment Order] (citing paragraph 26 of the declaration). Therefore, any orders should not extend to any other banknotes placed with King’s Currency.”

175. We consider that King’s Currency and JB Financial Group may have misinterpreted the declaration and the scope of the Variation Request and BHD Application. Paragraph 26 of the declaration states that the extension of the period for the return of all foreign currency banknotes placed by Benjamin Hornigold with King’s Currency pursuant to the Variation Deed (specified in footnote 20 of the declaration to be approximately \$7.12 million as at 31 May 2019) (individually and in conjunction with the Foreign Currency Transactions) in effect operated as a lock-up device. Given that the declaration relates to all foreign currency banknotes placed with King’s Currency, we are satisfied that it is appropriate under s657D(2)(a) to order all of these foreign currency banknotes to be returned to Benjamin Hornigold.

176. King’s Currency submitted that an order requiring it to return the foreign currency banknotes would “significantly decrease the working capital of King’s Currency, thereby slowing down its business plans and impacting its business performance” which would “in

⁵⁶ *Finders Resources Limited 03R [2018] ATP 11 at [27]*

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turn have a detrimental impact on JB Financial Group, its 36 shareholders and other creditors.” King’s Currency submitted that:

“... King’s Currency has operated on the reasonable assumption that the amendments agreed to the Services Agreement by Benjamin Hornigold in early June 2019 had been made with due authority and in accordance with all relevant requirements. King’s Currency has acted in reliance on the historical operating practices between the parties and the amended Services Agreement.

King’s Currency and JB Financial Group remain of the view that any order by the Panel which may result in revision to the arrangements agreed commercially between King’s Currency and Benjamin Hornigold under the Services Agreement (as amended) will be unfairly prejudicial to King’s Currency, a third party entity not involved in the takeover bid by John Bridgeman of Benjamin Hornigold and not a subsidiary or related party of John Bridgeman.”

177. While we acknowledge that an order requiring King’s Currency to return the foreign currency banknotes (or other foreign currency with an equal value) within 10 days will likely cause some prejudice to King’s Currency, we are not satisfied that such prejudice is unfair because:
- (a) King’s Currency did not quantify or provide any material providing evidence of the unfair prejudice that would result if we made orders for the return of the foreign currency banknotes earlier than 12 November 2019 (including the impact on its business plans and business performance) and indeed during proceedings King’s Currency clarified an earlier submission it had made by stating that it “*did not intend to suggest that it would not be able to return the banknotes if called in one tranche*”
 - (b) the foreign currency banknotes have at all times remained the property of Benjamin Hornigold and should have been treated as such by King’s Currency in accordance with the terms of the Services Agreement (see discussion at paragraphs 86 and 116) and
 - (c) King’s Currency has been aware since the date of the Variation Request that it was possible we may make such an order given the variation sought by Benjamin Hornigold, and as such, King’s Currency has had sufficient time to prepare for such an eventuality.
178. As we were considering proposed orders, we were made aware that Partners for Growth had asserted that it holds a fixed charge over the foreign currency banknotes placed with King’s Currency, the security interest had been perfected by registration under the *Personal Property Securities Act 2009* (Cth) and that the security interest has priority over Benjamin Hornigold’s security interest (if any) in King’s Currency.
179. As a person that might be affected by our orders, we invited Partners for Growth to make submissions on our proposed orders. Partners for Growth submitted that it opposed any order that would have the effect of requiring King’s Currency to return the foreign currency banknotes to Benjamin Hornigold or any other entity prior to the repayment of all amounts outstanding under a loan facility agreement dated 30

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November 2018 between Partners for Growth and JB Financial Group. Partners for Growth submitted in effect that an order for the return of the foreign currency banknotes to Benjamin Hornigold should be contingent on JB Financial Group first repaying to Partners for Growth all amounts outstanding under the loan facility agreement.

180. We consider that the priority dispute raised by Partners for Growth is not a matter for us to resolve. Accordingly, we ordered King's Currency to return the foreign currency banknotes unless it is restrained by an order of the court. On this basis, we are not satisfied that this order unfairly prejudices Partners for Growth.

