



Australian Government

Takeovers Panel

# MEDIA RELEASE

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No: TP19/50

Monday, 9 September 2019

## **Benjamin Hornigold Limited 05, 06 & 07 - Declaration of Unacceptable Circumstances**

The Panel has made a declaration of unacceptable circumstances (Annexure A) after consideration of:

- a request dated 24 July 2019 from Benjamin Hornigold Limited to vary the final orders made by the Panel on 8 February 2019<sup>1</sup> and an application dated 8 August 2019 from Benjamin Hornigold in relation to its affairs and
- an application dated 8 August 2019 from John Bridgeman Limited in relation to the affairs of Benjamin Hornigold (see [TP19/45](#)).

### **Background**

The following facts are in summary form (see the declaration for more background).

John Bridgeman is the exclusive investment manager for Benjamin Hornigold.

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 (among other things) requiring John Bridgeman to repay a \$4.5 million unsecured loan given by Benjamin Hornigold with any interest (**Repayment Order**) which the Panel considered that (in combination with other things) operated as a lock-up device.<sup>2</sup>

Through a series of transactions between 28 February 2019 and 31 May 2019 pursuant to a services agreement between King's Currency Exchange Pty Ltd and Benjamin Hornigold (**Services Agreement**), John Bridgeman directed Benjamin Hornigold to place approximately \$5.46 million in aggregate in foreign currency banknotes with King's Currency. The balance of foreign currency banknotes placed

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<sup>1</sup> See [Benjamin Hornigold Limited 02 and Henry Morgan Limited 02](#) [2019] ATP 1

<sup>2</sup> See [Benjamin Hornigold Limited 02 and Henry Morgan Limited 02](#) [2019] ATP 1

with King's Currency by Benjamin Hornigold was approximately \$7.12 million as at 31 May 2019.

On 5 March 2019, John Bridgeman announced that it had determined not to proceed with an off-market takeover bid for all of the securities in Benjamin Hornigold that it had announced on 10 September 2018 (**2018 Bid**) and that all previous acceptances of the 2018 Bid were cancelled and the 2018 Bid would lapse.

On 6 March 2019, JB Financial Group Pty Ltd provided an unsecured loan facility to John Bridgeman for up to \$7 million (**JBFG Facility**). On 7 March 2019 and 8 March 2019, John Bridgeman:

- drew down \$4.5 million of the JBFG Facility (in two tranches) for the purposes of repaying Benjamin Hornigold in accordance with the Repayment Order and
- made a repayment of \$4.5 million to Benjamin Hornigold (in two tranches).

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 and offers opened on 17 May 2019 (**2019 Bid**).

On 12 June 2019, a deed of variation was executed by King's Currency and Benjamin Hornigold on 12 June 2019 (**Variation Deed**) which (among other things) amended the Services Agreement to extend the period for the return of banknotes placed by Benjamin Hornigold from 30 days by providing that all banknotes placed by Benjamin Hornigold were not returnable until 12 November 2019. Later 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.

## **Declaration**

The Panel considered that the circumstances were unacceptable in relation to the affairs of Benjamin Hornigold because 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:

- the placement by Benjamin Hornigold of approximately \$5.46 million in aggregate in foreign currency banknotes with King's Currency and
- 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.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).<sup>3</sup>

## Orders

The Panel is considering what final orders it will make (if any), including whether it should make an order varying the orders made by the Panel on 8 February 2019,<sup>4</sup> and will publish details in due course.

The sitting Panel was Christian Johnston, John Sheahan QC (sitting President) and Sharon Warburton.

The Panel will publish its reasons for the decision in due course on its website [www.takeovers.gov.au](http://www.takeovers.gov.au).

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<sup>3</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)

<sup>4</sup> See [Benjamin Hornigold Limited 02 and Henry Morgan Limited 02](#) [2019] ATP 1



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## ANNEXURE A

### CORPORATIONS ACT SECTION 657A

### DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

BENJAMIN HORNIGOLD LIMITED 05, 06 & 07

#### CIRCUMSTANCES

1. John Bridgeman Limited (**John Bridgeman** or **JBL**) is an NSX listed company (NSX: JBL). Trading in John Bridgeman securities has been suspended since 10 April 2019.
2. Benjamin Hornigold Limited (**Benjamin Hornigold** or **BHD**) is an ASX listed investment company (ASX: BHD). Trading in Benjamin Hornigold securities has been suspended since 30 June 2018.
3. John Bridgeman is the exclusive investment manager for Benjamin Hornigold pursuant to the terms of a management services agreement dated 27 March 2017 and a services agreement dated 1 October 2016. John Bridgeman is also the investment manager for Henry Morgan Limited (**Henry Morgan** or **HML**) and Bartholomew Roberts Pty Limited (**BRL**) under agreements with the respective entities.
4. Mr Stuart McAuliffe is the Managing Director and Chief Investment Officer (**CIO**) of John Bridgeman. As CIO, Mr McAuliffe has the primary responsibility for the investment decisions of John Bridgeman, including investment decisions made in John Bridgeman's capacity as investment manager for Benjamin Hornigold.<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** or **JBFG**)

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<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

- (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>

	JBL	BHD	HML	BRL	JBFG	KC
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
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

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<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 11 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

<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)

