



**Australian Government**

**Takeovers Panel**

**Reasons for Decision**

**Benjamin Hornigold Limited 08R, 10R & 11R  
[2019] ATP 22**

**Catchwords:**

*Affirming initial Panel decisions - declaration – orders – circumventing Panel orders – lock-up device – independent expert’s report – supplementary target’s statement*

*Corporations Act 2001 (Cth), sections 203D, 249D, 602(a), 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 19: Insider participation in control transactions*

*Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311, Glencore International AG & Anor v Takeover Panel & Ors [2005] FCA 1290, Gjergja & Ors v Cooper & Ors (1986) 10 ACLR 577*

*Benjamin Hornigold Limited 09 [2019] ATP 21, Benjamin Hornigold Limited 05, 06 & 07 [2019] ATP 18, Benjamin Hornigold Limited 02 and Henry Morgan Limited 02 [2019] ATP 1, IFS Construction Services Limited [2012] ATP 15*

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

**INTRODUCTION**

1. The review Panel, Richard Hunt (sitting President), Diana Nicholson and Karen Phin, made minor variations to the declaration and orders made by the initial Panel in relation to the affairs of Benjamin Hornigold Limited.<sup>1</sup> The review Panel otherwise agreed with the initial Panel’s conclusions, for substantially the same reasons.

2. In these reasons, the following definitions apply.

**2018 Bid** has the meaning given in paragraph 3(c)

**2019 Bid** has the meaning given in paragraph 3(n)

**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*

<sup>1</sup> *Benjamin Hornigold Limited 05, 06 & 07 [2019] ATP 18*. All references to the initial Panel are to the Panel in *Benjamin Hornigold Limited 05, 06 & 07*

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<b><i>Benjamin Hornigold Limited 05, 06 &amp; 07</i></b>	<i>Benjamin Hornigold Limited 05, 06 &amp; 07 [2019] ATP 18</i>
<b>Foreign Currency Transactions</b>	means the placement of foreign currency banknotes by Benjamin Hornigold with King's Currency referred to in paragraphs 3(f), (i), (k) and (m)
<b>Henry Morgan or HML</b>	Henry Morgan Limited
<b>IBC</b>	Independent Board Committee
<b>IER</b>	has the meaning given in paragraph 94(a)
<b>JB Financial Group or JBFG</b>	JB Financial Group Pty Ltd
<b>JBFG Facility</b>	has the meaning given in paragraph 3(i)
<b>JBL Application</b>	the application by John Bridgeman dated 8 August 2019
<b>JBL Loan</b>	has the meaning given in paragraph 3(e)
<b>John Bridgeman or JBL</b>	John Bridgeman Limited
<b>King's Currency or KC</b>	King's Currency Exchange Pty Ltd
<b>Partners for Growth</b>	Partners for Growth V, L.P.
<b>Partners for Growth Facility</b>	has the meaning given in paragraph 27
<b>PPSA</b>	has the meaning given in paragraph 104(a)
<b>Repayment Order</b>	has the meaning given in paragraph 3(e)
<b>Request Letter</b>	has the meaning given in paragraph 3(p)
<b>Services Agreement</b>	has the meaning given in paragraph 3(f), including as amended by variation deeds dated 31 July 2018, 17 September 2018 and the Variation Deed (as the context requires)
<b>Variation Deed</b>	has the meaning given in paragraph 3(p)
<b>Voting Directors</b>	has the meaning given in paragraph 39(b)

## **FACTS**

3. The facts are as set out in *Benjamin Hornigold Limited 05, 06 & 07*. In summary:
- (a) John Bridgeman is an NSX listed company (NSX: JBL). Benjamin Hornigold is an ASX listed investment company (ASX: BHD). John Bridgeman is the exclusive investment manager for Benjamin Hornigold. Mr Stuart McAuliffe is the Managing Director and Chief Investment Officer of John Bridgeman.

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- (b) The reasons in *Benjamin Hornigold Limited 05, 06 & 07* details some shareholdings as at 8 February 2019<sup>2</sup> and some common officers and employees during the period 8 February 2019 to 12 June 2019<sup>3</sup> involving the following companies: Benjamin Hornigold, John Bridgeman, Henry Morgan, Bartholomew Roberts, JB Financial Group and King's Currency.
- (c) 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**).
- (d) On 3 December 2018, JB Financial Group placed approximately \$5.43 million in foreign currency banknotes with King's Currency.
- (e) On 8 February 2019, the Panel in *Benjamin Hornigold Limited 02 and Henry Morgan Limited* 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 (**JBL Loan**) 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.
- (f) On 28 February 2019, John Bridgeman directed Benjamin Hornigold to place \$350,000 of foreign currency banknotes with King's Currency<sup>4</sup> pursuant to a services agreement dated 21 February 2018 (as amended on 31 July 2018 and 17 September 2018) 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: (i) Benjamin Hornigold was to receive a return of 5.0% per annum on the capital value of the banknotes and (ii) on 30 days' notice (or such other time as otherwise agreed), King's Currency must provide the banknotes (or other foreign currency with an equal value) to Benjamin Hornigold. 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.
- (g) 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.
- (h) 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.

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<sup>2</sup> At [51]

<sup>3</sup> At [53]

<sup>4</sup> All placements of foreign currency banknotes by Benjamin Hornigold were accounted for as cash transfers in Australian dollars to King's Currency

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- (i) On 6 March 2019, JB Financial Group provided an unsecured loan facility to John Bridgeman for up to \$7.0 million (**JBFG Facility**). Also on 6 March, 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.
- (j) 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.
- (k) 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.
- (l) 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.
- (m) 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.
- (n) 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**). The bidder's statement was lodged with ASIC on 3 May 2019 and offers under the 2019 Bid opened on 17 May 2019. John Bridgeman's voting power in Benjamin Hornigold at the time was 0.47%.
- (o) On 3 June 2019, evidence was served in a court proceeding that indicated a strong likelihood that resolutions to remove the directors of Benjamin Hornigold at a s249F<sup>5</sup> meeting (scheduled to be held on 13 June 2019) would be carried by a majority.
- (p) 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 was considered at board meetings of Benjamin Hornigold held on 6 June 2019 and 7 June 2019 and amendments to the Services Agreement

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<sup>5</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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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 and the company secretary resigned, and three new directors were appointed.

4. On 6 September 2019, the initial Panel 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 effectively replaced Benjamin Hornigold's \$4.5 million loan to John Bridgeman the subject of the Repayment Order and, individually and in conjunction with the 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.
5. On 13 September 2019, the 2019 Bid closed with John Bridgeman having voting power in Benjamin Hornigold of approximately 17.44%.
6. On 24 September 2019, the initial Panel made orders requiring the foreign currency banknotes to be returned, restraining any further bid for Benjamin Hornigold by John Bridgeman, JB Financial Group and King's Currency (subject to an exception in relation to responding to a third party proposal), making acceptances under the 2019 Bid voidable at the election of an accepting shareholder and in relation to costs.

## APPLICATION

7. The Panel received three review applications:
  - (a) On 10 September 2019, John Bridgeman sought a review of the initial Panel's decision to make a declaration of unacceptable circumstances (08R). John Bridgeman did not have a copy of the initial Panel's reasons for making its declaration before making its review application.
  - (b) On 26 September 2019, John Bridgeman sought a review of the initial Panel's decision to make orders (10R). On the same day, JB Financial Group and King's Currency sought a review of the initial Panel's decision to make orders (11R). John Bridgeman, JB Financial Group and King's Currency did not have the initial Panel's reasons for making orders before making their review applications.
8. John Bridgeman in its review applications submitted that (among other things):
  - (a) there were "*fundamental errors in the findings of fact*" by the initial Panel in reaching their decision to make a declaration
  - (b) it would not be in the public interest to uphold the initial Panel's decision to make a declaration, where "*certain conclusions drawn by the*" initial Panel were "*contrary to well-established market practice and will have the effect of hindering*

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*legitimate commercial activity, in contradiction to the principles in section 602 and to the detriment of target shareholders” and*

- (c) the initial Panel’s orders unfairly prejudice John Bridgeman.
9. JB Financial Group and King’s Currency submitted in their review application that the declaration and orders by the initial Panel were “*affected by jurisdictional errors*”. They also submitted that the initial Panel’s order to return “*over \$7 million of foreign currency banknotes to Benjamin Hornigold Ltd within 10 days*” went beyond what was reasonable, failed to take into consideration their submissions and significantly interfered with contractual relations and business arrangements in a way which unfairly prejudiced them.
10. John Bridgeman, JB Financial Group and King’s Currency sought a stay of the initial Panel’s orders. On 30 September 2019, we stayed the initial Panel’s orders (Annexure A), except for orders 4 and 5 (which prohibited John Bridgeman from making a further bid for Benjamin Hornigold in certain circumstances) and orders 16, 17 and 18 (which were related to mechanics and definitions).

