



Australian Government

Takeovers Panel

Reasons for Decision

**Keybridge Capital Limited 04, 05 & 06
[2020] ATP 6**

Bidder’s statement – defeating conditions – prescribed occurrences – disclosure – efficient, competitive and informed market – funding arrangements – insider participation – frustrating action – placement – association – withdrawal rights – declaration – orders

Corporations Act 2001 (Cth), sections 12, 602, 606, 611, 624, 630, 650F, 650G, 652C, 657A, 657D

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

ASIC v Yandal Gold (1999) 32 ACSR 317, Elders IXL Ltd v NCSC [1987] VR 1

Guidance Note 4: Remedies General, Guidance Note 12: Frustrating Actions, Guidance Note 14: Funding Arrangements, Guidance Note 19: Insider Participation in Control Transactions

CASAC: Anomalies in the Takeovers Provisions of the Corporations Law

Procedural Rules 4.1.1

Caravel Minerals Limited [2018] ATP 8, Auris Minerals Limited [2018] ATP 7, Strategic Minerals Corporation NL [2018] ATP 2, Molopo Energy Limited 09 [2017] ATP 22, Resources Limited [2016] ATP 17, Gladstone Pacific Nickel Limited 02 [2011] ATP 16, Viento Group Limited [2011] ATP 1, GoldLink IncomePlus Limited [2008] ATP 21, Mount Gibson Iron Limited [2008] ATP 4, Tower Software Engineering Pty Ltd 01 [2006] ATP 20, AMP Shopping Centre Trust 02 [2003] ATP 24, Taipan Resources NL 11 [2001] ATP 16, Pinnacle VRB Ltd (No. 4) [2001] ATP 7

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

INTRODUCTION

- The Panel, Chelsey Drake, Bruce McLennan and Sharon Warburton (sitting President), made a declaration of unacceptable circumstances in relation to the affairs of Keybridge Capital Limited. Keybridge was the subject of competing takeover bids from WAM Active Limited and Aurora Funds Management Limited as responsible entity for the Aurora Dividend Income Trust (**ADIT**). The Panel considered that Keybridge shareholders were not given enough information to enable them to assess the merits of ADIT’s bid and Keybridge did not have sufficient procedures in place to mitigate any actual or potential conflicts of interest (arising from at least the time ADIT announced its intention to make its bid). The Panel also considered that WAM Active acquired a substantial interest in Keybridge (purportedly under a takeover bid) in circumstances where its bid had closed subject to defeating conditions. The Panel ordered unprocessed acceptances under WAM Active’s bid cancelled, required WAM Active to reverse any processed acceptances under WAM Active’s bid at the option of accepting shareholders and required ADIT to offer withdrawal rights to accepting shareholders under ADIT’s bid.

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2. In these reasons, the following definitions apply.

ADIT	Aurora as responsible entity for the Aurora Dividend Income Trust
AFARF	Aurora as responsible entity for the Aurora Fortitude Absolute Return Fund
ASG	Australian Style Group Pty Limited
ASIC	Australian Securities and Investments Commission
Aurora	Aurora Funds Management Limited
Bentley	Bentley Capital Limited
CASAC	has the meaning given in paragraph 63
Catalano Entities	Antony Catalano, Catalano Super Investments Pty Ltd ATF Catalano Superannuation Fund and Antstef Pty Ltd ATF Antstef Trust
CRPN	has the meaning given in paragraph 3
HHY	Aurora as responsible entity for HHY Fund
Keybridge	Keybridge Capital Limited
Placement	has the meaning given in paragraph 15
Scarborough	Scarborough Equities Pty Ltd
WAM Active	WAM Active Limited

FACTS

3. Keybridge is an ASX listed company (ASX code: KBC). Keybridge has on issue both ordinary shares and convertible redeemable promissory notes (CRPNs).
4. On 16 July 2019, Keybridge was suspended from quotation on ASX. Keybridge remains suspended as at the date of these reasons.
5. On 13 August 2019, an event of default occurred under the terms of issue of the CRPNs (arising due to the duration of Keybridge's suspension).
6. On 10 September 2019, Keybridge issued a default notice to CRPN holders. CRPN holders could at that point notify Keybridge that they would like their CRPNs to be redeemed or converted. Keybridge received a number of such notifications. Under the terms of the CRPNs, Keybridge was then obliged to redeem or convert (at Keybridge's election) the CRPNs the subject of each notice within 30 business days.
7. On 23 October 2019, Keybridge announced that it had redeemed 397,944 CRPNs for cash and it had written to 3 CRPN holders to determine the validity of their redemption requests prior to processing those requests. Keybridge subsequently announced on 26 November 2019 that it had sought further clarification from two of those holders.

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8. On 13 December 2019, WAM Active announced an off-market takeover bid for all the shares in Keybridge at 6.5 cents per Keybridge share. WAM Active lodged its bidder's statement with ASIC on the same day.
9. On 8 January 2020, ADIT announced an intention to make an off-market takeover bid for all the shares in Keybridge at 6.6 cents per Keybridge share.
10. On 17 January 2020, Keybridge lodged its target's statement in respect of WAM Active's bid with ASIC.
11. On 22 January 2020, Keybridge announced that 2,000,000 CRPNs had been redeemed and that 2,517,153 CRPNs the subject of redemption requests remained outstanding.
12. On 24 January 2020, WAM Active extended the offer period for its bid to 7.00pm (Sydney time) on 17 February 2020.
13. On 7 February 2020, ADIT lodged its bidder's statement with ASIC.
14. On 10 February 2020, WAM Active further extended the offer period for its bid to 7.00pm (Sydney time) on 3 March 2020.
15. On 12 February 2020, Keybridge announced that it had agreed to place 22,000,000 shares to sophisticated investors at an issue price of 6.9 cents per Keybridge share (**Placement**) to raise \$1.518m. The announcement stated that:

The Company intends to apply the funds towards repayment of the outstanding CRPN early-redemption requests, of which, approximately \$2.5m currently remains outstanding.
16. On 17 February 2020, Keybridge undertook the Placement. The Placement triggered a condition to WAM Active's bid that related to Keybridge issuing securities.
17. On 18 February 2020, WAM Active lodged the *Keybridge Capital Limited 04* application with the Panel (see paragraph 39 for further details).
18. Also on 18 February 2020, Keybridge received a notice from WAM Active requesting that Keybridge call a meeting under section 249D¹ to consider the removal of Keybridge's Managing Director, Mr Nicholas Bolton, as a director of the company.
19. On 19 February 2020, Catalano Super Investments Pty Ltd as trustee for the Catalano Superannuation Fund and its associates lodged a notice of initial substantial holder disclosing that the entities received 19,275,000 shares in the Placement. The entities are controlled by Mr Antony Catalano.

¹ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms defined in Chapter 6 have the meaning given in that chapter (as modified by ASIC)

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20. Also on 19 February 2020, Keybridge lodged a supplementary target's statement with ASIC in respect of WAM Active's bid (dated 18 February 2020). The supplementary target's statement disclosed, among other things, that:
- (a) Keybridge's Managing Director, Mr Bolton, *"has a 54.5% purely economic interest in the Responsible Entity and manager of ADIT, Aurora Funds Management Limited"* and
 - (b) *"On 10 February 2020, WAM Active gave notice that it extended its bid to close on 3 March 2020, being one month and one day after its original closing date of 3 February 2020. Accordingly, WAM Active's notice does not appear to comply with s650D(1)(a)(ii) of the Corporations Act ... Keybridge calls upon WAM Active to correct its notice and confirm that those shareholders that have accepted into their bid, may now withdraw that acceptance"*.
21. On 24 February 2020, WAM Active announced an increase in its offer price from 6.5 cents to 6.9 cents per Keybridge share and that it had *"also elected to waive the majority of the defeating conditions to its bid"*, with the effect that WAM Active's bid was only subject to a 'No Prescribed Occurrences' condition.
22. On 25 February 2020, WAM Active announced a notice of status of defeating conditions to its bid. The notice disclosed that:
- For the purposes of section 630(3) of the Corporations Act 2001 (Cth), WAM Active gives notice that:*
- (a) *the Offer remains subject to the condition in section 10.7(c) (**No Prescribed Occurrences**) but has been freed of all other conditions set out in section 10.7 of the Bidder's Statement;*
 - (b) *as far as WAM Active is aware, the No Prescribed Occurrences condition has not been fulfilled; ...*
23. On 28 February 2020, WAM Active lodged the *Keybridge Capital Limited 05* application with the Panel (see paragraph 40 for further details).
24. On 2 March 2020, WAM Active purported to free its bid of the 'No Prescribed Occurrences' condition and declare its bid unconditional.
25. Also on 2 March 2020, WAM Active purported to extend its bid to 7.00pm (Sydney time) on 3 April 2020.
26. On 3 March 2020, ADIT announced that it would *"increase its bid to 7.0 cents cash per KBC share on the condition that Target shareholders are able to withdraw their acceptances from the WAM Active takeover offer dated 3 January 2020"*.
27. On 4 March 2020, ADIT lodged a supplementary bidder's statement with ASIC. The supplementary bidder's statement refers to ADIT's announcement of its intention to

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increase the consideration under its bid and confirms that, in relation to the Placement, “ADIT has waived any prescribed condition in its Bid that would otherwise have been triggered in relation to the issuance of such New Shares”.