Prohibition on a future change of control transaction

181. ASIC submitted that:

"While JBL may close the 2019 Bid on 13 September 2019, it is relevant that the 2019 Bid constitutes the second JBL bid for BHD in the last 12 months. Clearly, JBL is seeking control of BHD and the unacceptable circumstances identified by the Panel will continue to frustrate a competitive landscape that would enable other proposals to be put to the BHD board or its shareholders until such time that they are remedied."

182. We share ASIC's concerns and decided to make an order prohibiting John Bridgeman, JB Financial Group and King's Currency from proposing, announcing or making any change of control transaction until the foreign currency banknotes have been returned to Benjamin Hornigold. We considered that such an order was appropriate to ensure that the unacceptable circumstances do not continue if a new takeover bid for Benjamin Hornigold was made before the foreign currency banknotes are returned to Benjamin Hornigold.

183. John Bridgeman submitted (among other things) that:

"...JBL does not consider that it should be restricted from undertaking a control transaction with respect to BHD, particularly in circumstances where it is open to any other bidder to make its own bid (regardless of whether or not the bank notes remain with King's Currency). Where a rival bidder emerges, JBL should have the opportunity to make a competing bid (if it would like to do so). JBL submits that this is consistent with the policy of section 602 and is to the ultimate benefit of target shareholders."

184. To address John Bridgeman's concerns, we decided to make an order that the prohibition on a future change of control transaction for Benjamin Hornigold does not apply in response to a bona fide change of control transaction by a third party provided we are satisfied that the third party is not related, has no significant relationship and is not influenced by any of John Bridgeman, JB Financial Group or King's Currency.

185. We are satisfied that an order prohibiting a future change of control transaction by John Bridgeman, JB Financial Group or King's Currency is appropriate under s657D(2)(a). We are not satisfied that the prohibition order is unfairly prejudicial to John Bridgeman, JB Financial Group or King's Currency in light of the exception for a competing proposal and the fact that the prohibition only applies until such time that the foreign currency banknotes have been returned to Benjamin Hornigold.

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Cancellation rights

186. We considered making orders cancelling acceptances by, or offering withdrawal rights to, Benjamin Hornigold securityholders that have accepted the 2019 Bid, and whether this should be limited to only those securityholders that accepted the 2019 Bid on or after 12 June 2019.
187. John Bridgeman submitted (among other things) that such orders were disproportionate to respond to the matters before us and sought to punish John Bridgeman rather than remedy the relevant circumstances having regard to (among other things):
- (a) *“...the fact that any accepting shareholder in the 2019 Bid did so after the placement of the relevant bank notes with King’s Currency”* and
 - (b) *“acceptances of less than 1% were received after 12 June 2019 (being the date of the variation of the Services Agreement).”*
188. John Bridgeman also submitted (among other things) that such orders unfairly prejudiced John Bridgeman in circumstances where:
- (a) it is an extreme remedy – in particular noting the likelihood that JBL will close its bid with an interest in voting shares below 20%;*
 - (b) JBL is not a party which has been directly involved with the Variation Deed (and is only involved as the bidder);*
 - (c) there was less than a 1% increase in acceptance after 12 June 2019 (if the Panel considers that such an order should be made it should be limited to BHD shareholders that accepted after 12 June 2019); and*
 - (d) the offer has been unconditional for several months and JBL has accordingly issued the consideration in the timeframes prescribed by the Corporations Act (and any withdrawal rights or cancellation of offers would require JBL to unwind those transactions).”*
189. While we accept that an order providing cancellation rights may cause some prejudice to John Bridgeman, we are concerned that:
- (a) the acceptances of the 2019 Bid after the placements of foreign currency banknotes were made in circumstances where a material asset of Benjamin Hornigold had in effect been locked-up with King’s Currency
 - (b) the fact that acceptances of only 1% were received after 12 June 2019 does not address the effect of the lock-up device making Benjamin Hornigold less attractive to a potential acquirer and less likely to attract competing proposals to the 2019 Bid, and as a result, diminished the value of Benjamin Hornigold if securityholders did not accept the 2019 Bid – an effect which continues to apply while the lock-up device is in place and
 - (c) notwithstanding John Bridgeman was not a party to the Variation Deed, we infer at paragraph 62 that (among other things) John Bridgeman had influence over JB Financial Group and King’s Currency at the time of the execution of the

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Variation Deed and note at paragraph 127 that John Bridgeman freed the 2019 Bid from all defeating conditions on the same day the Variation Deed was executed.