## DISCUSSION

11. The powers of a review Panel are set out in section 657EA. Our role is to conduct a *de novo review*.<sup>6</sup> Subsection (4) provides that a review Panel has the same powers to make a declaration or orders as the initial Panel and may vary or set aside the decision reviewed or substitute a new decision. It may also affirm the decision reviewed after conducting proceedings or decline to conduct proceedings and allow the initial Panel’s decision to stand.
12. We decided to conduct proceedings and directed that all three review applications be considered together pursuant to regulation 16(1)(a) of the *Australian Securities and Investments Commission Regulations 2001 (Cth)*.
13. Prior to conducting proceedings, we received all the materials which the initial Panel had when it considered whether to make a declaration (including submissions and rebuttals). We asked the parties a number of questions in our brief, including the following:
- All (except for PFG)<sup>7</sup> – Do you consider that any of the material before the initial Panel is inconsistent with the initial Panel’s findings, decision or reasons, please indicate specifically in what respect it is inconsistent and explain why. If there is additional evidence or material that rebuts or is inconsistent with the initial Panel’s findings, decision or reasons or you otherwise wish to bring to the Panel’s attention, please provide it.*
14. We also had the initial Panel’s reasons for making its declaration. We subsequently received all the material before the initial Panel in relation to its decision to make orders, and its reasons for making orders, prior to issuing our orders brief.

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<sup>6</sup> *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [187]

<sup>7</sup> Partners for Growth was not a party at the time the initial Panel made its declaration. Partners for Growth was separately asked “*Are there any issues or facts that you wish to bring to the Panel’s attention? If so, please provide details and submissions*”

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15. We have considered all the material referred to above but address only specifically that part of the material we consider necessary to explain our reasoning. Given that, as discussed below, we substantively agree with the conclusions and reasons of the initial Panel, the easiest way to read these reasons is as an addendum to the initial Panel's reasons. To assist, we adopt essentially the same headings as the initial Panel.

#### Lock-up device

16. For the reasons discussed below, we agree with the initial Panel's conclusion that the following transactions (individually and in conjunction, both of which occurred after the Panel made the Repayment Order) effectively replaced the loan the 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 did 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 and
  - (b) the extension of the period for the return of all banknotes placed by Benjamin Hornigold with King's Currency pursuant to the terms of the Variation Deed.

*John Bridgeman was responsible for making investments decisions for Benjamin Hornigold*

17. Paragraphs 43 to 49 of the initial Panel's reasons discuss why it made an inference that John Bridgeman was responsible for and made Benjamin Hornigold's investment decisions, including the decisions to make the Foreign Currency Transactions. None of the parties made any substantive submissions challenging this finding and we agree with the initial Panel's inference and reasons on this issue.

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

18. Paragraphs 50 to 63 of the initial Panel's reasons discuss the influence John Bridgeman has over JB Financial Group and King's Currency. John Bridgeman submitted that:

*... 'Influence' is a nebulous concept, which contemplates a vast gradation of varying degrees of significance. The degree of 'influence' the initial Panel considers that John Bridgeman is able to exert was not specifically identified by the initial Panel, nor was the requisite degree required in order for the initial Panel's conclusions to be drawn.*

19. The initial Panel considered that the material discussed below supported 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"*.
20. Paragraph 51 of the initial Panel's reasons details the various direct shareholdings between various interrelated entities and paragraph 52 quotes a submission from ASIC that it understood that *"if the total number of directly held shares in JBFG by Mr*

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*McAuliffe, BRL, HML and JBL were voted together, it would represent 69% of the voting power in JBFG”.*

21. JB Financial Group submitted that reference to “69%” was misleading. John Bridgeman submitted that *“the findings, decision and reasons of the initial Panel”* were *“incorrect insofar as they each rely upon or refer to the combined voting power in JB Financial Group of JBL, HML, Bartholomew Roberts and Stuart McAuliffe”*.
22. We disagree with these submissions. The initial Panel did not rely on the aggregate 69% figure in isolation or make any conclusion as to whether Mr McAuliffe, Bartholomew Roberts, Henry Morgan or John Bridgeman would vote their shares in JB Financial Group together. The initial Panel also considered, as noted in paragraph 53 of its reasons, the common officers and employees (including Mr McAuliffe) across the following interrelated entities during the period 8 February 2019 to 12 June 2019 (inclusive): John Bridgeman, Benjamin Hornigold, Henry Morgan, Bartholomew Roberts, JB Financial Group and King’s Currency.
23. The initial Panel also considered that the provision of the JBFG Facility 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, supported an inference that John Bridgeman had influence over JB Financial Group and King’s Currency. The initial Panel noted the submissions by John Bridgeman and JB Financial Group in relation to the negotiations and provision of expert advice leading up to the provision of the JBFG Facility (see paragraphs 55 to 58) but stated (in paragraph 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”.*
24. John Bridgeman submitted that the above statement by the initial Panel *“necessarily assumes that all communications between the parties were made in writing, and does not contemplate that parties regularly interact and negotiate on a verbal basis (the outcome of which may be subsequently documented) and do not record all discussions in writing”*. John Bridgeman did not provide any further material evidencing such discussions, even though we expressly invited it to provide *“additional evidence or material that rebuts or is inconsistent with the initial Panel’s findings, decision or reasons”* (as discussed in paragraph 13 above).<sup>8</sup>
25. JB Financial Group submitted that:  
*As previously submitted, initial discussions between John Bridgeman and JB Financial Group were in respect of terms which included a lower interest rate with security being provided to JB Financial Group. Ultimately, the parties agreed that a higher rate would be applied while the facility remained unsecured – but that this would be revisited in the future, with security*

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<sup>8</sup> For completeness we note that a number of questions in the initial Panel’s brief directed to John Bridgeman requested *“for discussions of which no record has been made, please describe what was said, by whom and when.”* John Bridgeman could have produced such descriptions in response to our request for additional evidence or material



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*to be provided in return for future decrease in rate. The Independent Director of JB Financial Group considered all relevant circumstances and risks in relation to providing the loan to John Bridgeman on an unsecured basis and all relevant general commercial terms and conditions forming part of the loan facility agreement when exercising his business judgement on this issue.*

26. JB Financial Group's submission is far from convincing in light of the issues regarding the financial viability of John Bridgeman and JB Financial Group as noted by the initial Panel in paragraphs 60 to 61 of its reasons. We also consider that the initial Panel's inference in relation to John Bridgeman's influence over JB Financial and King's Currency is further supported by material provided in this proceeding from Partners for Growth.
27. On 30 November 2018, Partners for Growth entered into a Facility Agreement, General Security Deed and related agreements with JB Financial Group, King's Currency and their related bodies corporate, providing JB Financial Group with \$7 million in loan notes (**Partners for Growth Facility**). Under the General Security Deed, Partners for Growth was granted first-ranking security over all the assets of a number of companies, including JB Financial Group and King's Currency.
28. On 18 June 2019, Partners for Growth provided JB Financial Group with a "Notice of Default and Reservation of Rights" letter stating the following events of default (among others):
  - (a) JBFG had "failed to comply with the King's Currency and Mercantile Agency EBITDA Covenant...in respect of the testing periods ending December 2018, January 2019, February 2019 and March 2019, and is therefore in breach of its obligation to comply with the Financial Covenants..." and
  - (b) JBFG had "recently advised that it entered into a further loan agreement with JBL dated on or about 6 March 2019, as amended by the parties on 1 May 2019, pursuant to which the Borrower [JBFG] made available a cash advance facility of A\$10,000,000 in aggregate to JBL...".<sup>9</sup>
29. There were two aspects of this additional material that concerned us. Firstly, we consider that JB Financial Group providing the JBFG Facility, in circumstances where its financial position was uncertain,<sup>10</sup> it was prohibited from doing so under the terms of the Partners for Growth Facility and Partners for Growth had a first ranking charge over the assets of JB Financial Group, was uncommercial.
30. Secondly, Partners for Growth's material suggested that the \$7 million JBFG Facility was in fact \$10 million. ASIC expressed concerns that this had not been disclosed to the initial Panel or us by either JB Financial Group or John Bridgeman Limited (or disclosed to the market).