28. On or about 6 March 2020, WAM Active commenced processing acceptances received under its bid.
29. On 10 March 2020, Bentley’s (and its related entity Scarborough’s) broker incorrectly sent CHESSE takeover messages to accept ADIT’s bid instead of WAM Active’s bid.²
30. On 11 March 2020, Keybridge lodged the *Keybridge Capital Limited 06* application with the Panel, submitting in essence that WAM Active had not freed its bid’s conditions in the time required under section 650F and accordingly the purported extension of WAM Active’s bid was not valid (see paragraph 42 for further details).
31. Also on 11 March 2020, the Acting President of the Panel ordered that WAM Active must not take any steps, or allow any steps to be taken, to process any acceptances received under, or any transfers in relation to, WAM Active’s bid.
32. On 12 March 2020, ADIT declared its bid unconditional (released by ASX on 13 March 2020).
33. On 13 March 2020, Keybridge convened a meeting to be held on 17 April 2020 for the purpose of considering resolutions concerning the removal of Mr Bolton as a director of the company (see paragraph 18) and the re-election of Mr William Johnson, a director of Keybridge at the time, and the other director of Keybridge (as Keybridge suffered a ‘second strike’ at its previous annual general meeting).
34. On 16 March 2020, Bentley and Scarborough made a separate application to the Panel seeking final orders to the effect that their acceptances into ADIT’s bid be reversed and any contracts between those entities and ADIT arising as a result of the acceptances be cancelled.³
35. On 24 March 2020, Aurora announced that “On 13 March 2020, Aurora announced that ADIT had freed its bid of all defeating conditions which included the Withdrawal Condition [referring to the condition described in paragraph 26]. As such, ADIT’s takeover bid for KBC is 7.0 cents per share”.
36. On 25 March 2020, Keybridge lodged its target’s statement in respect of ADIT’s bid with ASIC.
37. On 30 March 2020, ADIT lodged a second supplementary bidder’s statement with ASIC. The supplementary bidder’s statement included accountant’s certificates

² Bentley and Scarborough had previously emailed and posted acceptance forms accepting WAM Active’s bid in relation to their respective shareholdings, which had not been processed

³ *Keybridge Capital Limited 07*

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opining on whether there had been material changes in the financial position of funds that had agreed to provide funding for ADIT's bid since the date that each fund published its financial statements.

38. On 6 April 2020, ADIT's bid for Keybridge closed.

Declaration sought: Keybridge Capital Limited 04

39. By application dated 18 February 2020, WAM Active sought a declaration of unacceptable circumstances. WAM Active submitted (among other things) that:
- the Placement was a frustrating action denying Keybridge shareholders "*their right to consider and choose between competing control transactions*"
 - there "*are material disclosure deficiencies*" in Keybridge's target's statement, including in relation to the Keybridge directors' recommendations and the value of Keybridge
 - there "*are material disclosure deficiencies*" in ADIT's bidder's statement, including in relation to funding and
 - ADIT has "*insufficient cash and illiquid assets*" to fund its bid.

Declaration sought: Keybridge Capital Limited 05

40. By application dated 28 February 2020, WAM Active sought a declaration of unacceptable circumstances. WAM Active submitted (among other things) that:
- "*the terms and timing of the Placement (amongst other things) are evidence of Mr Catalano acting in concert with Mr Bolton and Aurora in respect of the control of [Keybridge]*" and
 - Keybridge's supplementary target's statement dated 18 February 2020 includes "*misleading and deceptive statements with respect to the WAM Active bid, suggesting [Keybridge] shareholders have a right to withdraw acceptances*".
41. WAM Active initially sought to vary the *Keybridge Capital Limited 04* application to include the matters the subject of the *Keybridge Capital Limited 05* application. After seeking submissions from the parties, we did not accept the variation on the basis that it related to new circumstances. WAM Active then resubmitted the variation as a new application.

Declaration sought: Keybridge Capital Limited 06

42. By application dated 11 March 2020, Keybridge sought a declaration of unacceptable circumstances. Keybridge made submissions to the effect that:
- for the purposes of section 650F, WAM Active needed to free its bid of its defeating conditions not less than 7 days before the end of the offer period. This did not occur, meaning that WAM Active's bid was not freed of the defeating conditions, and the conditions remained on foot and
 - WAM Active was not able to extend its bid on 2 March 2020 or in any case without notifying Keybridge shareholders of their withdrawal rights.

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Interim orders sought

43. In relation to the *Keybridge Capital Limited 04* application, WAM Active sought an interim order requiring Keybridge to disclose the recipients of shares under the Placement and to prohibit Keybridge from issuing any new shares or otherwise altering its issued capital for the duration of WAM Active's bid. Having regard to applicable Panel guidance,⁴ we were not satisfied it was necessary for us to make such an interim order, particularly as Catalano Super Investments Pty Ltd as trustee for the Catalano Superannuation Fund and its associates lodged a notice of initial substantial holder on 19 February 2020 disclosing that the entities received 19,275,000 shares in the Placement.
44. In relation to the *Keybridge Capital Limited 05* application, WAM Active sought an interim order permitting WAM Active to extend its bid for the duration of the proceedings without offering withdrawal rights. We considered that, at best, this was a request for a final order.
45. On 10 March 2020, Keybridge applied for an urgent interim order prohibiting WAM Active from processing and transferring any takeover offer acceptances received under its bid. Keybridge undertook to lodge an application in relation to WAM Active's bid. As at the date of Keybridge's interim orders application, WAM Active had processed acceptances in respect of 16,057,929 Keybridge shares and had not processed acceptances in respect of 39,874,466 Keybridge shares.
46. On 11 March 2020, the Acting President made an interim order to the effect requested by Keybridge (Annexure A) in order to maintain the status quo pending determination of Keybridge's application by a sitting Panel once appointed. We were ultimately appointed to consider the matter once Keybridge lodged the *Keybridge Capital 06* application.

Final orders sought

47. In relation to:
 - (a) the *Keybridge Capital Limited 04* and *05* applications, WAM Active sought final orders including:
 - (i) cancelling the shares issued under the Placement and returning all subscription monies to investors immediately
 - (ii) causing Aurora (in its capacity as responsible entity of ADIT) to withdraw ADIT's bid immediately unless it was able to establish to the Panel's satisfaction that it has adequate funding for all Keybridge shares and release either an announcement of that withdrawal or a supplementary bidder's statement and
 - (iii) allowing WAM Active's bid to remain open (without having to offer withdrawal rights) until Keybridge shareholders have been issued and given the opportunity to consider the effect of the aforementioned

⁴ See *Guidance Note 4: Remedies General* at [10]-[13]

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supplementary disclosures and all necessary member approvals have been obtained, and

- (b) the *Keybridge Capital Limited 06* application, Keybridge sought final orders including:
 - (i) “declaring that WAM Active has not properly freed its bid from a defeating condition for the purpose of section 650F” and
 - (ii) “declaring that Keybridge shareholders who accepted the WAM Active bid on or after 25 February 2020 have their acceptances cancelled (and any processing and transfers which have occurred to date be reversed)”.

DISCUSSION

48. The submissions received in this matter were voluminous. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

Decision to conduct proceedings and procedural matters

- 49. In relation to the *Keybridge Capital Limited 04* application, we received preliminary submissions from Bentley, Aurora, Keybridge and Mr Johnson (a director of Keybridge at the time). Broadly, Bentley and Mr Johnson supported the Panel conducting proceedings and Aurora and Keybridge did not.
- 50. In relation to the *Keybridge Capital Limited 06* application, we received preliminary submissions from WAM Active and Aurora. Broadly, Aurora supported the Panel conducting proceedings and WAM Active did not.
- 51. In our view, each application raised concerns that warranted consideration so in each case we decided to conduct proceedings.
- 52. On 28 February 2020, we directed pursuant to regulation 16(1)(a) of the *Australian Securities and Investments Commission Regulations 2001* (Cth) that the *Keybridge Capital Limited 04* and *05* applications be heard together. On 16 March 2020, we made a direction under the same regulation that the *Keybridge Capital Limited 06* application be heard together with the *Keybridge Capital Limited 04* and *05* applications.
- 53. We also made ancillary directions under regulation 16(1)(a) to facilitate hearing the matters together, including that notices of appearance lodged in respect of one matter were valid for the other matters and vice versa.
- 54. Following the receipt of the *Keybridge Capital Limited 04* application, we received notices of appearance from Samuel Terry Asset Management Pty Ltd, Mr Johnson and Bentley. Their interest in the proceedings was not immediately apparent to us, so we sought submissions as to their respective interest in the proceedings and why we should accept each person’s notice of appearance. We sought these submissions in order to determine whether those persons should become parties to the proceedings, as rule 4.1.1 of the Panel’s Procedural Rules provides that a person does not become a party to the proceedings until their notice of appearance is accepted by

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the Panel. We accepted each person's notice of appearance as we considered that either:

- (a) the person's interests may be materially affected by the proceedings (Samuel Terry Asset Management Pty Ltd submitted that it "*owns about 99% of the [CRPNs] currently due for repayment*" and Bentley submitted it "*has a direct interest in the outcome of the proceedings*" as a substantial shareholder) or
- (b) alternatively, the person would likely be able to assist us (Mr Johnson submitted that his directorship of Keybridge would allow him to "*provide an independent position to that which may be provided by Keybridge*").

