



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Benjamin Hornigold Limited 09  
[2019] ATP 21**

**Catchwords:**

*Decline to conduct proceedings – lock-up device – timeliness of application*

*Corporations Act 2001 (Cth), sections 249F, 657C(3)(b)*

*Benjamin Hornigold Limited 05, 06 & 07 [2019] ATP 18, Benjamin Hornigold Limited 02 and Henry Morgan Limited 02 [2019] ATP 1, Auris Minerals Limited [2018] ATP 7*

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

**INTRODUCTION**

1. The Panel, Christian Johnston, John Sheahan QC (sitting President) and Sharon Warburton, declined to conduct proceedings on an application by Benjamin Hornigold Limited in relation to its affairs. The application concerned whether the novation of the obligations to repay a loan, and the variation of another loan, to Benjamin Hornigold operated as a lock-up device. The Panel considered there was no reasonable prospect that it would grant any substantive relief having regard to (among other things) the quantum and effect of the above transactions, the effect of developments since (including the close of the takeover bid by John Bridgeman Limited for all of the securities in Benjamin Hornigold on 13 September 2019) and the orders of the Panel in *Benjamin Hornigold Limited 05, 06 & 07*.<sup>1</sup> The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

<b>2018 Bid</b>	has the meaning given in paragraph 7
<b>2019 Bid</b>	has the meaning given in paragraph 15
<b>\$4.5 million JBL Loan</b>	has the meaning given in paragraph 8(b)
<b>Benjamin Hornigold or BHD</b>	Benjamin Hornigold Limited
<b><i>Benjamin Hornigold Limited 02</i></b>	<i>Benjamin Hornigold Limited 02 and Henry Morgan Limited 02 [2019] ATP 1</i>
<b><i>Benjamin Hornigold Limited 05, 06 &amp; 07</i></b>	<i>Benjamin Hornigold Limited 05, 06 &amp; 07 [2019] ATP 18</i>
<b>Genesis</b>	Genesis Proprietary Trading Pty Ltd

<sup>1</sup> [2019] ATP 18

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<b>Genesis Loan</b>	has the meaning given in paragraph 10
<b>John Bridgeman or JBL</b>	John Bridgeman Limited
<b>JBFG</b>	JB Financial Group Pty Ltd
<b>JBFG Amendments</b>	has the meaning given in paragraph 17
<b>JBFG Convertible Loan</b>	has the meaning given in paragraph 5
<b>JBFG Loan Extension</b>	has the meaning given in paragraph 8(a)
<b>JBL Loan Extension</b>	has the meaning given in paragraph 9
<b>s249F meeting</b>	has the meaning given in paragraph 14

## FACTS

- Below is a summary of the relevant material. For more detailed background see *Benjamin Hornigold Limited 02* and *Benjamin Hornigold Limited 05, 06 & 07*.
- Benjamin Hornigold is an ASX listed investment company (ASX code: BHD). John Bridgeman is an NSX listed company (NSX code: JBL).
- On or around 11 September 2017, Benjamin Hornigold entered into a loan agreement with JBFG to provide JBFG with funding to acquire 100% of Genesis (**JBFG Convertible Loan**). One of the terms of the JBFG Convertible Loan allowed Benjamin Hornigold to make an election to convert the amount outstanding under the loan into shares in Genesis.
- On 8 August 2018, Benjamin Hornigold provided an unsecured loan to John Bridgeman for \$1,134,000 for a term of one year.
- On 10 September 2018, John Bridgeman announced an intention to make an off-market takeover 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**).
- On 17 September 2018, Benjamin Hornigold's board agreed to:
  - extend the expiry date of the JBFG Convertible Loan from 10 September 2018 to 11 March 2020 (**JBFG Loan Extension**) and
  - convert a \$4.5 million receivable due to Benjamin Hornigold from John Bridgeman into an unsecured loan with a term of 18 months (**\$4.5 million JBL Loan**).<sup>2</sup>
- On 16 October 2018, Benjamin Hornigold's board agreed to extend the loan to John Bridgeman referred to in paragraph 6 by a further six months (**JBL Loan Extension**).