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<sup>9</sup> JB Financial Group and King's Currency submitted that they disputed "any purported default notice issued by" Partners for Growth

<sup>10</sup> See also paragraph 68 of these reasons

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31. We asked JB Financial Group for a copy of the documentation relating to any increase of JBFG Facility from \$7 million to \$10 million. JB Financial Group produced a Deed of Variation to the JBFG Facility dated 1 May 2019 that operated to increase the facility limit to \$10 million.
32. Drawing on our experience we agree with paragraphs 50 to 63 of the initial Panel's reasons leading to its inference (in paragraph 62) regarding John Bridgeman's influence over JB Financial Group and King's Currency. In light of the material provided by Partners for Growth we would go further. We consider that the provision of the JBFG Facility was uncommercial and this also supports the inference regarding John Bridgeman's influence over JB Financial Group and King's Currency. In addition, the fact that the JBFG Facility was increased to \$10 million further supports this inference. No evidence was provided to explain the basis on which JB Financial Group thought this increase prudent or why it had not been previously disclosed.
33. It follows that we do not agree with John Bridgeman's submission (quoted in paragraph 18 of these reasons) that the initial Panel did not specifically identify the influence that John Bridgeman was able to exert. The surrounding facts support the inference in paragraph 32 above and the provision of the JBFG Facility is an example which demonstrates such influence.
34. In relation to the lack of disclosure regarding the increase of the JBFG Facility to \$10 million, ASIC submitted that:  
*...it is open to the Panel to seriously question the merit of the review applications in circumstances where it appears that both JBFG and JBL have failed to disclose this material information in their submissions to the Panel in Benjamin Hornigold Limited 05, 06 & 07, and in the case of JBL in its public disclosures and bidder's statements.*
35. In our view, it is not necessary to consider the credibility of JB Financial Group's and John Bridgeman's submissions (in light of their failure to disclose the increase in the JBFG Facility) in order to support the inference in paragraph 32 above. We would have sought further submissions on this issue if we considered it was necessary.

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

36. Paragraphs 64 to 72 of the initial Panel's reasons discuss in detail the various foreign currency transactions, the JBFG Facility and John Bridgeman's repayment of the \$4.5 million loan to Benjamin Hornigold required by the Repayment Order. We did not receive any substantive submissions from the parties on this material and adopt the initial Panel's description of those transactions.
37. Paragraphs 73 to 75 of the initial Panel's reasons discuss King's Currency's request for variations to the Services Agreement, consideration of that request by Benjamin Hornigold, amendments to the Services Agreement approved by Benjamin Hornigold, the execution of a variation deed to give effect to certain variations and the subsequent resignation of Benjamin Hornigold's directors. The facts in

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paragraphs 73 to 75 of the initial Panel's reasons were not rebutted by the parties. The following is some further detail in relation to those events.

38. As noted in paragraph 73 of the initial Panel's reasons, King's Currency's 6 June 2019 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 requested the following amendments to the Services Agreement "*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.
39. The Request Letter was considered by the board of Benjamin Hornigold on 6 June 2019. The company secretary was also in attendance. The minutes of that meeting note it was agreed that:
- (a) Messrs Stuart McAuliffe and Peter Aardoom would abstain from voting in relation to the proposed action and
  - (b) the meeting would be adjourned, so that Messrs Peter Ziegler and Bryan Cook (defined in the minutes as "**the Voting Directors**") could obtain further information, including a detailed analysis of the proposed amendments and how this would affect the cashflow and the assets of Benjamin Hornigold.
40. On 7 June 2019, Messrs Ziegler and Cook met to consider the Request Letter and another transaction. The company secretary was also in attendance. The minutes of that meeting state that:

*The Voting Directors considered the Board Paper provided in relation to the request from King's Currency Exchange Pty Ltd.*

*It was **NOTED** that:*

- (a) *King's is in the process of obtaining an external funding facility to supply funds for physical bank note trading and in order to provide King's with sufficient time to do this, it requires amendments to the Services Agreement in place with the Company;*
- (b) *There are synergies for the Company in terms of the proposal as set out in the Board Paper; and*
- (c) *The changes requested should benefit the Company financially.*

*The Voting Directors considered the further analysis provided and the amendment request by King's Currency Exchange Pty Ltd. Taking into account the implications for the Company in relation to the proposed amendments, it was **NOTED** that the proposed benefits would, overall, be in the best interests of the Company and its shareholders and would outweigh any disadvantages to the Company and its shareholders. Further, the amendments are being made*

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*on commercial terms and in an arm's length manner and would result in favourable terms for the Company.*

It was **RESOLVED** to recommend that the following amendments be made to the Services Agreement:

1. *The minimum return to the Company be increased from 5% of the capital value of the notes to 9.65% per annum;*
2. *If the Company wishes to recall the banknotes provided to King's Currency Exchange Pty Ltd under the Services Agreement, the Company must provide King's Currency Exchange Pty Ltd with eight months' notice;*
3. *The term of the Services Agreement be extended to 21 February 2021; and*
4. *The Company Secretary be authorised to do all things necessary to give effect to the above resolutions.*

*In making these resolutions, the Voting Directors have confirmed that they:*

- *Were making the judgement in good faith and for a proper purpose;*
- *Did not have a material personal interest in the subject matter;*
- *Have informed themselves about the subject matter to the extent they reasonably believed appropriate; and*
- *Rationally believed that the judgment is in the best interests of the Company.*

41. The board of Benjamin Hornigold met again at 7.00am (Brisbane time) on 12 June 2019. Messrs McAuliffe, Peter Aardoom, Bryan Cook, Peter Ziegler and three other directors attended this meeting. The company secretary was also present at the meeting. The minutes of the meeting note that the resolutions at the scheduled s249F meeting to remove all the directors were likely to pass and that the board considered whether it was in the best interests of Benjamin Hornigold for the board to approach the nominated directors in relation to their immediate appointment and for the board members to resign.
42. After this discussion the directors other than Messrs McAuliffe, Aardoom, Cook and Ziegler left the meeting. The minutes record that Messrs McAuliffe, Aardoom, Cook and Ziegler then considered the proposal to amend the Services Agreement and one other transaction and the view of the Voting Directors that both transactions were in the best interests of Benjamin Hornigold. The minutes record that the meeting was adjourned briefly for Messrs Cook and Ziegler to consider the proposals again and provide their recommendation to the board. When the board reconvened, Messrs Cook and Ziegler confirmed their recommendations. The minutes note that Mr Aardoom was not present and Mr McAuliffe noted the recommendations of the Voting Directors and abstained from voting. The minutes record that Messrs Cook and Ziegler resolved that "*the recommendations of 7 June 2019 be accepted and documented accordingly*".
43. The Services Agreement was amended on 12 June 2019 to:

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- (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. This differs from the approved recommendations on 7 June 2019.

44. 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.

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

45. Paragraph 83 of the initial reasons states that the initial Panel inferred “*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...in effect replaced the JBL Loan the subject of the Repayment Order*”.

46. John Bridgeman submitted that the initial Panel came to this conclusion “*notwithstanding the lack of evidence to suggest that this is so*”.

47. John Bridgeman also submitted that:

*...the fact that it had an outflow of funds of approximately \$4.5 million, without the benefit of a corresponding inflow (noting that the inflow of funds received under the JBFG Facility is offset by a corresponding debt) is inherently inconsistent with the findings, decision and reasons relating [to] the replacement of the funds the subject of the orders in Benjamin Hornigold Limited 02 and which the initial Panel appears not to have had regard to.*

48. We do not agree, noting the uncommercial circumstances surrounding the provision of the JBFG Facility. We agree with paragraphs 77 to 84 of the initial Panel’s reasons, that state (among other things) that while King’s Currency was not a party to the JBL Loan and that John Bridgeman was not a party to the Foreign Currency Transactions or the Variation Deed, these matters do not have bearing on the effect of those transactions (individually or in conjunction), which supports an inference that the Foreign Currency Transactions and Variation Deed effectively replaced the JBL Loan the subject of the Repayment Order.

49. The initial Panel discussed the terms of the Services Agreement in paragraphs 86, 87 and 89 of its reasons. Clause 2.1(c)(ii) of the Services Agreement<sup>11</sup> provides that the banknotes provided by Benjamin Hornigold to King’s Currency remain the property of Benjamin Hornigold, that Benjamin Hornigold bears any exchange gain or loss on “*the currency mix in the parcel of Banknotes provided*” and 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*”. Clause 2.1(c)(iii) provides that “*the mix of*

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<sup>11</sup> Paragraph 86 of the initial Panel’s reasons has a typographical error. The reference to Clause 2.1(e)(ii) should be to Clause 2.1(c)(ii)

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*currencies provided and required to be returned to" Benjamin Hornigold may only be changed if Benjamin Hornigold "agrees in writing that King's Currency may replace specific currencies and quantum thereof with other specific currencies and quantum on behalf of" Benjamin Hornigold.*

50. Item 3 of the Schedule to the Services Agreement provides that the "Parties acknowledge that the Banknotes (or if they are on-traded, then the replacement banknotes) are and will continue to remain an asset of" Benjamin Hornigold, and "do not become an asset of" King's Currency and 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.
51. We asked John Bridgeman, Benjamin Hornigold and King's Currency some questions as to how Benjamin Hornigold's placement of foreign currency banknotes with King's Currency worked in practice.
52. John Bridgeman submitted that:

*In practical terms, the Australian dollar amount placed by BHD with King's Currency is exchanged into foreign currency banknotes following receipt. Those banknotes are then sold and traded multiple times during the month. To establish the exchange gain or loss, the banknotes are valued and compared with the value determined at the end of the previous month. An invoice for the return payable to BHD is then raised based on the value placed with Kings and the effect of any revaluation, having regard to the minimum required return.*