WAM Active's bid – Prescribed occurrences

55. Section 10.7 of WAM Active's bidder's statement sets out the bid's defeating conditions. Relevantly, it states:

(c) No Prescribed Occurrences

None of the following happens during the period commencing on the Announcement Date and ending on the expiry of the Offer Period (each being a separate condition):

- (i) *the shares of KBC or any of the Controlled Entities of KBC are converted into a larger or smaller number of shares;*

...

- (iv) *KBC or a subsidiary of KBC makes an issue of or grants an option to subscribe for any of its securities or agrees to make such an issue or grant such an option;*

...

56. Section 10.8(c) of WAM Active's bidder's statement sets out the consequences of a condition being triggered:

Where an event occurs that would mean at the time the event occurs the Condition to which this Offer or the contract resulting from your acceptance is then subject would not be fulfilled, each paragraph of the Condition in Section 10.7 affected by that event becomes two separate Conditions on identical terms except that:

- (i) *one of them relates solely to that event; and*
- (ii) *the other specifically excludes that event.*

WAM Active may declare the Offer free under Section 10.7 from any paragraph of the Condition without declaring it free from the other paragraphs and may do so at different times.

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57. Under section 650F(1),⁵ a bidder can only free offers under its bid from a defeating condition if it gives the target a notice declaring the bid free from the condition in accordance with the following:
- (a) if the condition relates only to the happening of an event or circumstance referred to in section 652C(1) or (2), not later than 3 business days after the end of the offer period or
 - (b) in any other case, not less than 7 days before the end of the offer period.
58. The Placement triggered the condition set out in section 10.7(c)(iv) of WAM Active's bidder's statement. As a result of section 10.8(c) of WAM Active's bidder's statement, the condition then bifurcated into two: one related specifically to the Placement and one related generally to Keybridge issuing securities (but specifically excluding the Placement).
59. We asked for submissions from the parties as to whether the condition contained in section 10.7(c)(iv) of WAM Active's bidder's statement (as modified as a result of the Placement and the operation of section 10.8(c) of WAM Active's bidder's statement) was validly waived, as it was waived the day before the scheduled end of WAM Active's bid's offer period.
60. ASIC submitted that *"the condition relating to the Placement does not fall within s652C. Accordingly s650F(1)(b) required that condition to be waived not less than 7 days before the end of the offer period. This was not done, as the WAM Active 630 Notice dated 25 February 2020 expressly excluded 10.7(c)"*. We agree with this analysis. We also note that, as an extension of this analysis, the other part of the bifurcated condition (i.e. the condition specifically excluding the Placement) would also not fall within section 652C.
61. The condition in section 10.7(c)(i) of WAM Active's bidder's statement is similar to the condition in section 652C(1)(a) but with the addition of the words *"or any of the Controlled Entities of KBC"*. We asked for submissions from the parties as to whether the inclusion of those words extends the condition beyond the circumstances set out in section 652C.
62. WAM Active submitted that it does not for a number of reasons, including that the definition of *"Controlled Entities"* in its bidder's statement refers to the term as defined in the *Corporations Act 2001* (Cth) and the term is not a defined term in that legislation.
63. ASIC submitted that the genesis of sections 652C and 650F can be found in a March 1994 report by the Companies and Securities Advisory Committee (CASAC) titled *"Anomalies in the Takeovers Provisions of the Corporations Law"*. CASAC contemplated

⁵ See also ASIC Class Order [CO 13/521]

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the inclusion of a more expansive list of prescribed occurrences and set out its reasoning on page 47 of the report:

Some submissions, while supporting the [Discussion Paper] proposal, suggested that it should extend to any condition permitted under s 662, not just prescribed occurrence defeating conditions. The Legal Committee disagrees. The prescribed occurrences all concern specific matters relating to the capital structure, financial standing and solvency of the target company. A bidder might reasonably be given an additional period after the close of the bid to consider whether to abandon conditions relating to the position of the target company. The variety of other possible conditions is so open-ended that to include them could give the bidder an unfair or unjustified discretion. For instance, it would be undesirable to permit a bidder to decide the status of a minimum acceptance condition after the close of the bid. Offerees may be unfairly disadvantaged.

64. In ASIC's view "CASAC contemplated that the operation of s650F would be confined strictly to the matters included in s652C" and that the condition should have "technically" been properly addressed by a notice issued under section 650F(1)(b). Accordingly, the condition was not validly waived as it should have been waived not less than 7 days before the end of the offer period. We agree with this analysis.
65. For the reasons above, the 'No Prescribed Occurrences' condition to WAM Active's bid (including the sub-conditions (i) and (iv) (as varied)) did not relate only to the happening of an event or circumstance referred to in section 652C(1) or (2).
66. Accordingly, in accordance with section 650F(1), WAM Active needed to give a notice to Keybridge freeing its bid from those conditions not less than 7 days before the end of the offer period in order to do so validly.
67. This did not occur. At the time WAM Active purported to free its bid from the 'No Prescribed Occurrences' condition (on 2 March 2020) the offer period was scheduled to end at 7.00pm (Sydney time) on 3 March 2020.
68. WAM Active was also unable to extend its bid on 2 March 2020 as its bid remained subject to defeating conditions. Under section 650C, a bidder making a bid that is subject to a defeating condition may extend the offer period after the bidder has given a notice of defeating conditions under subsection 630(3) only if one of a list of certain events happens after the giving of the notice. WAM Active gave that notice on 25 February 2020 (see paragraph 22) and none of those events had occurred at the time of WAM Active's purported extension on 2 March 2020.
69. A bid will also automatically extend if one of a list of certain events set out in section 624(2) occurs (though a bidder must give each person specified in section 650D(1)(c), other than those who have accepted an offer under the bid, written notice that the extension has occurred within 3 days after that event). WAM Active did not purport to rely on that section.

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70. The consequence of WAM Active not effectively freeing its bid of all its defeating conditions and being unable to extend its bid at the time it purported to do so is that WAM Active's bid closed at 7.00pm (Sydney time) on 3 March 2020 subject to defeating conditions. All takeover contracts and acceptances in relation to WAM Active's bid then became void and no transfers should have been registered.⁶

71. WAM Active was on notice that its bid may have closed subject to defeating conditions as it was informed of the following before its bid had closed and prior to Keybridge lodging its Panel application:

- (a) On 4 March 2020, Keybridge informed WAM Active (through the proceedings) that:

This means that the bid has not been freed of the condition contained in section 10.7(c)(i), and the condition remains on foot.

...

Accordingly, WAM Active should not seek to process applications received under its bid.

...

Keybridge is concerned that WAM Active may have been unable to declare its bid to be free of the conditions set out in section 10.7(c) of the Bidder's Statement as it purported to do, and any implications flowing from this.

- (b) On 5 March 2020, Aurora informed WAM Active (through the proceedings) that:

Further, Aurora does not believe WAM Active was able to declare free of all conditions after its s. 630(3) notice, in circumstances where WAM Active held a defeating condition (being the Placement) that had been defeated at the time the s. 630(3) notice was provided. WAM Active was well aware that this condition had been defeated, as evidenced by their Panel Application, yet WAM Active carried this defeating condition into the last week of its bid, on the basis that it could be relied upon in order to withdraw its bid in the last week. Aurora considers this to be significant problem that clashes with the takeover provisions, including the spirit and intention of the takeover provisions.

72. Despite this, WAM Active commenced processing acceptances on 6 March 2020. WAM Active therefore acquired a substantial interest in Keybridge (i.e. purportedly under a takeover bid) in circumstances where its bid had closed subject to defeating conditions.