190. We are satisfied that it is appropriate under s657D(2)(a) to make orders providing a right (but not an obligation) for Benjamin Hornigold securityholders that have accepted the 2019 Bid to cancel their acceptance. Given our finding that the Foreign Currency Transactions and the Variation Deed (individually and in conjunction) in effect operated as a lock-up device, we decided that the right to cancel acceptances should extend to all Benjamin Hornigold securityholders that have accepted the 2019 Bid (rather than limiting the right to only those securityholders who accepted on or after 12 June 2019).

191. We are not satisfied that this order would unfairly prejudice John Bridgeman.

Costs

192. Section 657D(2)(d) provides that the Panel may make any order (including a remedial order but not including an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C) that it thinks appropriate to determine who is to bear the costs of the parties to the proceedings before the Panel.

193. Paragraph 28 of Guidance Note 4: *Remedies General* provides guidance to the Panel's approach to cost orders, including the following considerations (footnotes omitted):

- (a) the Panel's primary role is to resolve disputes expeditiously and informally
- (b) a declaration relates to circumstances, not conduct, and may involve no finding of fault
- (c) costs orders are the exception not the rule, so may not follow to a 'successful' party and
- (d) a party is entitled to make, or resist, an application once without exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way.

194. A non-exhaustive list of circumstances where a cost order may be awarded against a party is set out in paragraph 29 of Guidance Note 4, including where a party has failed to comply with an order of the Panel the costs of the other parties attributable to the failure may be awarded (notwithstanding that a declaration relates to circumstances and not conduct).

195. We are satisfied that it is appropriate for us to exercise our power under s657D(2)(d) to make an order requiring John Bridgeman to pay costs incurred by Benjamin Hornigold and ASIC. Matters that were relevant to our decision to make a costs order in the unique circumstances of this case included:

- (a) the Foreign Currency Transactions and Variation Deed (individually and in conjunction) in effect:
 - (i) replaced the JBL Loan that was subject to the Repayment Order (see paragraphs 76 to 92) and removed the effect of the Repayment Order in

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remedying the unacceptable circumstances found in *Benjamin Hornigold Limited 02* in relation to the JBL Loan (see *Benjamin Hornigold Limited 02* at [62] and [77]) and

- (ii) operated as a lock-up device (see paragraphs 110 to 123) in a similar way to the lock-up device declared to be unacceptable in *Benjamin Hornigold Limited 02* (see paragraph 6)
- (b) our inference that John Bridgeman:
 - (i) was responsible for and made Benjamin Hornigold’s investment decisions, including the decisions to make the Foreign Currency Transactions (see paragraph 49) and
 - (ii) had (and continues to have) influence over JB Financial Group and King’s Currency, including at the time of the Foreign Currency Transactions and the execution of the Variation Deed and
- (c) the complexity of the matter and significant involvement required by the parties to the Variation Request, BHD Application and JBL Application (including ASIC).

196. We decided it was appropriate to order John Bridgeman to pay to Benjamin Hornigold \$120,000 (plus GST) and to ASIC \$17,580.75, reflecting what we considered in our experience to be the costs actually, necessarily, properly and reasonably incurred in these proceedings. We are not satisfied that the cost order unfairly prejudices John Bridgeman.

No variation to the Repayment Order

197. Although we were satisfied that the Repayment Order had in effect been circumvented (see paragraph 195(a)), we do not consider it appropriate to vary the orders of the Panel in *Benjamin Hornigold Limited 02* (including the Repayment Order as requested by Benjamin Hornigold in the Variation Request) in light of the declaration and the orders we have made.