*The foreign currency banknotes are valued at the spot market rate at each reporting date. The foreign currency banknotes are revalued between reporting periods when there are any purchases or sales of banknotes, and any valuation movement from the previous reporting date is recorded as a foreign exchange gain or loss in the relevant reporting period.*

*Under the terms of the Services Agreement, BHD is exposed to foreign exchange fluctuation as it is a professional investor. When BHD places Australian dollars with King's Currency, the Australian dollar value is converted to the portfolio or currency value at the spot rates of that day.*

*In order to manage any foreign exchange risk, John Bridgeman is able to adjust BHD's investments in foreign exchange derivatives, and maintains positions which it is able to alter swiftly, taking into consideration any market movements and foreign exchange banknote exposure. BHD is therefore exposed to little foreign exchange risk because John Bridgeman is able to mitigate it (or 'hedge it out') through trading positions every day, and if necessary, intraday.*

*...In relation to the 'management and on-trading' of Banknotes, the King's Currency business manages the purchase and sale of foreign currency banknotes in the retail market. As noted above, upon receipt of the AUD transferred by BHD, Kings would purchase foreign currency banknotes. Those notes would be combined with the existing stock held by King's Currency across its 30 stores, and sold in the ordinary course of business. With the AUD proceeds from the sale of notes, additional foreign currency banknotes would be purchased. The notes form part of the overall King's Currency float of foreign exchange, which are traded tens of thousands of transactions, monthly.*

53. King's Currency submitted that:

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*Placements would be made with King's Currency in Australian dollars. King's Currency would then convert the Australian dollars into the appropriate denomination of foreign currency banknotes having regard to demand, seasonal expectations, etc. As noted in previous submissions, the banknotes are sold and traded through King's Currency[s] 30 retail foreign exchange stores, multiple times per month (with an average of over 485,000 transactions annually). At the end of the month, John Bridgeman values the banknotes to establish the exchange gain or loss, and compares this with the value determined at the end of the previous month. An invoice for the return due to BHD would be raised based on the value of funds placed with King's Currency and the effect of any revaluation, taking into consideration the minimum required return under the Services Agreement.*

*The foreign currency banknotes are valued at the spot market rate at each reporting date. The foreign currency banknotes are revalued between reporting periods when there are any purchases or sales of banknotes, and any valuation movement from the previous reporting date is recorded as a foreign exchange gain or loss in the relevant accounting period.*

54. There was no material before us or the initial Panel relating to John Bridgeman's ongoing trading of foreign derivative transactions on Benjamin Hornigold's behalf or monthly valuations of foreign currency banknotes. If we take John Bridgeman's and King's Currencies' submissions at face value, they are consistent with our inference relating to the influence that John Bridgeman had on JB Financial Group and King's Currency.
55. We asked the parties to confirm that the banknotes remained at all times the property of Benjamin Hornigold (including if they were on traded) and, if not, explain why. Benjamin Hornigold submitted that this was the case. John Bridgeman submitted that:

*The agreement was prepared on the basis that BHD would provide funds to King's Currency, which King's Currency would on-trade through retail foreign exchange outlets to generate a minimum return for BHD.*

*In practice, the funds were provided by BHD to King's Currency in AUD. It was then for King's Currency to convert AUD into various foreign currency denominations and trade them multiple times to generate a return. To the extent that the actual 'dollar bills' placed by BHD with King's Currency were on-traded (as required by the Services Agreement), those bills cannot be returned to BHD. However, the investment arrangement was made on the basis that the amount deposited by BHD with King's Currency was required to be returned together with a minimum return.*

56. JB Financial Group submitted that:

*... notwithstanding the terms of the Services Agreement as originally drafted, in practice, BHD places Australian dollars with King's Currency. King's Currency then uses those Australian dollars to purchase foreign currency banknotes, which it then on-trades to generate a minimum specified return for BHD. By the nature of these operations, the physical banknotes are on-traded and exchanged thousands of times per month.*

*King's Currency then returns the AUD equivalent of the original AUD amount provided plus a minimum return to BHD.*

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57. It is clear from the material that the cash provided by Benjamin Hornigold to King's Currency under the Services Agreement was used by King's Currency in its retail foreign exchange business.

58. The initial Panel stated (in paragraph 89 of its reasons) that:

*We consider that the Services Agreement and the placement of foreign currency banknotes under that agreement may have in effect operated as an unsecured loan 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...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).*

We agree with the initial Panel's assessment.<sup>12</sup> JB Financial Group's submission that "King's Currency then returns the AUD equivalent of the original AUD amount provided plus a minimum return to BHD" (see paragraph 56 of these reasons) is consistent with that conclusion.

59. John Bridgeman, JB Financial Group, Benjamin Hornigold and Partners for Growth made submissions as to the relevant priority of the foreign currency banknotes vis-a-vis the Partners for Growth Facility. Any priority Benjamin Hornigold has in the foreign currency banknotes compared to Partners for Growth's charge is difficult to determine legally. We agree with the view of the initial Panel in paragraph 180 of its reasons and consider that we do not need to come to a view on this.

60. We also consider that the interplay between the ownership of the foreign currency banknotes and the Partners for Growth Facility should have been taken into account in relation to the decisions regarding the Foreign Currency Transactions and the Variation Deed. This is discussed further below.

61. In conclusion, we agree with the initial Panel's reasons in paragraphs 76 to 92 and, in particular the initial Panel's conclusion in paragraph 92 that "*the Foreign Currency Transactions and the Variation Deed in effect replaced the JBL Loan that was the 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*

62. In paragraphs 93 to 109 of the initial Panel's reasons, the initial Panel discussed the effect of the Foreign Currency Transactions and the Variation Deed on Benjamin Hornigold. The initial Panel concluded (in paragraphs 105 and 106 of its reasons) that in effect the Foreign Currency Transactions and the Variation Deed diminished

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<sup>12</sup> Like the initial Panel, we make no finding as to whether the arrangement was legally a loan



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the value of Benjamin Hornigold, “rendering Benjamin Hornigold a less attractive acquisition target and making it less likely to attract competing proposals to the 2019 Bid from potential acquirers”.

63. We asked John Bridgeman (in its capacity as investment manager for Benjamin Hornigold) and Messrs McAuliffe, Ziegler and Cook about what considerations were given to the risks<sup>13</sup> associated with Benjamin Hornigold’s placement of \$7.12 million in banknotes with King’s Currency and the Variation Deed, including having regard to any risks in light of the Partners for Growth Facility.

64. John Bridgeman submitted<sup>14</sup> that (in effect):

- (a) the existence of the Partners for Growth Facility was disclosed by John Bridgeman in announcements of 30 November 2018 and 12 December 2018 and
- (b) any increase in risk regarding the Partners for Growth Facility has been caused by the actions of the current Benjamin Hornigold board (i.e. those appointed on 12 June 2019).

65. Mr Cook submitted that:

*At the time of making recommendations in relation to the amendments to the Services Agreement, I was aware of a General Security Deed in place over the assets of JB Financial Group Pty Ltd and King’s Currency Exchange Pty Ltd. However at the time, there was a floating charge over the bank notes, not a fixed charge. Any risks in relation to this floating charge were considered at the time, however due to the valuation placed on JB Financial Group and King’s Currency Exchange Pty Ltd at the time, the banknotes represented only a minor portion in terms of the total value and assets of King’s Currency Exchange Pty Ltd. Therefore any counterparty risk was low.*

*I was not aware that Partners for Growth had claimed a fixed charge over the assets of King’s Currency Exchange Pty Ltd and therefore any risks associated with that were not considered at the time. I am informed that the fixed charge was placed over the bank notes by Partners for Growth after the 12 June 2019 and this came to my knowledge as a result of these Takeover Panel Proceedings.*

66. Mr Ziegler submitted that:

*I was unaware that Partners for Growth would subsequently claim a charge over the assets of King’s Currency which could impact on the company’s ownership of the bank notes that were provided to King’s Currency pursuant to the terms of the Services Agreement (as amended). ...I only became aware that Partners for Growth claimed a security interest over the BHD bank notes on 13 September 2019 when BHD issued their ASX release ‘Update on Kings Currency Notes’ in this regard.*

67. Mr Ziegler also submitted in relation to his consideration of the Request Letter that “no concerns were advised to the BHD board by BHD management as to the ongoing suitability or desirability of the King’s Currency arrangements in terms of BHD’s

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<sup>13</sup> We asked them to address “specifically counterparty risk, credit risk, concentration risk, liquidity and foreign exchange risk and any other material considerations”

<sup>14</sup> Mr McAuliffe made a similar submission

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*investment, cashflow, certainty of repayment or other commercial purposes or objectives over the term of the proposed extension”.*