⁶ Section 650G

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WAM Active's bid – Section 630(5) issue

73. There was another procedural issue relating to WAM Active's bid. On 10 March 2020, WAM Active commenced Court proceedings to seek, in effect, a declaration that alleged non-compliance by it with section 630(5) was not a defect affecting its bid or, alternatively, orders effectively rectifying the alleged defect. WAM Active's proceedings did not extend to the other alleged procedural defects relating to its bid that were the subject of the *Keybridge Capital Limited 06* application.⁷ This is surprising. In our commercial judgement, we would have expected any bidder seeking to rectify an aspect of its bid (or alternatively seeking to receive confirmation that rectification was not required) would also seek similar orders in relation to any other potential defects in its bid.
74. We asked the parties for submissions as to how we should proceed in light of the Court proceedings commenced by WAM Active. Although the Panel has stated that it "*should not decline to consider an application or make orders merely because the applicant may be concurrently pursuing other avenues of relief in connection with the same circumstances, unless there is a clear overlap in the nature of proceedings (such as a scheme of arrangement where the court has commenced scrutiny of the scheme)*",⁸ after considering the submissions, we were minded not to further investigate the section 630 issue given the other defects in WAM Active's bid and the concurrent Court proceedings. In other circumstances it is possible we would have considered this matter further.⁹

Frustrating action

75. Guidance Note 12: *Frustrating Actions* defines a frustrating action as "*an action by a target, whether taken or proposed, by reason of which:*
- *a bid may be withdrawn or lapse or*
 - *a potential bid is not proceeded with*".¹⁰
76. In exercising our power to declare circumstances unacceptable, we must have regard to the purposes of Chapter 6 set out in section 602.¹¹ One of those purposes is to ensure that, as far as practicable, a company's shareholders have a reasonable and equal opportunity to participate in any benefits accruing to shareholders through any proposal under which a person would acquire a substantial interest in the company.¹² When considering that purpose in relation to the acquisition or proposed acquisition of a substantial interest, we must take into account the actions of directors

⁷ See paragraphs [55]-[72] above

⁸ *Regal Resources Limited* [2016] ATP 17 at [64], approved in *Caravel Minerals Limited* [2018] ATP 8 at [53]

⁹ As a postscript, subsequent to our declaration but prior to making our orders, Keybridge informed us in its submissions that "*the court proceedings initiated by WAM Active have been discontinued in whole*"

¹⁰ *Guidance Note 12: Frustrating Actions* at [3]

¹¹ Section 657A(3)

¹² Section 602(c)

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including actions that caused or contributed to the acquisition or proposed acquisition not proceeding (that is, frustrating actions).¹³

77. The Placement triggered a condition to WAM Active's bid. However, WAM Active subsequently purported to waive the triggered condition and also subsequently raised the consideration under its offer. These actions are inconsistent with WAM Active's bid being frustrated.
78. Paragraph 10 of Guidance Note 12: Frustrating Action states that: "...the Panel may declare circumstances to be unacceptable if the actions of the target directors cause an acquisition or proposed acquisition not to proceed or contribute to it not proceeding". In the circumstances of this matter, WAM Active accepted that the Placement would not lead to the defeat of its bid when it purported to waive the condition relating to it. We consider this waiver, along with our conclusion that WAM Active's bid has closed, to be a changed circumstance that means it is not necessary for us to declare whether the Placement gave rise to unacceptable circumstances. We recognise that the purported waiver was not effective (also due to the actions of WAM Active). However, the ineffectiveness of the waiver does not change the position that WAM Active clearly intended to waive the condition and accepted that its bid should continue despite the Placement.

ADIT's bidder's statement

79. WAM Active made a number of submissions in relation to ADIT's bid, including to the effect that the funding of the bid and the disclosure of funding arrangements were deficient.
80. *Guidance Note 14: Funding Arrangements* provides that a bidder should consider making disclosure in relation to "establishing that its funder has the necessary financial resources",¹⁴ including that:

*For other [i.e. non-bank] funders more disclosure may be needed (eg, full accounts, or in most cases an accountant's certificate as to its ability to meet the obligation with disclosure of the content of the accountant's certificate or enough of it to allow shareholders to be satisfied of the sufficiency of the arrangements).*¹⁵

81. ADIT's bidder's statement dated 7 February 2020 disclosed:

ADIT's internal cash reserves are currently insufficient for ADIT to fund the total cash consideration under the Bid and the expected Bid costs. ADIT's portfolio is comprised of highly liquid investments, which ADIT can liquidate at short notice.

Should ADIT's cash reserves, as a result of normal business activities over the Bid Period, be insufficient to fully fund the total cash consideration and costs of the Bid, ADIT will draw on the Bid Funding Agreements and, if necessary, will seek to liquidate other liquid investments

¹³ *Guidance Note 12: Frustrating Actions* at [9]; Section 657A(3)

¹⁴ *Guidance Note 14: Funding Arrangements* at [21(a)]; See *Tower Software Engineering Pty Ltd 01 [2006] ATP 20* at [53]-[64]

¹⁵ *Guidance Note 14: Funding Arrangements* at [22]

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or raise capital from ADIT unitholders in order to fund the balance of the Bid consideration and associated costs.

82. The bidder's statement also disclosed:

- (a) *ADIT holds approximately \$900,000 in cash available for payment of Bid Consideration;*
- (b) *ADIT holds liquid investments listed on the ASX, which together with its available cash exceeds \$4.4 million and which investments may be liquidated at short notice to fund Bid Consideration where required;*
- ...
- (d) *ADIT has entered into funding agreements with HHY Fund (HHY) and Aurora Fortitude Absolute Return Fund (AFARF) which, if called upon, will enable the cash requirements of the Bid to be satisfied (Bid Funding Agreements). The arrangements entered into with these entities include the following:*
 - (i) *Up to \$3 million is available to be called from HHY and up to \$775,000 from AFARF;*
 - (ii) *As the responsible entity of HHY and AFARF, Aurora is in a position to confirm that HHY and AFARF have the cash resources available to meet calls under the Bid Funding Agreements, and that they are fully solvent and able to meet the obligations under those Bid Funding Agreements; ...*

83. ADIT'S second supplementary bidder's statement dated 30 March 2020 attaches accountant's certificates in relation to HHY and AFARF. The accountant's certificates opine on whether there have been material changes in the financial position of each fund since the date that fund's financial statements (in relation to the 30 June 2019 financial year) were published. Each certificate lists the unaudited net tangible assets of the relevant fund "at 29 February 2019".

84. Aurora submitted that:

- (a) *HHY has substantial holdings in 3 ASX-listed securities and that "Aurora is of the view that these investments could be liquidated in an orderly manner at or around their respective market prices" and*
- (b) *AFARF has substantial holdings in two ASX-listed funds and that "Aurora is of the view that these investments could be liquidated in an orderly manner at or around their respective market prices".*

85. Aurora also submitted that it did not state in its bidder's statement that AFARF's accounts were available upon request as a result of an "inadvertent omission".

86. The Panel has previously required evidence that a funder had sufficient arrangements in place to meet its funding obligations and did not simply accept a

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statement acknowledging that the funder had the financial standing to meet its obligations.¹⁶

87. However, in *Taipan Resources NL 11*,¹⁷ the Panel said that it considers “*there will be situations where it is clearly evident from public financial statements or other information available to the Panel and the market that a bidder has the capacity to pay for acceptances under its bid*”.¹⁸
88. In this case, we are focused on ADIT’s disclosure of its funding arrangements rather than the adequacy of those arrangements, but drawing on our experience we do not think the circumstances are such that it is so clearly evident that HHY and AFARF have the financial capacity to meet their cash funding obligations so as to dispense with any additional disclosure requirement. ADIT and AFARF are unlisted funds (noting HHY is listed on ASX) holding a range of investments; even if Keybridge shareholders researched those funds and obtained information on their financial position it would be difficult for shareholders to make an assessment of the value at which each fund’s investments could be liquidated.
89. Aurora submitted that the funds’ investments “*could be liquidated in an orderly manner at or around respective market prices*”. We consider that ADIT did not provide sufficient disclosure of how it would manage the risks involved in the realisation of ADIT’s, HHY’s and AFARF’s underlying investments, given that if ADIT’s bid were successful a substantial proportion of these investments would need to be sold (and in a timely basis to ensure that ADIT would be able to meet its payment obligations).¹⁹
90. For instance, as noted above, ADIT’s bidder’s statement dated 7 February 2020 disclosed that ADIT had “*liquid investments listed on ASX, which together with its available cash [\$900,000] exceeds \$4.4 million*”. However, in order for ADIT to be able to draw on its funding agreements with AFARF and HHY, ADIT would need to have first expended \$3 million of its own funds.²⁰ This equates to approximately 70% of the value of its assets as stated in its bidder’s statement: not an insignificant percentage. Keybridge shareholders were not given any information in ADIT’s bidder’s statement as to the specific investments held by ADIT.²¹ In the context of ADIT’s bid, where a substantial portion of the fund’s assets would need to be sold to fund the consideration and meet a condition to drawdown on the funding agreements, it was important for shareholders to be given sufficient information to be able to make an assessment as to whether those assets could be realised and at what price.