John Sheahan QC

President of the sitting Panel

Decision dated 6 September 2019 (declaration) & 24 September 2019 (orders)

Reasons given to parties 25 September 2019 (declaration) & 7 October 2019 (orders)

Reasons published 14 October 2019

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Advisers

Party	Advisers
Benjamin Hornigold Limited	Corrs Chambers Westgarth
John Bridgeman Limited	McCullough Robertson
JB Financial Group Pty Ltd	Thomson Geer ⁵⁷
King's Currency Exchange Pty Ltd	Thomson Geer ⁵⁸

⁵⁷ Until 16 September 2019

⁵⁸ Until 16 September 2019



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Annexure A

**CORPORATIONS ACT
SECTION 657A**

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

BENJAMIN HORNIGOLD LIMITED 05, 06 & 07

CIRCUMSTANCES

1. John Bridgeman Limited (**John Bridgeman** or **JBL**) is an NSX listed company (NSX: JBL). Trading in John Bridgeman securities has been suspended since 10 April 2019.
2. Benjamin Hornigold Limited (**Benjamin Hornigold** or **BHD**) is an ASX listed investment company (ASX: BHD). Trading in Benjamin Hornigold securities has been suspended since 30 June 2018.
3. John Bridgeman is the exclusive investment manager for Benjamin Hornigold pursuant to the terms of a management services agreement dated 27 March 2017 and a services agreement dated 1 October 2016. John Bridgeman is also the investment manager for Henry Morgan Limited (**Henry Morgan** or **HML**) and Bartholomew Roberts Pty Limited (**BRL**) under agreements with the respective entities.
4. Mr Stuart McAuliffe is the Managing Director and Chief Investment Officer (**CIO**) of John Bridgeman. As CIO, Mr McAuliffe has the primary responsibility for the investment decisions of John Bridgeman, including investment decisions made in John Bridgeman's capacity as investment manager for Benjamin Hornigold.¹
5. As at 8 February 2019:
 - (a) Mr McAuliffe held a deemed 22.97% relevant interest in John Bridgeman,² a 6.77% interest in BRL and a 8.92% interest in JB Financial Group Pty Ltd (**JB Financial** or **JBFG**)
 - (b) John Bridgeman held a 11.07% interest in Henry Morgan, a 51.71% direct interest in BRL and a 7.63% direct interest in JB Financial Group
 - (c) Henry Morgan held a 30.12% interest in BRL and a 19.87% interest in JB Financial Group

¹ In his capacity as CIO of John Bridgeman, Mr McAuliffe receives support from various investment professionals who are employed by John Bridgeman or engaged as external advisers

² Consisting of shares held directly and indirectly through various entities

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- (d) BRL held a 32.86% interest in JB Financial Group and
- (e) King’s Currency Exchange Pty Ltd (**King’s Currency** or **KC**) was a wholly owned subsidiary of JB Financial Group.³
6. The table below sets out common officers and employees (including Mr McAuliffe) across various interrelated entities during the period 8 February 2019 to 12 June 2019 (inclusive).⁴

	JBL	BHD	HML	BRL	JBFG	KC
Stuart McAuliffe	Managing Director CIO	Executive Chairman ⁵	Managing Director	Director	CEO	N/A
John McAuliffe	Chairman	N/A	Director	Director ⁶	N/A	N/A
Ross Patane	Director	Director ⁷	Director	Director ⁸	N/A	N/A
Peter Aardoom	N/A	Director ⁹	N/A	N/A	Director	Director
Peter Ziegler	N/A	Director ¹⁰	Director	N/A	N/A	N/A
James Stewart-Koster	N/A	N/A	N/A	N/A	Compliance Officer (Group) CEO (Retail FX)	CEO
Rachel Weeks	Chief Operating Officer	N/A	N/A	N/A	Chief Operating Officer	N/A

³ Paragraph 5 does not set out all holdings (direct or indirect), relevant interests or voting powers for each of the relevant entities

⁴ The table does not name all common officers and employees of each of the interrelated entities

⁵ Mr McAuliffe resigned as a director of Benjamin Hornigold at a Benjamin Hornigold board meeting held on 12 June 2019 (effective 7:45pm)

⁶ Mr John McAuliffe resigned as a director of BRL on 16 April 2019

⁷ Mr Patane was appointed as a director of Benjamin Hornigold on 11 June 2019 and resigned as a director at a Benjamin Hornigold board meeting held on 12 June 2019 (effective 7:45pm)