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<sup>2</sup> *Benjamin Hornigold Limited 02* at [45]

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10. On 24 December 2018, a loan arrangement was entered into between Genesis and Benjamin Hornigold for a loan amount (to Genesis) of \$800,000 with a maturity date of 31 October 2019 at an interest rate of 9% per annum (**Genesis Loan**).
11. On 28 December 2018, certain Benjamin Hornigold shareholders<sup>3</sup> made applications to the Panel seeking declarations of unacceptable circumstances in relation to the affairs of Benjamin Hornigold<sup>4</sup> and the Panel made a declaration of unacceptable circumstances in relation to the affairs of Benjamin Hornigold on 25 January 2019.<sup>5</sup>
12. The Panel made the declaration on the basis that the \$4.5 million JBL Loan, and the JBFG Loan Extension and the JBL Loan Extension, 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.<sup>6</sup> The Panel made orders on 8 February 2019, including ordering repayment of the \$4.5 million JBL Loan with interest by 6 March 2019. The Panel decided not to reverse the JBFG Loan Extension and the JBL Loan Extension, stating that:

*We consider that the potential benefit to BHD shareholders of such orders is outweighed by the prejudice to JBL and JBFG.<sup>7</sup>*

13. 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.
14. On 22 March 2019, Benjamin Hornigold announced that it had received from certain Benjamin Hornigold shareholders a notice under ss249F<sup>8</sup> 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.
15. 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**).
16. On 7 May 2019, the Genesis Loan was novated so that the obligation to repay the amount outstanding (including accrued, unpaid interest) was transferred from

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<sup>3</sup> 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

<sup>4</sup> See *Benjamin Hornigold Limited 02* at [11]. Applications were also made seeking declarations of unacceptable circumstances in relation to the affairs of Henry Morgan

<sup>5</sup> The Panel also made a declaration in relation to the affairs of Henry Morgan

<sup>6</sup> See *Benjamin Hornigold Limited 02* at [62]

<sup>7</sup> *Benjamin Hornigold Limited 02* at [78]

<sup>8</sup> 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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Genesis to JBFG. As at the date of the novation, the amount payable under the Genesis Loan was \$857,994.52.

17. Amendments to the JBFG Convertible Loan were considered at Benjamin Hornigold board meetings held on 6 June 2019, 7 June 2019 and at 7:00am (Brisbane time) on 12 June 2019. At the board meeting held on 12 June 2019, the “Voting Directors” of Benjamin Hornigold (ie Messrs Bryan Cook and Peter Ziegler) passed resolutions (among other things) to approve amendments to the JBFG Convertible Loan. Later on 12 June 2019, a deed of variation was executed by Benjamin Hornigold, JBFG and JB Trading House Pty Ltd to vary the JBFG Convertible Loan that (among other things and subject to a proposed transaction completing):
  - (a) extended the date of repayment from 11 March 2020 to 11 September 2020
  - (b) removed Benjamin Hornigold’s right to convert outstanding monies into shares in Genesis and
  - (c) increased the interest rate from 9.65% to 10.5% per annum (the **JBFG Amendments**).
18. At a second board meeting of Benjamin Hornigold convened at 7:30pm (Brisbane time) on 12 June 2019, all of the directors and the company secretary of Benjamin Hornigold resigned (effective 7:45pm), and three new directors were appointed.
19. On 6 September 2019, we made a declaration in *Benjamin Hornigold Limited 05, 06 & 07*, because (in summary) the placement of foreign currency banknotes by Benjamin Hornigold with King’s Currency Exchange Pty Ltd (a wholly owned subsidiary of JBFG) effectively replaced the \$4.5 million JBL Loan (the subject of the repayment order discussed in paragraph 12) 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 the 2019 Bid.<sup>9</sup>
20. The 2019 Bid closed on 13 September 2019 with John Bridgeman having voting power in Benjamin Hornigold of approximately 17.44%.