¹⁶ See *Pinnacle VRB Ltd (No. 4)* [2001] ATP 7 at [44], [64]-[65]

¹⁷ [2001] ATP 16

¹⁸ *Taipan Resources NL 11* [2001] ATP 16 at [37]

¹⁹ See *Guidance Note 14: Funding Arrangements* at [16]

²⁰ A condition to drawdown, as set out in section 5.3(d)(iii) of ADIT’s bidder’s statement dated 7 February 2020

²¹ ADIT’s bidder’s statement dated 7 February 2020 does, however, disclose that “*ADIT’s portfolio is comprised of highly liquid investments, which ADIT can liquidate at short notice*”

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91. Accordingly, we consider the disclosure in ADIT's bidder's statement dated 7 February 2020 is materially deficient. It does not establish that the entities that have agreed to provide funding have the necessary financial resources. The disclosure also contains relatively limited information on ADIT's financial capacity.
92. ADIT submitted that the accountant's certificates attached to its second supplementary bidder's statement dated 30 March 2020 address the disclosure deficiencies and, accordingly, ADIT has "*remedied this situation*". The certificates report material changes to the funds' balance sheets since 30 June 2019 (with unaudited net tangible assets being reported as at 29 February 2020). The additional disclosure is useful information for shareholders, however, it does not address the uncertainty around liquidating each fund's investments on a timely basis for a sufficient amount. An accounting certificate in relation to ADIT itself was not provided. Accordingly, the supplementary bidder's statement dated 30 March 2020 does not rectify the materially deficient disclosure because the disclosure (as supplemented) does not establish that HHY and AFARF have the necessary financial resources to meet their funding commitments.
93. In addition, ADIT's bidder's statement (as supplemented) did not provide any further disclosure of how its increase in bid consideration from 6.6 cents to 7.0 cents would be funded.²²
94. In *GoldLink IncomePlus Limited*, the Panel accepted from a bidder "*further disclosure that in each case the accountant considered that the financier had sufficient capacity to satisfy the financing commitments under the facility agreement*".²³ Similar disclosure would have been appropriate in this case: one of the main disclosure deficiencies is that Keybridge shareholders had no information as to whether the funders could satisfy their cash commitments under their funding agreements.

Keybridge's management of conflicts

95. *Guidance Note 19: Insider Participation in Control Transactions* states that as soon as the board of a company becomes aware of a bid or potential bid where there is likely to be the participation of insiders, it should normally establish an independent board committee consisting of those directors who are not participating insiders and that any directors who are participating insiders should not be present at, or participate in or vote on, any consideration by the board of the bid or any competing bid.²⁴
96. As stated by the Panel in *Strategic Minerals Corporation NL*,²⁵ the reason for this is that transactions involving insiders require an increased sensitivity and vigilance to ensure that conflicts are avoided, full disclosure of all material information is made and the consideration by the target board and management of the target's response is

²² The supplementary bidder's statement dated 30 March 2020 does disclose that "*In light of the recent volatility in the local and global equity markets, due largely to COVID-19 pandemic [sic], Aurora hereby advises that the funding agreement with AFARF has been increased from \$775,000 to \$1.5 million. In the event further market volatility is experienced, Aurora may make further adjustments to the Bid Funding Agreements as appropriate.*"

²³ *GoldLink IncomePlus Limited 03 [2008] ATP 21* at [15]

²⁴ *Guidance Note 19: Insider Participation in Control Transactions* at [16]

²⁵ [2018] ATP 2 at [68]

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undertaken free from any actual influence (or appearance of influence) from participating insiders.

97. In this case, Mr Bolton, Keybridge’s Managing Director, participated in Keybridge’s response to WAM Active’s bid. For instance, Mr Bolton signed Keybridge’s target’s statement in response to WAM Active’s bid (after being authorised to sign pursuant to a resolution passed at a director’s meeting), signed the managing director’s letter in the target’s statement, recommended shareholders reject the bid, and was the contact listed in the target’s statement for any shareholders with queries in relation to the bid. Although Mr Bolton has no interest in WAM Active, he has a “54.5% *purely economic interest*” in Aurora (the responsible entity of ADIT).
98. Aurora submitted that Mr Bolton “*is not involved in Aurora’s decision-making process*” and that “*there are no performance fees or management fees payable by ADIT, with costs being subject to cost recovery. As such, whether ADIT is successful or [not] in its bid for Keybridge, Mr Bolton receives no financial benefit*”.
99. *Guidance Note 19* uses the term “*participating insider*”. Under the terms of the *Guidance Note*:
- (a) an “*insider*” includes any officer of a target who is in a position to influence the *target’s* consideration of a bid (rather than the bidder’s consideration of the bid).²⁶ Accordingly the relevant question here is Mr Bolton’s involvement in Keybridge’s decision making process in relation to WAM Active’s bid and
 - (b) a “*participating insider*” is an insider who is given an understanding by, or enters or proposes to enter into an agreement with, a potential bidder that they will gain or benefit from the bidder making a successful bid.²⁷
100. Applying our commercial judgement, we are of the view that there is a benefit to Aurora (and by extension, to Mr Bolton through his economic interest) in ADIT’s bid being successful notwithstanding that ADIT does not charge performance fees or management fees at this point in time. Fee structures can change and the nature of asset management companies is such that greater assets under management would allow for a greater management fee. In any event, for the purpose of *Guidance Note 19*, benefits are not limited to financial benefits.²⁸ We are of the view that the guidance in *Guidance Note 19* is relevant to Keybridge’s situation.
101. Keybridge therefore needed to consider the issue of conflicts and ensure that sufficient procedures were in place to mitigate any actual or potential conflict of interest from at least the time that ADIT announced its intention to make an off-market takeover bid for Keybridge on 8 January 2020. It was important for Keybridge to consider conflicts with respect to WAM Active’s bid and not just with respect to ADIT’s bid. This is because the competing takeover bids meant that a

²⁶ *Guidance Note 19: Insider Participation in Control Transactions* at [10]

²⁷ *Guidance Note 19: Insider Participation in Control Transactions* at [12]

²⁸ See *Guidance Note 19: Insider Participation in Control Transactions*, Footnote 3

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decrease in the likelihood that WAM Active's bid would be successful would be to ADIT's benefit and vice versa.

102. ASIC submitted that: *“Mr Bolton's conflict is, in the first instance, a matter for Keybridge's board, [although] a failure to mitigate any conflict may give rise to unacceptable circumstances”*.
103. We agree. Although conflict management is a matter for Keybridge's board at first instance, in our role we are empowered to assess the arrangements put in place and whether they give rise to unacceptable circumstances. Ultimately, Keybridge appears to have done little to address actual or potential conflicts, as Keybridge permitted Mr Bolton to participate in Keybridge's consideration of WAM Active's bid after the announcement of ADIT's bid. We are satisfied that sufficient procedures were not put in place to mitigate actual or potential conflicts of interest.

Alleged associations

104. WAM Active's *Keybridge Capital Limited 05* application alleged a number of associations, including between:
- (a) Mr Catalano and Mr Bolton and Aurora
 - (b) *“Mr Catalano, KBC and Aurora (and their respective associates)”*
 - (c) Mr Bolton and *“Aurora, ADIT and the entities funding ADIT's bid”* and
 - (d) Mr Bolton and *“his associated entity, ASG”*.
105. Section 12 sets out the tests for association as applied to Chapter 6. There are two relevant tests here:
- (a) section 12(2)(b) - which provides, in essence, that B is an associate of A if (and only if) B is a person with whom A has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of a company's board or conduct of its affairs and
 - (b) section 12(2)(c) - which provides, in essence, that B is an associate of A if (and only if) B is a person with whom A is acting or proposing to act in concert in relation to the company's affairs.
106. In *Viento Group Limited*, the Panel set out a number of circumstances which are relevant to establishing an association.²⁹ It is helpful to consider WAM Active's submissions in relation to those circumstances:
- (a) Common knowledge of relevant facts – WAM Active submitted that Mr Catalano's position as the controller of the purchaser of [REDACTED] a transaction that Keybridge advanced funds to participate in, *“places him and his associates in a unique position of having detailed knowledge”* of the status of those funds and Keybridge's investment.

²⁹ *Viento Group Limited* [2011] ATP 1 at [120], citing *Mount Gibson Iron Limited* [2008] ATP 4

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- (b) Uncommercial actions – WAM Active submitted that Mr Catalano invested in the Placement *“on terms that are uncommercial (when assessed using publicly available information)”* and that *“an investor... that is not motivated by a shared purpose in relation to Keybridge’s affairs, would not invest in Keybridge”*.
- (c) Common investments and dealings / shared goal or purpose – WAM Active submitted that *“whilst KBC and Mr Catalano may have differing motivations, they clearly have shared goals of in [sic] preventing WAM Active’s bid from succeeding and Mr Bolton retaining control of the KBC board”* for reasons relating to the purchase of [REDACTED].
- (d) Prior collaborative conduct – WAM Active submitted that:
 - (i) *“Mr Catalano, Mr Bolton and Aurora have collaborated in the past, including in a Federal Court proceeding that sought to block Fairfax Media’s \$4 billion merger with NEC (without success)”*
 - (ii) *“WAM Active understands Mr Bolton and Aurora to have assisted Mr Catalano in his trading activities, including warehousing stock on his behalf”* and
 - (iii) *“the Panel and ASIC have found Aurora, KBC and ASG to be associates and to have collaborated extensively in the past”*.