68. Paragraph 60(b) of the initial Panel’s reasons notes that *“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”*. We consider that Benjamin Hornigold’s investment in foreign currency banknotes (including the extension to the period for the return of the banknotes) was a high risk investment, particularly given the financial situation of JB Financial Group and the Partners for Growth Facility. [REDACTED]
69. John Bridgeman submitted that it assessed counterparty risk and credit risk of investing in the foreign exchange banknotes as low because it had *“access to internal valuation papers which put an internal valuation on King’s Currency of approximately [REDACTED]”*. In our experience, an internal valuation alone does not of itself provide sufficient comfort of an entity’s solvency risk. The issues referred to in paragraph 68 of these reasons should have put John Bridgeman and the Voting Directors on alert to potential risk regarding the solvency of JB Financial Group and King’s Currency.
70. One of the reasons why the initial Panel considered that the value of Benjamin Hornigold was diminished by the Foreign Currency Transactions and amendments under the Variation Deed was because *“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”*.<sup>15</sup>
71. John Bridgeman submitted that the initial Panel’s reference to Benjamin Hornigold’s investments in foreign currency bank notes representing 57% of Benjamin Hornigold’s total assets was incorrect. It submitted that *“the investment represented approximately 45.10% of total assets and 45.86% of total net assets”*.
72. Benjamin Hornigold submitted in relation to the 57% figure:  
*Based on a [REDACTED] 2019 NTA of \$0.6524 per share, and 24,155,241 shares on issue as per the most recent half year report, the net tangible assets were \$15.759m, of which \$7.12m is currency notes; which equates to approximately 45%. However, when the deferred tax asset is removed from the NTA (which does not form part of BHD’s investments), a percentage closer to 57% is achieved.*
73. Even if the 45% figure is correct, we have come to the same view as the initial Panel as to effect of concentration risk on the value of Benjamin Hornigold and that investment was (and is) a material asset of Benjamin Hornigold.
74. On an assessment of the material, we have also come to the same view as the initial Panel, drawing from our experience that the rate of return under the Services

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<sup>15</sup> See paragraph 105(b) of the initial Panel’s reasons

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Agreement (as amended) is likely below market having regard to the risks of the investment.<sup>16</sup> The initial Panel (in paragraph 103 of its reasons) quoted ASIC's submission questioning the relevance of John Bridgeman's submission comparing rates of return under the Services Agreement (as amended by the Variation Deed) and a fixed cash deposit given that Benjamin Hornigold is a listed investment company. John Bridgeman submitted that this submission:

*"...is difficult to reconcile with BHD's public statements that it would have placed the relevant funds in exactly such an investment [ie. a fixed cash deposit]. To the extent that these submissions informed the initial Panel's decisions, John Bridgeman respectfully submits that the initial Panel has erred."*

75. We consider that current statements by Benjamin Hornigold's new board in relation to investments has to be seen in the context of its dispute with John Bridgeman, following the appointment of the new board.
76. We are of the view that the value of Benjamin Hornigold was diminished by the Foreign Currency Transactions and the amendments under the Variation Deed, which 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 (for the reasons expressed above and in paragraphs 93 to 106 in the initial Panel's reasons).
77. The initial Panel considered that the Foreign Currency Transactions and the negotiations over the Variation Deed were not relevantly at arm's length.<sup>17</sup> John Bridgeman submitted that the initial Panel's consideration of this issue did *"not appear to take account of the fact that, even if a transaction is between related parties, this does not mean that such a transaction cannot be on arm's length terms"*.
78. We do not agree. We consider that in light of the material before the initial Panel and what we have subsequently discovered (in particular regarding the Partners for Growth Facility) we are prepared to infer (drawing from our experience) that these transactions were not commercial and that the previous directors of Benjamin Hornigold did not undertake an appropriate assessment of the risks. We consider it follows from this, and what the initial Panel referred to as *"the network of shareholdings, office holding and contractual relationships"*<sup>18</sup> that the Foreign Currency Transactions and the negotiations over the Variation Deed were not relevantly at arm's length.
79. The initial Panel also considered that it was *"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"*.<sup>19</sup>

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<sup>16</sup> See paragraph 101 of the initial Panel's reasons

<sup>17</sup> See paragraph 107 of the initial Panel's reasons

<sup>18</sup> See paragraph 108 of the initial Panel's reasons

<sup>19</sup> See paragraph 109 of the initial Panel's reasons

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80. Benjamin Hornigold's target's statement in response to the 2019 Bid disclosed that *"in light of the Association between Mr Stuart McAuliffe and JBL, BHD has formed the IBC, which comprises Mr Peter Aardoom and Mr Bryan Cook. The IBC has full delegated authority to deal with all aspects of the Improved JBL Offer. Mr Peter Ziegler is not a member of the IBC given his recent appointment as a BHD Director"*.
81. It was appropriate for Benjamin Hornigold to have established an IBC because (among other matters) John Bridgeman's role as investment manager for Benjamin Hornigold and the cross shareholdings and common directors and officers discussed by the initial Panel in paragraphs 51 to 53 of its reasons.<sup>20</sup>
82. The board at its 7 June 2019 meeting decided to nominate Messrs Ziegler and Cook as the Voting Directors (see paragraph 39 of these reasons). We consider that we do not need to come to a view as to the adequacy of any safeguards put in place to manage conflicts in relation to consideration of the Request Letter and approving amendments to the Services Agreement. However we are concerned the procedures adopted by Benjamin Hornigold on this matter may not have been adequate because:
- (a) Mr McAuliffe was present at the 12 June 2019 meeting which approved amendments to the Services Agreement, abstaining from voting in relation to the proposal to amend the Services Agreement (see paragraph 42 of these reasons).
  - (b) Mr Cook signed a number of documents in relation to the Partners for Growth Facility in his capacity as a director of Ashdale Integrity Solutions Pty Ltd, namely the Letter of Offer, Deed of Guarantee and Indemnity and General Security Deed. Ashdale Integrity Solutions Pty Ltd is listed as a subsidiary of JB Financial Group in the Letter of Offer. Mr Cook has been a director of Ashdale Integrity Solutions Pty Ltd since 1 September 2003. Mr Cook therefore was considering a request to vary the Services Agreement to benefit King's Currency in circumstances where he has signed as director of another company as a guarantor to the Partners for Growth Facility. There is no material before us to suggest that this conflict was disclosed or managed appropriately.

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

83. The initial Panel concluded in paragraph 123 of its reasons that:

*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.*

84. We agree. To the extent that further information has come to light in the review proceedings, this information has given us greater confidence in drawing the same inferences as the initial Panel. In particular we consider that:

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<sup>20</sup> See generally Guidance Note 19, *Insider Participation in Control Transactions*

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- (a) the provision of the JBFG Facility was uncommercial and
- (b) the material provided by the parties during the proceedings, including the circumstances and process in relation to which decisions were made to place the foreign currency notes and enter into the Variation Deed, supports an inference that these decisions were not commercial or made on an arm's length basis.

*Intentions and motivations*

85. We also agree with the observations made by the initial Panel in paragraphs 124 to 128 of the initial Panel's reasons subject to the following comments.
86. In paragraph 127 of the initial Panel reasons, the initial Panel notes in relation to the execution of the Variation Deed on 12 June 2019, the proximity of a number of events. We substantially agree with the initial Panel's observations here except that:
- (a) We note but do not draw anything from the freeing of the 2019 Bid from all defeating conditions on 12 June 2019.
  - (b) We consider that the further information that has come to light regarding the Partners for Growth Facility and how the Request Letter was considered by the board of Benjamin Hornigold is also relevant.
87. It follows from our conclusion in paragraph 86(b) of these reasons that we have gone further than the initial Panel in its conclusion in paragraph 129 of its reasons. The initial Panel was satisfied "*that the Foreign Currency Transactions and the variation to the Services Agreement are not explained merely by ordinary commercial considerations for Benjamin Hornigold*". We infer that these transactions were uncommercial.

*Policy implications*

88. We agree with paragraph 132 of the initial Panel's reasons.
89. John Bridgeman submitted in its application for review of the initial Panel's decision to make a declaration that:

*For the reasons set out in JBL's submissions, and with particular reference to the matters identified in this Application, JBL submits that the Decision creates policy which has wide-reaching implications for future commercial practice.*

*In effect, it will operate to restrict the legitimate commercial activities of investment managers (and ultimately, the portfolios which are managed by those entities) whereby investment managers must consider if any investment made pursuant to the terms of their appointment may reasonably be considered to be a lock-up device, regardless of whether or not a control transaction is currently on foot.*

*JBL also notes that, should the Panel make orders unwinding those transactions (which is ultimately the remedy sought by BHD) it is reasonable to consider that potential counterparties to similar transactions may be wary of this result and accordingly consider that those transactions are subject to a higher risk profile (with the commercial terms to be agreed on this basis).*

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*It is evidently not in the interests of the holders of interests in such entities (whether they be investment companies or managed investment schemes) for this to occur.*

90. Guidance Note 19, *Insider Participation in Control Transactions*, sets out the protocols that should be put in place when “there is involvement by the management, directors or external advisers of a target company with the bidder”.<sup>21</sup> If an investment manager wishes to make a takeover bid for a fund which it manages (and continues to actively manage during the course of the bid), complying with this guidance note would assist in ensuring that transactions are not undertaken that could constitute an unacceptable lock-up device.
91. During the period that the Foreign Currency Transactions and the Variation Deed took place, John Bridgeman was Benjamin Hornigold’s investment manager and Benjamin Hornigold had no employees.<sup>22</sup> We also infer from Mr Ziegler’s submission quoted in paragraph 67 of these reasons that the board of Benjamin Hornigold depended on John Bridgeman for advice in relation to consideration of the Request Letter.
92. Given these issues we consider John Bridgeman and Benjamin Hornigold should have been careful in avoiding conflicts in relation to the 2019 Bid, consideration of the Request Letter and the decision to amend the Services Agreement. As discussed in paragraph 82, we have some concerns in relation to this.