⁸ Mr Patane resigned as a director of BRL on 16 April 2019

⁹ Mr Aardoom resigned as a director of Benjamin Hornigold at a Benjamin Hornigold board meeting held on 12 June 2019 (effective 7:45pm)

¹⁰ Mr Ziegler was appointed as a director of Benjamin Hornigold on 28 May 2019 and resigned as a director at a Benjamin Hornigold board meeting held on 12 June 2019 (effective 7:45pm)

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	JBL	BHD	HML	BRL	JBFG	KC
Jody Wright ¹¹	Company Secretary	Company Secretary	Company Secretary	Company Secretary	Company Secretary	Director

7. On 10 September 2018, John Bridgeman announced an intention to make an off-market bid for all of the securities in Benjamin Hornigold (**2018 Bid**).
8. On 3 December 2018, JB Financial Group placed approximately \$5.43 million¹² in foreign currency banknotes with King's Currency.¹³
9. On 8 February 2019, the Panel in *Benjamin Hornigold Limited 02 and Henry Morgan Limited 02* [2019] ATP 1 made an order in relation to the affairs of Benjamin Hornigold requiring John Bridgeman to repay a \$4.5 million unsecured loan given by Benjamin Hornigold with any interest (**Repayment Order**). The Panel considered that (in combination with other things) the loan given to John Bridgeman diminished the value of important assets of Benjamin Hornigold making Benjamin Hornigold less attractive to an acquirer and less likely to attract competing proposals (and as a result, diminished the value of Benjamin Hornigold if shareholders did not accept the 2018 Bid), in effect operating as a lock-up device.
10. On 28 February 2019, John Bridgeman directed Benjamin Hornigold to place \$350,000 of foreign currency banknotes with King's Currency¹⁴ pursuant to a services agreement dated 21 February 2018¹⁵ between Benjamin Hornigold and King's Currency for the management and trading of physical foreign currency banknotes (**Services Agreement**). Under the terms of the Services Agreement, Benjamin Hornigold was to receive a return of 5.0% per annum on the capital value of the banknotes. The placement by Benjamin Hornigold on 28 February 2019 increased the total amount of physical foreign currency banknotes placed with King's Currency to approximately \$1.95 million in aggregate.
11. Through a series of transactions completed by early March 2019, JB Financial Group fully recalled all of the foreign currency banknotes it had placed with King's Currency in December 2018.¹⁶

¹¹ The co-company secretary of JBL, BHD, HML, BRL and JBFG and the company secretary of KC resigned as company secretary of each entity on 10 May 2019

¹² All references to amounts of foreign currency placed with King's Currency are to the Australian dollar equivalent

¹³ JB Financial Group had previously made a series of investments in King's Currency since February 2017

¹⁴ All placements of foreign currency banknotes by Benjamin Hornigold occurred by way of cash transfers in Australian dollars to King's Currency

¹⁵ As amended by variation deeds dated 31 July 2018 and 17 September 2018

¹⁶ Some of the transactions recalling foreign currency banknotes occurred as early as December 2018