107. There are factors that weigh against accepting WAM Active’s submissions, including

- (a) First, the Catalano Entities denied *“the specific allegation in the Second Application that Mr Catalano used Aurora to purchase or warehouse shares in [REDACTED] [REDACTED]”,* and Mr Bolton also denied the *“prior collaborative conduct as asserted by WAM Active”*.
- (b) Second, although Mr Bolton appears to have originated Keybridge’s participation in the [REDACTED] transaction, that transaction was entered into by Keybridge. It does not necessarily follow that Mr Bolton in his personal capacity is associated with Mr Catalano or the other Catalano Entities (or that Keybridge is so associated). Mr Bolton submitted³⁰ that *“My only involvement with the Catalano Entities is in my capacity as Managing Director of Keybridge on behalf of Keybridge”*.
- (c) Third, WAM Active’s submission that the Placement was uncommercial carries little force in light of the fact that WAM Active subsequently increased its offer price to the Placement price of 6.9 cents.
- (d) Fourth, in relation to ASG, Mr Bolton submitted that *“an independent director with no personal or professional relationship with me”* is the sole director of ASG and that director *“makes all decisions on behalf of the company for all matters, including in relation to Keybridge”*.

³⁰ Mr Bolton was not a party to the proceedings. However, the Panel gave Mr Bolton the opportunity to make submissions on matters affecting Mr Bolton directly

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(e) Fifth, Keybridge submitted that its “*relationship with Aurora would be better described as difficult*” and that: “*It was terminated as the manager of HHY by Aurora, without Keybridge’s consent and this matter is in dispute*”.

108. A finding of association, where one has not been admitted or disclosed previously, is a serious finding for the Panel to make, particularly if it means the parties have committed a breach of section 606 (which would be the case in some combinations of the alleged associations). It follows that the evidence presented to the Panel must be sufficient to support such a finding. In the words of Marks J, “... *such a finding must be truly available and not the product of mere suspicion or prejudice*”.³¹

109. We do not consider findings of association are available to us given the evidence before us. There are undoubtedly some connections between the relevant persons. However, this is not enough to establish an association.

110. We note however that, in these circumstances, the Panel’s observations in *Auris Minerals Limited* may be apt:

*As a practical matter it may be more difficult for an applicant to demonstrate a sufficient body of probative material where it is alleged that a large number of parties have recently commenced acting in concert. In such cases, if there is an association and it continues, it may well become easier over time to demonstrate patterns of conduct or other material to satisfy that requirement. Where that is the case, shareholders or ASIC may seek to apply to the Panel again.*³²

Keybridge’s target’s statement

111. WAM Active submitted that Keybridge’s target’s statement contains a number of disclosure deficiencies, including:

- (a) “*the Recommendation provided by [Keybridge] is incomplete (Mr Johnson providing no explanation for making no recommendation), inconsistent and presented in a misleading way*” and
- (b) “*the reasons for [Keybridge’s] Recommendation are neither soundly based nor reasonable ... the statements that [Keybridge] is undervalued are not accompanied by up to date financial information ... Shareholders have no way of knowing the current value of their [Keybridge] shares*”

112. WAM Active also submitted that Keybridge’s supplementary target’s statement contains a number of disclosure deficiencies, including:

- (a) “*misleading and deceptive statements with respect to the [WAM Active] Bid, suggesting that [Keybridge] shareholders have a right to withdraw acceptances*” and
- (b) “*disclosing Mr Bolton’s 54.5% “pure economic interest” in Aurora ... This information was previously excluded from the Target’s Statement where Mr Bolton*

³¹ *Elders IXL Ltd v NCSC* [1987] VR 1 at 15

³² [2018] ATP 7 at [20]

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recommended [Keybridge] shareholders reject the [WAM Active] Bid in light of the ADIT bid which was announced”.

113. In circumstances where WAM Active’s bid closed subject to defeating conditions on 2 March 2020, it is unlikely to be in the public interest to continue this aspect of the proceedings. The Panel can only make a declaration or decline to make a declaration if it considers that doing so is not against the public interest.³³ We are therefore satisfied that it is not necessary for us to conclude whether the alleged disclosure deficiencies give rise to unacceptable circumstances.³⁴

Other allegations

114. The *Keybridge Capital Limited 05* application made allegations of insider trading. We asked the parties for submissions in connection with these allegations. We are not satisfied the allegations were substantiated or necessarily a matter for the Panel in the circumstances of this matter.

DECISION

Declaration

115. It appears to us that the circumstances are unacceptable circumstances:

- (a) having regard to the effect that we are satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Keybridge or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Keybridge
- (b) in the alternative, having regard to the purposes of Chapter 6 as set out in section 602 and
- (c) in the further alternative, because certain of the unacceptable circumstances constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6.

116. Accordingly, we made the declaration set out in Annexure B and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3).

117. Mr Bolton was not a party to the proceedings. Prior to making the declaration, we sought submissions from Mr Bolton directly on the basis that he was a person to whom our proposed declaration related.³⁵

³³ Section 657A(2)

³⁴ See also *Gladstone Pacific Nickel Limited 02* [2011] ATP 16 at [55], where the Panel declined to make a declaration where circumstances changed

³⁵ Section 657D(4)

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Orders

118. Following the declaration, we made the final orders set out in Annexure C. Under section 657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'³⁶ if 4 tests are met:
- (a) it has made a declaration under section 657A. This was done on 7 April 2020.
 - (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, we are satisfied that our orders do not unfairly prejudice any person.
 - (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 27 March 2020 (in relation to a supplementary brief on the declaration and orders), 5 April 2020 and 7 April 2020.³⁷
 - (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons, or ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred. The orders do this by (in effect):
 - (i) cancelling any acceptances into WAM Active's bid that have not been processed and requiring WAM Active to comply with any request from any shareholder whose acceptance was processed to reverse the transaction (subject to any Court order or declaration inconsistent with that order)
 - (ii) for a period of six months, preventing WAM Active from exercising any votes attaching to Keybridge shares above what it could have otherwise acquired under its 'creep' capacity. This assists with preserving the status quo as far as possible for a period to allow the parties to seek a Court declaration as to the status of the shares processed by WAM Active if desired. This is consistent with a submission by ASIC that "*as an interim measure however... some form of voting freeze order may be appropriate*" and
 - (iii) granting each shareholder that accepted into ADIT's bid a withdrawal right so that shareholders can reconsider their acceptance in the knowledge of ADIT's disclosure deficiencies and requiring ADIT to act on any voting instructions received from that shareholder prior to any withdrawal request being actioned. This protects the rights or interests of the persons primarily affected by the unacceptable circumstances relating

³⁶ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

³⁷ Mr Bolton was also given an opportunity to make submissions in his personal capacity on 6 April 2020 and 8 April 2020

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to ADIT's disclosure (i.e. those Keybridge shareholders who accepted into the bid in a market that was not efficient, competitive and informed).

119. On 5 April 2020, we provided draft orders to the parties and ASIC.³⁸ These orders were in substantially the same form as the final orders other than that they included the following additional orders (in effect):
- (a) an order requiring ADIT to extend the offer period for its bid by at least one month
 - (b) an order requiring ADIT to prepare a supplementary bidder's statement including an independent accountant certificate opining:
 - (i) on the current market value of HHY's and AFARF's holdings and each fund's ability to liquidate its positions on a timely basis
 - (ii) on the current market value of ADIT's holdings and its ability to liquidate its positions on a timely basis and
 - (iii) that ADIT has access to sufficient funds (and if provided by others, binding commitments) to pay for acceptances under its off market bid for Keybridge (other than in relation to any shares held by ASG or Mr Bolton)
 - (c) an order cancelling ADIT's bid if it cannot finalise such a supplementary bidder's statement within 21 days and
 - (d) an order preventing Mr Bolton from attending any Keybridge board meetings or voting on Keybridge board resolutions, in connection with Keybridge's response to any new bid made by WAM Active for Keybridge, or provide a recommendation in relation to any such bid while either of the following are on foot:
 - (i) ADIT's bid for Keybridge or
 - (ii) any other bid in relation to Keybridge made by Aurora or an entity related to or controlled by Aurora was on foot.
120. Following the provision of the draft orders to the parties, ADIT's bid closed on 6 April 2020. In light of that development, we reconsidered the orders mentioned above. Ultimately, we removed them for the reasons below.
121. Relevantly, the Panel can make any order under section 657D it thinks appropriate to:
- (a) protect the rights or interests of any person, or group of persons, who have been or are being affected, or will be or are likely to be affected by unacceptable circumstances or