*Additional transactions*

93. We note that the Panel has considered a further application from Benjamin Hornigold in relation to the matters referred to in paragraphs 133 to 134 of the initial Panel’s reasons.<sup>23</sup> We make no comment or findings on these matters.

**Withdrawal of the opinion in the IER**

94. In its application to the initial Panel, John Bridgeman submitted that:
  - (a) the withdrawal of the opinion of the independent expert accompanying Benjamin Hornigold’s target’s statement (**IER**) caused Benjamin Hornigold’s target’s statement (as supplemented by Benjamin Hornigold’s first supplementary target’s statement) to contravene s640 and
  - (b) Benjamin Hornigold’s first supplementary target’s statement did 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.
95. In its review application John Bridgeman submitted that it is in the public interest that from a policy perspective, “it is not permissible for the conduct of a target to cause or contribute to the withdrawal of an independent expert report”.

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<sup>21</sup> Ibid at [1]

<sup>22</sup> As noted in paragraph 3 of the initial Panel’s reasons

<sup>23</sup> *Benjamin Hornigold Limited 09* [2019] ATP 21

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96. The 2019 Bid closed on 24 September 2019. We asked the parties (except for Partners for Growth) whether we should consider the circumstances in relation to the withdrawal of the IER. John Bridgeman submitted (among other things) that *“the review Panel should consider the circumstances in relation to the withdrawal of the IER, on the basis that such circumstances have not, to John Bridgeman’s knowledge, previously been considered by the Panel nor the Courts and John Bridgeman accordingly considers that there are serious policy reasons for considering those circumstances”*.
97. ASIC submitted that it was open to the Panel to decline to consider the circumstances in relation to the withdrawal of the independent expert’s report and that the Panel ought reasonably to have regard for the fact the John Bridgeman itself is not currently in compliance with its statutory financial reporting obligations.
98. Nothing has come our attention that would make us question the initial Panel’s consideration of this issue. In any event given the 2019 Bid has closed, the matter is now academic.

#### **Supplementary Target’s Statement disclosure**

99. We agree with paragraphs 148 to 150 of initial Panel’s reasons on this topic.

#### **Extension of time**

100. For the avoidance of doubt, to the extent that John Bridgeman’s review application extends to the initial Panel’s decision to extend time under s657C(3), we affirm that decision for the same reasons.

## **DECISION**

### **Declaration**

101. For the reasons set out above we varied the initial Panel’s declaration set out in Annexure B to (among other things):
  - (a) Refer to the facts surrounding the Partners for Growth Facility (see paragraphs 27 and 28 of these reasons).
  - (b) Refer to the uncommercial nature of the JBFG Facility (see paragraph 32 and 84(a) of these reasons).
  - (c) State our conclusion that the material provided by the parties during the proceedings, including the circumstances and process in relation to which decisions were made to place the foreign currency notes and enter into the Variation Deed, supports an inference that these decisions were not commercial or made on an arm’s length basis (see paragraph 84(b) of these reasons).
  - (d) Fix some minor typographical errors and make consequential changes to paragraph numbers, footnote numbers and cross references.

### **Orders**

102. We sought submissions from the parties in relation to the initial Panel’s orders. We agree with the conclusions reached by the initial Panel in relation to its orders, only making minor variations (as discussed below). We varied the initial Panel’s orders

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accordingly, including staying the initial Panel's costs orders while we considered further submissions on costs (Annexure C). We later varied the orders to lift the stay on the costs order (Annexure D).

***Return of the foreign currency banknotes***

103. JB Financial Group submitted that we should not order the return of the banknotes because (among other things):

- (a) *"...King's Currency has placed reliance on the existence of the Service Agreement in terms of capital, operational requirements and growth planning. An early return of the banknotes (which was not contemplated by King's Currency prior to the takeover panel decision) was not factored into business operation planning".*

*"King's Currency senior management have, due to the decision of the Panel and the proposed draft orders, had to source alternative external funding on terms that are not necessarily as favourable as the terms would have been had the decision and the proposed orders not been made".*

- (b) In deciding that the priority dispute is not a matter for it to resolve, the initial Panel *"is ignoring the implications of its orders in circumstances where it is fully aware that there is a priority dispute. This places King's Currency in an invidious position because on one hand, it would be in breach of the Panel's proposed orders if it does not transfer \$7.12 million to Benjamin Hornigold within 10 days of the order, and on the other hand, it would potentially be in breach of a security arrangement with Partners For Growth if it did comply with such an order. In order to resolve the priority dispute, Kings Currency would need to pay out Partners for Growth as well as Benjamin Hornigold Limited simultaneously. This forces JB Financial Group and King's Currency to double their current capital raisings. While JB Financial Group and King's Currency are confident they can do so, the proposed 10-day deadline is unreasonable, uncommercial and unfairly prejudicial, particularly in circumstances unrelated to the 2019 Bid".*

104. Partners for Growth submitted that:

- (a) the initial Panel's reasons did not give any indication that the initial Panel considered Partners for Growth's security position under the *Personal Property Securities Act 2009 (Cth) (PPSA)* and
- (b) even if the initial Panel had formed the view that there was some uncertainty at law regarding the treatment of the foreign currency banknotes, the initial Panel cannot reasonably have made any orders in relation to the treatment of the banknotes without understanding the implications of those orders under the PPSA.

105. Partners for Growth also submitted, in response to the initial Panel's conclusion (in paragraph 180 of its reasons) that it did not consider the orders would unfairly prejudice Partners for Growth because the order requiring King's Currency to return the foreign currency banknotes was subject to the proviso *"unless it is restrained by order of the court"*:



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### Reasons - Benjamin Hornigold Limited 08R, 10R & 11R [2019] ATP 22

*This, however, undermines a key benefit of the PPSA regime - to introduce a clear framework to determine priority of competing security interests without the need for protracted court disputes. There would be no requirement for PFG to seek court orders in connection with the enforcement of its priority security interest in the ordinary course, and an obligation to do so should not be created by a Panel order for King's Currency to deal with the banknotes in a manner inconsistent with PFG's security.*

*The initial Panel's orders, in effect, put the onus on PFG to bring court proceedings to confirm its priority security position. PFG would not need to do this absent the initial Panel's orders (given PFG's priority security position under the PPSA is clear). PFG is now having to consider dedicating significant resources, time and money in bringing court proceedings to reconfirm its priority over the banknotes (which should not be in issue).*

106. We do not consider that Partners for Growth is suggesting in the above submission that the order for repayment of the Foreign Currency banknotes changes any priorities under the PPSA, only that it may require Partners for Growth to take court action to enforce its security, which it might not otherwise have to do and is unfairly prejudicial to it.
107. Benjamin Hornigold submitted (among other things) that:
- PFG [Partners for Growth] has, in so far as BHD is aware, access to the usual remedies available to a secured creditor. Nothing in the Panel's orders has the effect of reducing PFG's rights. If PFG is correct, then any order for payment would involve disturbing the rights of secured creditors. The absurdity of such a submission is patent. PFG have whatever rights PFG have at law and can enforce those rights.*
108. We consider the order for the return of the foreign currency banknotes should be made and agree with paragraphs 173 to 180 of the initial Panel's reasons. In addition we have taken into account that, as a result of the review applications, King's Currency has had in effect the period of the review to obtain further funding and comply with the order.
109. In deciding whether to make an order, the Panel is required to weigh "*the object of protecting rights or interests of any person affected by the relevant circumstances against the prejudice to any person that would flow from the making of an order, in order to determine whether that prejudice would be unfair*".<sup>24</sup> We have done so here. We accept that the order may prejudice Partners for Growth, but we are not satisfied that such prejudice is unfair.<sup>25</sup>

#### ***Prohibition on a future change of control transaction***

110. We agree with paragraphs 181 to 185 of the initial Panel's reasons and the initial Panel's order prohibiting John Bridgeman from making a further bid for Benjamin Hornigold until the foreign currency banknotes have been repaid, with the exception of responding to a bona fide control transaction from a third party.