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12. On 5 March 2019, John Bridgeman announced that it had determined not to proceed with the 2018 Bid and all previous acceptances of the 2018 Bid were cancelled and the 2018 Bid would lapse.
13. On 6 March 2019, JB Financial Group provided an unsecured loan facility to John Bridgeman for up to \$7.0 million (**JBFG Facility**).
14. On 6 March 2019, John Bridgeman directed Benjamin Hornigold to place \$2.1 million of foreign currency banknotes with King's Currency, increasing the total amount placed by Benjamin Hornigold with King's Currency to approximately \$4.0 million in aggregate.
15. On 7 March 2019, John Bridgeman drew down \$3.0 million of the JBFG Facility for the purposes of repaying Benjamin Hornigold in accordance with the Repayment Order. On the same day, John Bridgeman repaid \$3.0 million of the amount due under the Repayment Order to Benjamin Hornigold.
16. Through a series of transactions between 7 March 2019 and 27 March 2019, John Bridgeman directed Benjamin Hornigold to place an additional \$2.49 million of foreign currency banknotes with King's Currency, increasing the total amount placed by Benjamin Hornigold in foreign currency banknotes with King's Currency to approximately \$6.49 million by 27 March 2019. The amounts placed between 6 March 2019 (see paragraph 14) and 27 March 2019 totalled \$4.59 million.
17. On 8 March 2019, John Bridgeman drew down a further \$1.5 million of the JBFG Facility for the purposes of repaying the loan in accordance with the Repayment Order. On the same day, John Bridgeman repaid the remaining \$1.5 million in principal due under the Repayment Order to Benjamin Hornigold.
18. On 22 March 2019, Benjamin Hornigold announced that it had received from certain Benjamin Hornigold shareholders a notice under ss249F¹⁷ and 203D of an intention to call a general meeting to consider resolutions to remove and appoint directors of Benjamin Hornigold (**s249F Meeting**). The s249F Meeting was later called to be held on 13 June 2019.
19. Through a series of additional transactions occurring after 27 March 2019, the total amount Benjamin Hornigold was directed by John Bridgeman to place in foreign currency banknotes with King's Currency increased to approximately \$7.12 million in aggregate as at 31 May 2019. The total amount placed by Benjamin Hornigold with King's Currency after the date of the Repayment Order was approximately \$5.46 million (see paragraphs 10, 14, 16 and this paragraph 19).

¹⁷ 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)

Takeovers Panel

Reasons – Benjamin Hornigold Limited 05, 06 & 07 [2019] ATP 18

20. At a John Bridgeman board meeting held on 1 April 2019, the board considered that it may be the appropriate time for to proceed with a new takeover bid for Benjamin Hornigold and resolved to commence preparation of a new bidder's statement.
21. On 26 April 2019, John Bridgeman announced its intention to make a new off-market takeover bid for all of the securities in Benjamin Hornigold (**2019 Bid**). At a John Bridgeman board meeting held on 30 April 2019, the board resolved to finalise the preparation and lodgement of the new bidder's statement. The bidder's statement was lodged with ASIC on 3 May 2019 and offers under the 2019 Bid opened on 17 May 2019.
22. On 26 May 2019, Benjamin Hornigold commenced proceedings in the Supreme Court of Queensland seeking to restrain the s249F Meeting from proceeding (**Court Proceeding**). On 3 June 2019, evidence was served in the Court Proceeding that indicated a strong likelihood that the resolutions to remove the directors of Benjamin Hornigold would be carried by a majority at the s249F Meeting. The Court Proceeding was dismissed with costs on 4 June 2019.
23. On 6 June 2019, King's Currency sent a letter to Benjamin Hornigold requesting that amendments be made to the Services Agreement (**Request Letter**). The Request Letter stated that "*King's is in the process of establishing an external financial facility with a bank or non-bank institution to supply funds for physical banknote trading.*" The following amendments were requested "*to provide King's Currency with sufficient time to finalise the establishment of the facility*":
 - (a) increase the minimum return to Benjamin Hornigold of the capital value of the banknotes to 9.65% per annum (from 5.0% per annum)
 - (b) extend the period of notice for the return of the banknotes from 30 days to 8 months and
 - (c) extend the term of the agreement to 21 February 2021.
24. The Request Letter was considered at board meetings of Benjamin Hornigold held on 6 June 2019 and 7 June 2019 and amendments to the Services Agreement were approved by Benjamin Hornigold at a board meeting held at 7:00am (Brisbane time) on 12 June 2019. A deed of variation was executed by King's Currency and Benjamin Hornigold later on 12 June 2019 (**Variation Deed**) to increase the minimum return to Benjamin Hornigold to 9.65% per annum and to provide that all banknotes placed by Benjamin Hornigold were not returnable until 12 November 2019. At a second board meeting of Benjamin Hornigold convened at 7:30pm (Brisbane time) on 12 June 2019, all of the directors of Benjamin Hornigold (including Mr McAuliffe) and the company secretary resigned, and three new directors were appointed.
25. The Panel considers that the material provided by the parties during the proceedings supports an inference (among other things) that John Bridgeman:

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- (a) was responsible for and made Benjamin Hornigold's investment decisions, including the decisions to place foreign currency notes with King's Currency and
- (b) had influence over JB Financial Group and its wholly owned subsidiary, King's Currency in relation to relevant transactions (particularly given John Bridgeman's various relationships with the interrelated entities¹⁸ and role as investment manager of Benjamin Hornigold¹⁹).