³⁸ Mr Bolton received the orders in his capacity as Managing Director of Keybridge at this time

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- (b) ensure that a takeover bid or proposed takeover bid proceeds (as far as possible) in a way that it would have proceeded if unacceptable circumstances had not occurred.
122. Given ADIT's bid closed, we considered the orders requiring an extension of ADIT's bid period and supplementary disclosure were no longer appropriate for two reasons:
- (a) a withdrawal right would adequately protect the rights or interests of the persons primarily affected by the unacceptable circumstances (i.e. those Keybridge shareholders who accepted into the bid in a market that was not efficient, competitive and informed) as the unacceptable circumstances relating to ADIT's disclosure were no longer continuing, and accordingly potential cancellation of the bid was unnecessary and potentially unfairly prejudicial to shareholders that had accepted and been paid and
- (b) in circumstances where ADIT's bid was no longer on foot, it is not clear how supplementary disclosure (and potentially cancellation of the bid) would ensure that ADIT's bid proceeded in a way that it would have proceeded but for the unacceptable circumstances (because there was no longer a bid). Such orders may have simply resulted in Keybridge shareholders receiving potentially confusing information.
123. We also considered the order relating to Mr Bolton's involvement was no longer appropriate as the unacceptable circumstances relating to him were no longer continuing (as there was no conflict or potential conflict in the absence of ADIT's bid). As no unacceptable circumstances were continuing, it is not clear what rights or interests of persons affected by the unacceptable circumstances would be protected by such an order.
124. On 7 April 2020, we provided to the parties and ASIC updated orders substantially in the same form as the final orders.³⁹
125. In relation to those orders, Keybridge submitted that *"In relation to the Processed Shares, it appears if the Panel recognises that the position can be unwound at any time even after the expiry of the 21 day period. The Panel should clarify this in the reasons"* after previously submitting that the relevant shares' *"status as WAM Active shares is erroneous"*. The *"Processed Shares"* are the shares processed by WAM Active after its bid closed.
126. As stated above in paragraph 70, a consequence of WAM Active's bid closing subject to defeating conditions is that all takeover contracts, and all acceptances that did not result in binding takeover contracts, were void. We also note that section 650G provides that: *"A transfer of securities based on an acceptance or contract that is void under this section must not be registered"*. As a factual observation however, WAM Active is registered on the Keybridge share register in respect of some of the shares and also

³⁹ Mr Bolton received the orders in his capacity as Managing Director of Keybridge at this time

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paid the consideration for them. This presents challenges in relation to making orders.

127. We considered vesting the relevant shares in ASIC for sale, but making such an order was potentially unfairly prejudicial given the challenging economic climate existing at the time of our orders and Keybridge’s continuing suspension. ASIC was clear in its submissions that it was not in favour of this approach:

... ASIC considers it relevant for the Panel to consider that Keybridge’s shares are currently suspended, limiting the options available to ASIC in the event that vesting orders are made. Additionally, ASIC refers to its submissions to the Brief and reiterates that the current economic climate is a relevant consideration for the Panel, as any sale (unless effected by way of, or transacted with a buyer with the sole intention of, accepting into the ADIT bid) may be at a substantial discount to the WAM Active offer price.

128. It is appropriate in considering whether orders unfairly prejudice a person to consider “*the degree of culpability of the persons whose interests are affected by the orders*”.⁴⁰ WAM Active’s errors leading up to its bid closing appear inadvertent. This is not the case in relation to WAM Active proceeding to process acceptances when it was not entitled to do so.
129. Vesting all the shares in ASIC could also have a substantial effect on the voting at any general meeting of Keybridge by substantially affecting the number of shares available to be voted (i.e. reducing the ‘free float’).⁴¹ We were aware at the time of making our orders that Keybridge had such a meeting upcoming.⁴²
130. We also considered cancelling the acceptances. However, this would have required shareholders to return the consideration received from WAM Active. We were conscious of the prejudice such an order could cause shareholders who may not have ready access to those funds. We were also conscious of the possibility, depending on the wording of the order, that shareholders obligated to repay funds as a result of such an order may need to be granted an opportunity to make submissions under section 657D(1); a practical difficulty in the circumstances.
131. We consider Keybridge’s circumstances constrain our ability to make orders and are of the view there are no better options that meet the requirements of section 657D. We recognise that our orders leave WAM Active as the registered holder of the relevant shares. However, we have not validated that registration.⁴³ We consider the question of whether the registration of those shares automatically became void or became voidable a question more appropriately adjudicated by a Court. Our order relating to shareholders’ reversal right (see below) facilitates this by automatically ceasing if a Court makes orders or a declaration inconsistent with it.

⁴⁰ *AMP Shopping Centre Trust 02* [2003] ATP 24, quoting *ASIC v Yandal Gold* (1999) 32 ACSR 317, at [120] to [121]

⁴¹ A vesting order typically prevents the person whose shares are being vested from voting those shares

⁴² See paragraphs 18 and 33

⁴³ It is unclear that we have the power to do so

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132. Rather than determine the legal status of the relevant shares (a question more appropriately adjudicated by a Court), to protect the rights and interests of shareholders affected by the unacceptable circumstances and whose acceptances have been processed, we have ordered WAM Active to comply with any reversal request. This obligation on the part of WAM Active (and the corresponding right on the part of the affected shareholders) is not limited by time.
133. Keybridge also submitted that: *“In relation to the Creep Limit, it seems that the Panel is not relying on section 611 item 9. Accordingly, it is incumbent on the Panel to explain in its reasons that this is the case”*. The *“Creep Limit”* in our orders is the number of shares above which a voting freeze applies and corresponds to 24.15% of Keybridge’s current capital (188,136,486 shares), being 3% higher than WAM Active’s voting power six months’ prior to the date of our orders. The parties were given the opportunity to provide submissions on these figures, including WAM Active’s voting power six months’ prior to the date of our orders.
134. In order to rely on item 9 of section 611 (‘creep’), a person needs to maintain voting power in a company of at least 19% throughout a six month period. Keybridge submitted that WAM Active did not have 19% of Keybridge’s capital *“at the time it started obtaining transfers of the Processed Shares”*. Our order was not based on a determination that WAM Active was entitled to acquire shares under creep at the time it acquired the processed shares. Rather, at a more conceptual level, instead of WAM Active launching a takeover bid on 13 December 2019, it could presumably have acquired shares under its creep capacity. In our commercial view, this hypothetical limit is an appropriate level at which to cap WAM Active’s ability to vote shares in Keybridge as it reflects the voting power WAM Active could theoretically have acquired in Keybridge in other circumstances.
135. We also emphasise that our orders do *not* say that WAM Active *can* vote the processed shares up to the *“Creep Limit”*. Instead, the orders say that WAM Active *cannot* vote shares above that limit (other than in the circumstance permitted under the orders). The difference is significant. We consider whether WAM Active can vote the processed shares, and the scope of WAM Active’s rights in relation to those shares more generally, are again issues more appropriately adjudicated by a Court.
136. Keybridge also submitted that *“there are some shareholders that fall into the category of Processed Shareholders who have also accepted into the ADIT bid ... Those shareholders are prejudiced as a consequence of the Panel’s Draft Orders as they have no ability to access the superior ADIT offer”*. The orders grant such shareholders effective withdrawal rights in respect of both bids, which addresses any such potential issues.
137. In relation to ADIT’s bid closing and our revised orders, WAM Active submitted that it *“considers it to be a perverse outcome for Aurora to avoid adverse orders where it knew that the Panel was going to make a declaration of unacceptable circumstances in relation to its actions”*. We consider a withdrawal right is the most appropriate order in the circumstances. It should be noted that ADIT’s bid closed in accordance with its terms. WAM Active and Bentley were also aware that ADIT’s bid was scheduled to

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close and did not seek an urgent interim order to prevent the bid from closing as scheduled.

138. WAM Active also submitted:

- (a) We should make orders in effect preventing Aurora from making a bid for Keybridge for a period of 4 months to prevent ADIT “*seek[ing] to confuse Keybridge shareholders by making an unfunded ‘phantom’ bid*”. We do not consider the additional order proposed by WAM Active is necessary, particularly given there were no bids on foot for Keybridge as at the date of our orders, or appropriate to deal with the unacceptable circumstances in relation to ADIT’s funding disclosure.
- (b) We should reinstate certain of the orders removed following the closure of ADIT’s bid. Our reasoning in relation to why those orders were removed is set out above from paragraph 120 onwards.

139. Bentley submitted that ADIT’s bid should be cancelled and all acceptances in respect of the bid voided. It is not clear to us how such an order would better protect the rights or interests of persons affected by the unacceptable circumstances than the withdrawal rights we granted to shareholders who accepted into ADIT’s bid. In any event, such an order is also problematic for the reasons stated in paragraph 130.