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<sup>24</sup> *Glencore International AG & Anor v Takeover Panel & Ors* [2005] FCA 1290 at [52]

<sup>25</sup> See s657D(1) and *Gjergja & Ors v Cooper & Ors* (1986) 10 ACLR 577

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111. John Bridgeman submitted that the initial Panel had not taken into account in determining that this order was not unfairly prejudicial that:
- (a) John Bridgeman has no ability *“to determine whether or not and when (or if) King’s Currency has the capacity to do and does return the foreign bank notes to BHD”*.<sup>26</sup>
  - (b) *“[T]he exception for a bona fide control transaction requires JBL to satisfy the Panel that the relevant potential acquirer is ‘not related’, has no ‘significant relationship’ with and is ‘not influenced by’ JBL (the requirements of which have not been articulated)”*.
112. We do not consider that either of these arguments establishes that this order is unfairly prejudicial to John Bridgeman.

***Cancellation rights***

113. In relation to the initial Panel’s reasons for making the order that all acceptances under the 2019 Bid are voidable, John Bridgeman submitted those reasons *“do not address JBL’s submissions that the relevant control transaction is no longer on foot (and there is no competing bid to JBL’s knowledge at present) and how the lack of a current control transaction may impact the making of the proposed orders”*.
114. We do not agree. Acceptances under the 2019 Bid were made *“in circumstances where a material asset of Benjamin Hornigold had in effect been locked-up with King’s Currency”* (see paragraph 189(a) of the initial Panel’s reasons). Providing accepting shareholders with the ability to withdraw their acceptances deals with some of the effects of the unacceptable circumstances.
115. Unlike the initial Panel, we do not draw anything from the fact that John Bridgeman freed the 2019 Bid from all defeating conditions on the same day the Variation Deed was executed. However we agree with initial Panel’s other reasons for making the cancellation order.
116. After receiving submissions from the parties on whether accepting securityholders required any information to assist them in considering whether to withdraw their acceptances, we decided to vary this order requiring John Bridgeman to include, in their notice to accepting shareholders, a statement to the effect that they should seek their own professional advice.

***Costs***

117. During the course of the review proceedings we sought various submissions from the parties in relation to costs. After consideration of all material, we agree with the initial Panel’s decision to order costs in respect of the initial proceedings for substantially similar reasons.
118. In particular, our decision on costs was influenced by the Foreign Currency Transactions and Variation Deed (individually and in conjunction) in effect replacing

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<sup>26</sup> We note that the initial Panel in response to a similar submission from John Bridgeman made a further order requiring King’s Currency to inform the Panel, Benjamin Hornigold, John Bridgeman and JB Financial Group in writing that the foreign currency banknotes had been returned and the date when they had been returned.

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the JBL Loan that was subject to the Repayment Order (see paragraphs 36 to 61 of these reasons) and removing the effect of the Repayment Order in 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]).

119. In practical terms, we consider the above was the equivalent of a failure by John Bridgeman to comply with the Panel's orders in *Benjamin Hornigold Limited 02*. As set out in Guidance Note 4, a costs order may be awarded against a party in that circumstance<sup>27</sup> (noting, however, that we do not consider the circumstances listed in paragraph 29 of Guidance Note 4 to be exhaustive).
120. At the time of varying the initial Panel's declaration we informed the parties that we were minded to make a costs order but had not determined the quantum of that order. We sought further submissions and stayed the initial Panel's orders relating to costs, pending the outcome of our determination.
121. After considering the material provided to us in response (and all other material), we agree with the initial Panel that it was appropriate to order John Bridgeman to pay to Benjamin Hornigold \$120,000 (plus GST) and to ASIC \$17,580.75 in respect of costs incurred in the initial proceedings. We have exercised our commercial judgement in applying a discount to the amount claimed by Benjamin Hornigold; the Panel is a commercial tribunal and in respect of costs, as well as in its general remit, it takes a commercial approach – which we have done.<sup>28</sup> We are not satisfied that the costs orders unfairly prejudice John Bridgeman.
122. We considered making a costs order in relation to the review proceedings. On one hand, we became aware of circumstances during the review proceedings that gave us cause to contemplate such an order.<sup>29</sup> On the other hand, we were guided by s657EA, which provides a right to each party to the initial proceedings (and ASIC) to apply for a review of the initial Panel's decision; and Guidance Note 4, which says that costs orders are the exception and not the rule. On balance, we have decided not to make a costs order in relation to the review proceedings as those proceedings were not made, or conducted, in such a way as to warrant the exercise of our discretion to award costs.

### **Postscript**

123. The Panel executive received at approximately 3.52pm (Melbourne time) on 24 October 2019 a request from King's Currency to stay the operation of the order requiring it to return the foreign currency banknotes. King's Currency submitted in effect that a number of matters had occurred that were unexpected and outside the control of King's Currency, to do primarily with negotiations between King's

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<sup>27</sup> See Guidance Note 4 at [29(a)], citing *IFS Construction Services Limited* [2012] ATP 15 at [79]

<sup>28</sup> We consider that making an order in the form of Attachment A of Guidance Note 4 would, in this instance, cause an unnecessary delay

<sup>29</sup> For example, we became aware that the JBL Loan had increased in quantum from \$7m to \$10m, which was not disclosed to the Panel in the initial proceedings

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Currency and Benjamin Hornigold not progressing and actions taken by Partners for Growth.

124. We sought submissions from the parties due on 25 October 2019. King's Currency was required to comply with this order by 24 October 2019. It was not possible for the Panel to provide parties and ASIC with a meaningful opportunity to make submissions, as is required under s657D(3), by the end of 24 October 2019. King's Currency had sufficient time to seek a stay of this order from the Panel or the Court in time for either forum to properly consider the request before King's Currency was required to comply.
125. We do not consider it is appropriate to give the stay given:
- (a) King's Currency had already breached this order
  - (b) the reasons why we made the order
  - (c) the potential prejudice to Benjamin Hornigold if a stay was granted and
  - (d) the effective time in which King's Currency had to ensure that it could comply with this order, noting that it was always possible that the review Panel may not vary the initial Panel's orders.

**Richard Hunt**

**President of the sitting Panel**

**Decision dated 8 October 2019 (Declaration), 14 October 2019 (Orders) and 17 October 2019 (costs)**

**Reasons given to parties 25 November 2019**

**Reasons published 29 November 2019**

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**Advisers**

<b>Party</b>	<b>Advisers</b>
Benjamin Hornigold Limited	Corrs Chambers Westgarth
John Bridgeman Limited	McCullough Robertson
JB Financial Group Pty Ltd	
King's Currency	
Partners for Growth	Arnold Bloch Leibler



**Australian Government**

**Takeovers Panel**

**Annexure A**

**CORPORATIONS ACT  
SECTION 657EA  
INTERIM ORDERS**

**Benjamin Hornigold Limited 08R, 10R & 11R**

On 6 September 2019, the Panel made a declaration of unacceptable circumstances in relation to the affairs of Benjamin Hornigold Limited under section 657A of the *Corporations Act 2001* (Cth) (**Act**) and on 24 September 2019, the Panel made orders under section 657D of the Act (**Orders**).

The Panel **ORDERS**:

1. That the Orders (except orders 4, 5, 16, 17 and 18) are stayed.
2. These interim orders have effect until the earliest of:
  - (i) further order of the Panel
  - (ii) the determination of the proceedings and
  - (iii) 2 months from the date of these interim orders.

**Allan Bulman**  
**Director**  
**with authority of Richard Hunt**  
**President of the sitting Panel**  
**Dated 30 September 2019**



**Australian Government**

**Takeovers Panel**

**Annexure B**

**CORPORATIONS ACT  
SECTION 657EA  
VARIATION OF DECLARATION OF UNACCEPTABLE  
CIRCUMSTANCES**

**BENJAMIN HORNIGOLD LIMITED 08R, 10R & 11R**

**VARIATION**

The declaration made on 6 September 2019 in relation to *Benjamin Hornigold Limited 05, 06 & 07* is varied by:

- (a) replacing “June” with “July” in paragraph 2
- (b) inserting new paragraphs 8, 26 and 28 and footnotes 12, 19 and 22 (as renumbered)
- (c) amending paragraph 27(b) (as renumbered)
- (d) fixing typographical errors and making consequential changes to paragraph numbers, footnote numbers and cross references,

so that the declaration reads as follows:

**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 July 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

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investment decisions of John Bridgeman, including investment decisions made in John Bridgeman's capacity as investment manager for Benjamin Hornigold.<sup>1</sup>

5. As at 8 February 2019:
- (a) Mr McAuliffe held a deemed 22.97% relevant interest in John Bridgeman,<sup>2</sup> a 6.77% interest in BRL and a 8.92% interest in JB Financial Group Pty Ltd (**JB Financial Group** 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
  - (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.<sup>3</sup>
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).<sup>4</sup>

	<b>JBL</b>	<b>BHD</b>	<b>HML</b>	<b>BRL</b>	<b>JBFG</b>	<b>KC</b>
Stuart McAuliffe	Managing Director  CIO	Executive Chairman <sup>5</sup>	Managing Director	Director	CEO	N/A
John McAuliffe	Chairman	N/A	Director	Director <sup>6</sup>	N/A	N/A
Ross Patane	Director	Director <sup>7</sup>	Director	Director <sup>8</sup>	N/A	N/A