26. The Panel considers that, in relation to the affairs of Benjamin Hornigold, the following transactions (individually and in conjunction, both of which occurred after the Panel made the Repayment Order) effectively replaced the loan subject of the Repayment Order and diminished the value of a material and important asset of Benjamin Hornigold, making it less attractive to a potential acquirer and less likely to attract competing proposals to the 2019 Bid (and as a result, diminished the value of Benjamin Hornigold if securityholders do not accept the 2019 Bid), in effect operating as a lock-up device:

- (a) the placement by Benjamin Hornigold of approximately \$5.46 million in aggregate in foreign currency banknotes with King's Currency (see paragraph 19) and
- (b) the extension of the period for the return of all banknotes placed by Benjamin Hornigold with King's Currency²⁰ pursuant to the terms of the Variation Deed (see paragraph 24).

EFFECT

27. It appears to the Panel that the acquisition of control over voting securities shares in Benjamin Hornigold has not taken place in an efficient, competitive and informed market.

CONCLUSION

28. 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 Benjamin Hornigold or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Benjamin Hornigold

¹⁸ See paragraphs 5 - 6

¹⁹ See paragraphs 3 - 4

²⁰ \$7.12 million in aggregate as at 31 May 2019 - see paragraph 72

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(b) in the alternative, having regard to the purposes of Chapter 6 set out in s602.

29. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in s657A(3).

DECLARATION

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

**Allan Bulman
Director
with authority of John Sheahan QC
President of the sitting Panel
Dated 6 September 2019**



Australian Government

Takeovers Panel

Annexure B

**CORPORATIONS ACT
SECTION 657D
ORDERS**

Benjamin Hornigold Limited 05, 06 & 07

The Panel made a declaration of unacceptable circumstances on 6 September 2019.

THE PANEL ORDERS

Return of Foreign Currency Banknotes

1. Within 10 days after the date of these orders, King's Currency must unless restrained by an order of a court return the Foreign Currency Banknotes to Benjamin Hornigold.
2. As soon as practicable (and no later than 3 days) after King's Currency has returned the Foreign Currency Banknotes to Benjamin Hornigold, King's Currency must inform the Panel, Benjamin Hornigold, John Bridgeman and JB Financial Group in writing that the Foreign Currency Banknotes have been returned to Benjamin Hornigold and specify the date on which they were returned.
3. On the date that King's Currency returns the Foreign Currency Banknotes to Benjamin Hornigold, King's Currency must pay to Benjamin Hornigold all amounts due to Benjamin Hornigold under Item 4 of the Schedule to the Services Agreement as accrued up to that date.

Restraint of future bid for Benjamin Hornigold

4. John Bridgeman, JB Financial Group and King's Currency must not propose, announce or make any change of control transaction (including a takeover bid or scheme of arrangement) in relation to the securities of Benjamin Hornigold until King's Currency has returned the Foreign Currency Banknotes to Benjamin Hornigold or Benjamin Hornigold otherwise consents in writing.
5. Order 4 does not apply if a bona fide change of control transaction is proposed or made in relation to the securities of Benjamin Hornigold by a third party that the Panel is satisfied:
 - (a) is unrelated to John Bridgeman, JB Financial Group or King's Currency
 - (b) has no significant relationship to John Bridgeman, JB Financial Group or King's Currency and
 - (c) is not influenced by any of John Bridgeman, JB Financial Group or King's Currency or anyone who is or at any time since 1 January 2019 has been an officer of any of those entities.