	JBL	BHD	HML	BRL	JBFG	KC
					CEO (Retail FX)	
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 3 December 2018, JB Financial Group placed approximately \$5.43 million<sup>12</sup> in foreign currency banknotes with King's Currency.<sup>13</sup>
9. On 8 February 2019, the Panel in *Benjamin Hornigold Limited 02 and Henry Morgan Limited 02* [2019] ATP 1 made an order in relation to the affairs of Benjamin Hornigold requiring John Bridgeman to repay a \$4.5 million unsecured loan given by Benjamin Hornigold with any interest (**Repayment Order**). The Panel considered that (in combination with other things) the loan given to John Bridgeman diminished the value of important assets of Benjamin Hornigold making Benjamin Hornigold less attractive to an acquirer and less likely to attract competing proposals (and as a result, diminished the value of Benjamin Hornigold if shareholders did not accept the 2018 Bid), in effect operating as a lock-up device.
10. On 28 February 2019, John Bridgeman directed Benjamin Hornigold to place \$350,000 of foreign currency banknotes with King's Currency<sup>14</sup> pursuant to a services agreement dated 21 February 2018<sup>15</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.

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

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

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

<sup>15</sup> As amended by variation deeds dated 31 July 2018 and 17 September 2018

11. Through a series of transactions completed by early March 2019, JB Financial Group fully recalled all of the foreign currency banknotes it had placed with King's Currency in December 2018.<sup>16</sup>
12. On 5 March 2019, John Bridgeman announced that it had determined not to proceed with the 2018 Bid and all previous acceptances of the 2018 Bid were cancelled and the 2018 Bid would lapse.
13. On 6 March 2019, JB Financial Group provided an unsecured loan facility to John Bridgeman for up to \$7.0 million (**JBFG Facility**).
14. On 6 March 2019, John Bridgeman directed Benjamin Hornigold to place \$2.1 million of foreign currency banknotes with King's Currency, increasing the total amount placed by Benjamin Hornigold with King's Currency to approximately \$4.0 million in aggregate.
15. On 7 March 2019, John Bridgeman drew down \$3.0 million of the JBFG Facility for the purposes of repaying Benjamin Hornigold in accordance with the Repayment Order. On the same day, John Bridgeman repaid \$3.0 million of the amount due under the Repayment Order to Benjamin Hornigold.
16. Through a series of transactions between 7 March 2019 and 27 March 2019, John Bridgeman directed Benjamin Hornigold to place an additional \$2.49 million of foreign currency banknotes with King's Currency, increasing the total amount placed by Benjamin Hornigold in foreign currency banknotes with King's Currency to approximately \$6.49 million by 27 March 2019. The amounts placed between 6 March 2019 (see paragraph 14) and 27 March 2019 totalled \$4.59 million.
17. On 8 March 2019, John Bridgeman drew down a further \$1.5 million of the JBFG Facility for the purposes of repaying the loan in accordance with the Repayment Order. On the same day, John Bridgeman repaid the remaining \$1.5 million in principal due under the Repayment Order to Benjamin Hornigold.
18. On 22 March 2019, Benjamin Hornigold announced that it had received from certain Benjamin Hornigold shareholders a notice under ss249F<sup>17</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.
19. Through a series of additional transactions occurring after 27 March 2019, the total amount Benjamin Hornigold was directed by John Bridgeman to place in foreign currency banknotes with King's Currency increased to approximately

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<sup>16</sup> Some of the transactions recalling foreign currency banknotes occurred as early as December 2018

<sup>17</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)

\$7.12 million in aggregate as at 31 May 2019. The total amount placed by Benjamin Hornigold with King's Currency after the date of the Repayment Order was approximately \$5.46 million (see paragraphs 10, 14, 16 and this paragraph 19).

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

directors of Benjamin Hornigold (including Mr McAuliffe) and the company secretary resigned, and three new directors were appointed.

25. The Panel considers that the material provided by the parties during the proceedings supports an inference (among other things) that John Bridgeman:
  - (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>18</sup> and role as investment manager of Benjamin Hornigold<sup>19</sup>).
26. The Panel considers that, in relation to the affairs of Benjamin Hornigold, the following transactions (individually and in conjunction, both of which occurred after the Panel made the Repayment Order) effectively replaced the loan subject of the Repayment Order and diminished the value of a material and important asset of Benjamin Hornigold, making it less attractive to a potential acquirer and less likely to attract competing proposals to the 2019 Bid (and as a result, diminished the value of Benjamin Hornigold if securityholders do not accept the 2019 Bid), in effect operating as a lock-up device:
  - (a) the placement by Benjamin Hornigold of approximately \$5.46 million in aggregate in foreign currency banknotes with King's Currency (see paragraph 19) and
  - (b) the extension of the period for the return of all banknotes placed by Benjamin Hornigold with King's Currency<sup>20</sup> pursuant to the terms of the Variation Deed (see paragraph 24).

## EFFECT

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

## CONCLUSION

28. It appears to the Panel that the circumstances are unacceptable circumstances:
  - (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:

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<sup>18</sup> See paragraphs 5 – 6

<sup>19</sup> See paragraphs 3 - 4

<sup>20</sup> \$7.12 million in aggregate as at 31 May 2019 – see paragraph 19

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

## **DECLARATION**

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

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