<sup>1</sup> 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

<sup>2</sup> Consisting of shares held directly and indirectly through various entities

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

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

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

<sup>6</sup> Mr John McAuliffe resigned as a director of BRL on 16 April 2019

<sup>7</sup> 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)

<sup>8</sup> Mr Patane resigned as a director of BRL on 16 April 2019



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	JBL	BHD	HML	BRL	JBFG	KC
Peter Aardoom	N/A	Director <sup>9</sup>	N/A	N/A	Director	Director
Peter Ziegler	N/A	Director <sup>10</sup>	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 Wright <sup>11</sup>	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 30 November 2018, Partners for Growth V, L.P. (**Partners for Growth**) entered into a Facility Agreement, General Security Deed and related agreements with JB Financial Group, King's Currency and their related bodies corporate, providing JB Financial Group with \$7 million in loan notes (**Partners for Growth Facility**). Under the General Security Deed, Partners for Growth was granted first-ranking security over all the assets of a number of companies, including JB Financial Group and King's Currency.<sup>12</sup>

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

<sup>10</sup> 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)

<sup>11</sup> 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

<sup>12</sup> Ashdale Integrity Solutions Pty Ltd is listed as a subsidiary of JBFG in the Letter of Offer in relation to the Partners for Growth Facility. Ashdale Integrity Solutions Pty Ltd was a party in its capacity as guarantor to the Letter of Offer, Deed of Guarantee and Indemnity and General Security Deed. Mr Bryan Cook, a director of Benjamin Hornigold (including during the period 8 February 2019 to 12 June 2019 (inclusive)), signed the Letter of Offer, Deed of Guarantee and Indemnity and General Security Deed as a director of Ashdale Integrity Solutions Pty Ltd

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9. On 3 December 2018, JB Financial Group placed approximately \$5.43 million<sup>13</sup> in foreign currency banknotes with King's Currency.<sup>14</sup>
10. 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.
11. On 28 February 2019, John Bridgeman directed Benjamin Hornigold to place \$350,000 of foreign currency banknotes with King's Currency<sup>15</sup> pursuant to a services agreement dated 21 February 2018<sup>16</sup> 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.
12. 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.<sup>17</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 6 March 2019, JB Financial Group provided an unsecured loan facility to John Bridgeman for up to \$7.0 million (**JBFG Facility**).
15. 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.

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<sup>13</sup> All references to amounts of foreign currency placed with King's Currency are to the Australian dollar equivalent

<sup>14</sup> JB Financial Group had previously made a series of investments in King's Currency since February 2017

<sup>15</sup> All placements of foreign currency banknotes by Benjamin Hornigold occurred by way of cash transfers in Australian dollars to King's Currency

<sup>16</sup> As amended by variation deeds dated 31 July 2018 and 17 September 2018

<sup>17</sup> Some of the transactions recalling foreign currency banknotes occurred as early as December 2018

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16. 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.
17. 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 15) and 27 March 2019 totalled \$4.59 million.
18. 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.
19. On 22 March 2019, Benjamin Hornigold announced that it had received from certain Benjamin Hornigold shareholders a notice under ss249F<sup>18</sup> 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.
20. 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 11, 15, 17 and this paragraph 20).
21. 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.
22. 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.
23. 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

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<sup>18</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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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.

24. 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.
25. 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.<sup>19</sup> 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.
26. On 18 June 2019, Partners for Growth provided JBFG with a "Notice of Default and Reservation of Rights" letter alleging the following events of default (among others):
- (a) JB Financial Group had "*failed to comply with the King's Currency and Mercantile Agency EBITDA Covenant...in respect of the testing periods ending December 2018, January 2019, February 2019 and March 2019, and is therefore in breach of its obligation to comply with the Financial Covenants...*" and
  - (b) JB Financial Group had "*recently advised that it entered into a further loan agreement with JBL dated on or about 6 March 2019, as amended by the parties in 1*

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<sup>19</sup> As a director of Benjamin Hornigold, Mr Stuart McAuliffe was present at all times during this meeting but abstained from voting. Mr Bryan Cook was one of two directors that approved the amendments to the Services Agreement

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*May 2019, pursuant to which the Borrower [JB Financial] made available a cash advance facility of A\$10,000,000 in aggregate to JBL...".<sup>20</sup>*

27. The Panel considers that the material provided by the parties during the proceedings supports an inference (among other things) that John Bridgeman:
- (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 entities<sup>21</sup>, its role as investment manager of Benjamin Hornigold<sup>22</sup>, and the uncommercial nature of the JBFG Facility<sup>23</sup>).
28. The Panel considers that the material provided by the parties during the proceedings, including the circumstances and process in relation to which decisions were made to place the foreign currency notes and enter into the Variation Deed, supports an inference that these decisions were not commercial or made on an arm's length basis.
29. 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 20) and
  - (b) the extension of the period for the return of all banknotes placed by Benjamin Hornigold with King's Currency<sup>24</sup> pursuant to the terms of the Variation Deed (see paragraph 25).

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<sup>20</sup> JB Financial Group and King's Currency submitted that they disputed "*any purported default notice issued by*" Partners for Growth

<sup>21</sup> See paragraphs 5 - 6

<sup>22</sup> See paragraphs 3 - 4

<sup>23</sup> See paragraphs 14 and 26(b)

<sup>24</sup> \$7.12 million in aggregate as at 31 May 2019 - see paragraph 3(m)

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**EFFECT**

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

**CONCLUSION**

31. 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
  - (b) in the alternative, having regard to the purposes of Chapter 6 set out in s602.
32. 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.

**Tania Mattei**  
**Counsel**  
**with authority of Richard Hunt**  
**President of the sitting Panel**  
**Dated 8 October 2019**



**Australian Government**

**Takeovers Panel**

**Annexure C**  
**CORPORATIONS ACT**  
**SECTIONS 657EA AND 657D**  
**ORDERS**

**Benjamin Hornigold Limited 08R, 10R & 11R**

The initial Panel in *Benjamin Hornigold Limited 05, 06 & 07* made a declaration of unacceptable circumstances on 6 September 2019 and orders on 24 September 2019. The Panel varied the declaration of unacceptable circumstances on 8 October 2019.

The orders made on 24 September 2019 are varied by:

- (a) amending Order 7(a)(iv)
- (b) including a new Order 15A to stay Order 14 and Order 15 until the Panel orders otherwise
- (c) inserting in Order 18 definitions for “date of these orders” and “Panel” and
- (d) making consequential amendments,

so that the orders read as follows.

**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.

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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.

**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 (as varied 8 October 2019) in relation to the affairs of Benjamin Hornigold and these orders (as varied) and including advice to the effect that the Accepting Securityholders should seek their own professional advice 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.



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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.
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.
- 15A. Order 14 and Order 15 are stayed until the Panel orders otherwise.

#### 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 (as varied).
17. The parties to these proceedings and ASIC have the liberty to apply to the Panel for further orders in relation to these orders (as varied).

#### Definitions

18. In these orders (as varied) 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

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<b>Accepting Securityholders</b>	Benjamin Hornigold securityholders who accepted the 2019 Bid
<b>ASIC</b>	Australian Securities and Investments Commission
<b>Benjamin Hornigold Corporations Regulations</b>	Benjamin Hornigold Limited <i>Corporations Regulations 2001</i> (Cth)
<b>date of these orders</b>	14 October 2019 or in relation to Order 14 and Order 15, the date the stay of those Orders is lifted
<b>Foreign Currency Banknotes</b>	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
<b>JB Financial Group</b>	JB Financial Group Pty Ltd
<b>John Bridgeman</b>	John Bridgeman Limited
<b>King's Currency Panel</b>	King's Currency Exchange Pty Ltd the sitting Panel in <i>Benjamin Hornigold Limited 08R, 10R &amp; 11R</i>
<b>Services Agreement</b>	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 Richard Hunt**  
**President of the sitting Panel**  
**Dated 14 October 2019**



**Australian Government**

**Takeovers Panel**

## **Annexure D**

### **CORPORATIONS ACT SECTIONS 657EA AND 657D VARIATION OF ORDERS**

#### **Benjamin Hornigold Limited 08R, 10R & 11R**

The initial Panel in *Benjamin Hornigold Limited 05, 06 & 07* made a declaration of unacceptable circumstances on 6 September 2019 and orders on 24 September 2019. The Panel varied the declaration of unacceptable circumstances on 8 October 2019 and varied the orders on 14 October 2019.

#### **THE PANEL ORDERS**

The orders made on 24 September 2019 and varied on 14 October 2019 are further varied by:

1. Replacing “the proceedings” in Order 14 with “the initial proceedings”.
2. Replacing “the proceedings” in Order 15 with “the initial proceedings”.
3. Deleting Order 15A and lifting the stay of Order 14 and Order 15 with immediate effect.

**Tania Mattei**  
**Counsel**  
**with authority of Richard Hunt**  
**President of the sitting Panel**  
**Dated 17 October 2019**