## APPLICATION

### Declaration sought

21. By application dated 13 September 2019, Benjamin Hornigold sought a declaration of unacceptable circumstances. Benjamin Hornigold submitted that the novation of the Genesis Loan and the JBFG Amendments:
  - (a) interfered with the efficiency and competitiveness of the market and
  - (b) operated as a lock-up device that had the effect of diminishing the value of Benjamin Hornigold rendering the company a less attractive acquisition target and in turn making it less likely to attract competing proposals from other potential third party acquirers,

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<sup>9</sup> See *Benjamin Hornigold Limited 05, 06 & 07* at [123]

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therefore operating in the same unacceptable way as the transactions that we found were unacceptable in *Benjamin Hornigold Limited 05, 06 & 07*.

#### Final orders sought

22. Benjamin Hornigold sought a final order that the novation of the Genesis Loan and the JBFG Amendments be declared void. It also sought an order for costs.

#### DISCUSSION

23. John Bridgeman made a preliminary submission, submitting (among other things) that:
- (a) The Panel in *Benjamin Hornigold Limited 02* considered the JBGF Loan Extension and “ultimately decided not to reverse the transaction, as it considered that the potential benefit to BHD shareholders was outweighed by prejudice to JBFG”.
  - (b) The application was made outside the time prescribed in s657C(3)(b).
24. We consider there is no reasonable prospect that we would grant any substantive relief in relation to the novation of the Genesis Loan and the JBFG Amendments having regard to the following:
- (a) While in theory these transactions may conceivably operate as lock-ups in a similar way to the transactions we found unacceptable in *Benjamin Hornigold Limited 05, 06 & 07*, the quantum and effect differs. The Genesis Loan was only for \$800,000 (which is materially less than the amount owing under the JBL Loan). We consider it is unlikely that the removal of the right to convert outstanding monies under the JBFG Loan into shares in Genesis would deter rival proposals. The extension of the JBFG Loan was from 11 March 2020 to 11 September 2020. The Panel in *Benjamin Hornigold Limited 02* did not make any orders in relation to the earlier extension of that loan.
  - (b) The effect of what has happened since, including the fact that the 2019 Bid has ended and that we have ordered in *Benjamin Hornigold Limited 05, 06 & 07* withdrawal rights for Benjamin Hornigold securityholders that accepted the 2019 Bid and imposed a restraint on John Bridgeman making a future bid for Benjamin Hornigold (subject to exceptions).<sup>10</sup>
  - (c) Now that the 2019 Bid has ended, Benjamin Hornigold has the ability to seek relief in relation to these transactions in the courts.<sup>11</sup>
25. We also agree with John Bridgeman that the application is out of time. Benjamin Hornigold could have included the matters complained about here in its Benjamin Hornigold Limited 06 application dated 8 August 2019 but chose not to do so. It first raised the novation of the Genesis Loan and the JBFG Amendments in its submissions to the brief in *Benjamin Hornigold Limited 05, 06 & 07* on 22 August 2019.

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<sup>10</sup> See *Benjamin Hornigold Limited 05, 06 & 07* at [184] and order 5 of our orders dated 24 September 2019

<sup>11</sup> See *Auris Minerals Limited* [2018] ATP 7 at footnote 10

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### DECISION

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

### Orders

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

**John Sheahan QC**

**President of the sitting Panel**

**Decision dated 26 September 2019**

**Reasons given to parties 21 October 2019**

**Reasons published 23 October 2019**

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### Advisers

Party	Advisers
Benjamin Hornigold	Corrs Chambers Westgarth
John Bridgeman	McCullough Robertson
JBFG	
King's Currency Exchange Pty Ltd	
Partners for Growth V, L.P	Arnold Bloch Leibler