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Reasons – Benjamin Hornigold Limited 05, 06 & 07 [2019] ATP 18

Cancellation of acceptances

6. In respect of all acceptances by Accepting Securityholders pursuant to the 2019 Bid, each contract of purchase of Benjamin Hornigold securities by John Bridgeman entered into with Benjamin Hornigold securityholders pursuant to the 2019 Bid is voidable at the election of each Accepting Securityholder in accordance with and subject to Order 7.
7. To give effect to Order 6, John Bridgeman must:
 - (a) unless the Panel objects under Order 13, send a notice to each Accepting Securityholder within 15 days after the date of these orders:
 - (i) advising of their right to avoid the contract
 - (ii) enclosing an election form and any required transfer forms for exercise of that right
 - (iii) advising that to elect to avoid the contract the Accepting Securityholders must take the following steps:
 - (A) return the completed form to John Bridgeman before 7:00pm (Melbourne time) on the date that is 21 days after the date of dispatch of the notice and
 - (B) give John Bridgeman any certificates and transfer documents needed to effect the return of the Benjamin Hornigold securities and the securities issued as consideration or complying with Corporations Regulation 6.6.01(2), as the case may be and
 - (iv) explaining the effect of the Panel's declaration made 6 September 2019 in relation to the affairs of Benjamin Hornigold and these orders and
 - (b) promptly take all reasonable steps necessary to give effect to the exercise of a right to avoid the contract by an Accepting Securityholder.
8. John Bridgeman must comply with Corporations Regulation 6.6.01(3) in relation to each Accepting Securityholder who avoids the contract, as if the Regulation applies to this Order.
9. In respect of each avoided contract, the relevant John Bridgeman securities issued as consideration are cancelled with effect immediately after John Bridgeman complies with Order 7 and Order 8.
10. In respect of any acceptances by Accepting Securityholders pursuant to the 2019 Bid that have not been processed by John Bridgeman, each Accepting Securityholder has a right to withdraw their acceptance.
11. To give effect to Order 10, John Bridgeman must:
 - (a) comply with the requirements of Order 7, with such modifications as are necessary and
 - (b) promptly take all reasonable steps necessary to give effect to the exercise of a right to withdraw by an Accepting Securityholder.

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12. John Bridgeman must provide a form of the explanation in Order 7(a)(iv) to the Panel within 5 days after the date of these orders.
13. If the Panel objects to the form of the explanation provided by John Bridgeman under Order 12, John Bridgeman must:
 - (a) make any changes to the explanation as requested by the Panel and
 - (b) send the notice in Order 7(a) with any changes requested under Order 13(a) to each Accepting Securityholder by no later than a date advised by the Panel.

Costs

14. Within 10 days after the date of these orders, John Bridgeman must pay to Benjamin Hornigold \$120,000.00 (plus GST) representing the costs actually, necessarily, properly and reasonably incurred by Benjamin Hornigold in the course of the proceedings.
15. Within 10 days after the date of these orders, John Bridgeman must pay to ASIC \$17,580.75 representing the costs actually, necessarily, properly and reasonably incurred by ASIC in the course of the proceedings.

Miscellaneous

16. John Bridgeman, Benjamin Hornigold, JB Financial Group and King's Currency must do all things necessary (including execute any document) to give effect to these orders.
17. The parties to these proceedings and ASIC have the liberty to apply for further orders in relation to these orders.

Definitions

18. In these orders the following terms apply:

2019 Bid	the off-market takeover bid by John Bridgeman for all of the securities in Benjamin Hornigold announced on 26 April 2019
Accepting Securityholders	Benjamin Hornigold securityholders who accepted the 2019 Bid
ASIC	Australian Securities and Investments Commission
Benjamin Hornigold	Benjamin Hornigold Limited
Corporations Regulations	<i>Corporations Regulations 2001</i> (Cth)
Foreign Currency Banknotes	all foreign currency banknotes placed with King's Currency by Benjamin Hornigold or other foreign currency with an equal value of the foreign currency banknotes pursuant to the Services Agreement
JB Financial Group	JB Financial Group Pty Ltd

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John Bridgeman

John Bridgeman Limited

King's Currency

King's Currency Exchange Pty Ltd

Services Agreement

services agreement between Benjamin Hornigold and King's Currency dated 21 February 2018, as amended by variation deeds dated 31 July 2018, 17 September 2018 and 12 June 2019

Tania Mattei

Counsel

with authority of John Sheahan QC

President of the sitting Panel

Dated 24 September 2019