140. The Catalano Entities made a request for a costs order. We have not granted this request because, among other things, we were not of the view that WAM Active had presented a case that was not of reasonable merit or had done so in an unbusinesslike way.⁴⁴

141. Given the complicated nature of this matter, we include a liberty to apply clause in our orders to make it clear that a party or ASIC may seek a variation of orders from us if circumstances require. We expect that if any Keybridge shareholder or other affected person brought an issue to any party’s attention, that party would then bring it to our attention.

Sharon Warburton
President of the sitting Panel
Declaration dated 7 April 2020
Orders dated 9 April 2020
Reasons given to parties 1 May 2020
Reasons published 8 May 2020

⁴⁴ See *Guidance Note 4: Remedies General* at [29]

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Advisers

Party	Advisers
Antony Catalano, Catalano Super Investments Pty Ltd ATF Catalano Superannuation Fund and Antstef Pty Ltd ATF Antstef Trust	MinterEllison
Keybridge Capital Limited	Baker McKenzie
Samuel Terry Asset Management Pty Ltd	
WAM Active Limited	Mont Lawyers Pty Limited
William Johnson	
Bentley Capital Limited	Squire Patton Boggs
Aurora Funds Management Limited as responsible entity for Aurora Dividend Income Trust, HHY Fund and Aurora Fortitude Absolute Return Fund	



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Takeovers Panel

Annexure A
CORPORATIONS ACT
SECTION 657E
INTERIM ORDERS

KEYBRIDGE CAPITAL LIMITED 06

Keybridge Capital Limited (**Keybridge**) has undertaken to make an application to the Panel in relation to its affairs and has made an application for interim orders.

The Acting President ORDERS:

1. WAM Active Limited (**WAM Active**) must not take any steps, or allow any steps to be taken, to process any acceptances received under, or any transfers in relation to, WAM Active's bid for Keybridge.
2. These interim orders have effect until the earliest of:
 - (i) further order of the Acting President or the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

Tania Mattei
Counsel
with authority of Richard Hunt
Acting President
Dated 11 March 2020



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Takeovers Panel

Annexure B

**CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

KEYBRIDGE CAPITAL LIMITED 04, 05 & 06

CIRCUMSTANCES

1. On 13 December 2019, WAM Active Limited (**WAM Active**) announced an off-market takeover bid for all the shares in Keybridge Capital Limited (**Keybridge**) at 6.5 cents per Keybridge share. WAM Active lodged its bidder's statement with ASIC on the same day.
2. On 8 January 2020, Aurora Funds Management Limited as responsible entity for the Aurora Dividend Income Trust (**ADIT**) announced an intention to make an off-market takeover bid for all the shares in Keybridge at 6.6 cents per Keybridge share.
3. On 17 January 2020, Keybridge lodged its target's statement in respect of WAM Active's bid with ASIC. The target's statement was announced on 20 January 2020.
4. On 24 January 2020, WAM Active extended the offer period for its bid to 7.00pm (Sydney time) on 17 February 2020.
5. On 7 February 2020, ADIT lodged its bidder's statement with ASIC. The bidder's statement disclosed that, should ADIT's cash reserves be insufficient to fully fund the total cash consideration and the costs of the bid, ADIT would draw on bid funding agreements entered into with HHY Fund and Aurora Fortitude Absolute Return Fund. The disclosure in ADIT's bidder's statement as to the proposed funding of ADIT's bid was materially deficient because, among other things, it did not establish that the entities that agreed to provide funding had the necessary financial resources.
6. On 10 February 2020, WAM Active further extended the offer period for its bid to 7.00pm (Sydney time) on 3 March 2020.
7. On 12 February 2020, Keybridge announced that it had agreed to place 22,000,000 shares to sophisticated investors at an issue price of 6.9 cents per Keybridge share (**Placement**). The Placement subsequently took place on 17 February 2020.

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8. The Placement triggered a condition to WAM Active's bid that related to Keybridge issuing securities.⁴⁵ The terms of WAM Active's bid provided that where an event occurs that triggers a condition, the condition "*affected by that event becomes two separate Conditions on identical terms except that: (i) one of them relates solely to that event; and (ii) the other specifically excludes that event.*"
9. On 19 February 2020, Keybridge lodged a supplementary target's statement with ASIC in respect of WAM Active's bid. The supplementary target's statement disclosed among other things that Keybridge's Managing Director, Mr Nicholas Bolton, "*has a 54.5% purely economic interest in the Responsible Entity and manager of ADIT, Aurora Funds Management Limited*". From at least the time that ADIT announced its intention to make an off-market takeover bid, Keybridge needed to consider the issue of conflicts and ensure that sufficient procedures were in place to mitigate any actual or potential conflict of interest.
10. On 24 February 2020, WAM Active announced an increase in its offer price from 6.5 cents to 6.9 cents per Keybridge share and that it had elected to waive the majority of the defeating conditions to its bid, with the effect that WAM Active's bid was only subject to a 'No Prescribed Occurrences' condition as set out in section 10.7(c) of WAM Active's bidder's statement. The 'No Prescribed Occurrences' condition contained a number of separate conditions, including:
- (a) the conditions referred to in paragraph 8 and
 - (b) a condition similar to the condition in section 652C(1)(a) of the *Corporations Act 2001 (Cth)*⁴⁶ (**Act**) but with the additional words "*or any of the Controlled Entities of KBC*".⁴⁷
11. On 25 February 2020, WAM Active announced a notice of status of defeating conditions, which stated that:
- For the purposes of section 630(3) of the Corporations Act 2001 (Cth), WAM Active gives notice that:*
- (a) *the Offer remains subject to the condition in section 10.7(c) (No Prescribed Occurrences) but has been freed of all other conditions set out in section 10.7 of the Bidder's Statement...*
12. On 2 March 2020, WAM Active announced that:
- Pursuant to section 650F of the Corporations Act 2001 (Cth), [WAM Active] gives notice that:*

⁴⁵ Set out in section 10.7(c)(iv) of WAM Active's bidder's statement

⁴⁶ As modified by ASIC, including by [CO 13/521]

⁴⁷ Set out in section 10.7(c)(i) of WAM Active's bidder's statement

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- (a) *The Offer is free of the Condition set out in section 10.7(c) (No Prescribed Occurrences) of the Bidder's Statement; and*

...

Accordingly, the Offer is now unconditional.

13. The conditions set out in paragraphs 10(a) and 10(b) above did not relate only to the happening of an event or circumstance referred to in subsection 652C(1) or (2) of the Act and so were not prescribed occurrences. Accordingly, WAM Active needed to give a notice to Keybridge freeing its bid from those conditions not less than 7 days before the end of the offer period in order to validly do so.⁴⁸ This did not occur as, at the time WAM Active purported to free its bid from those conditions, the offer period was scheduled to end at 7.00pm (Sydney time) on 3 March 2020.
14. Also on 2 March 2020, WAM Active purported to extend its bid to 7.00pm (Sydney time) on 3 April 2020. WAM Active was unable to extend its bid at this time as its bid remained subject to defeating conditions.⁴⁹
15. As WAM Active did not effectively free its bid of all its defeating conditions, and was unable to extend its bid at the time it purported to do so, WAM Active's bid closed at 7.00pm (Sydney time) on 3 March 2020 subject to defeating conditions. All takeover contracts and acceptances in relation to WAM Active's bid then became void and no transfers should have been registered.⁵⁰
16. On 4 and 5 March 2020, other parties to the Panel proceedings informed WAM Active of their view that WAM Active's bid had not been validly freed of its defeating conditions. One of those parties stated that WAM Active should not seek to process acceptances received under its bid.
17. On or about 6 March 2020, WAM Active commenced processing acceptances received under its bid.

⁴⁸ Under section 650F(1) of the Act, a bidder can only free offers under its bid from a defeating condition if it gives the target a notice declaring the bid free from the condition in accordance with the following: (a) if the condition relates only to the happening of an event or circumstance referred to in subsection 652C(1) or (2) of the Act, not later than 3 business days after the end of the offer period or (b) in any other case, not less than 7 days before the end of the offer period

⁴⁹ Under section 650C of the Act, a bidder making a bid that is subject to a defeating condition may extend the offer period after the bidder has given the notice under subsection 630(3) (see paragraph 11) only if one of a list of certain events happens after the giving of the notice. None of those events had occurred at the time of WAM Active's purported extension. A bid will also automatically extend if one of a list of certain events set out in section 624(2) occurs (though a bidder must give each person specified in s650D(1)(c) (other than those who have accepted an offer under the bid) written notice that the extension has occurred within 3 days after that event). WAM Active did not purport to rely on that section

⁵⁰ See section 650G of the Act

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18. On 10 March 2020, WAM Active commenced Court proceedings to seek, in effect, a declaration that an alleged procedural defect was not a defect or, alternatively, orders effectively rectifying the alleged defect. The application did not extend to any matters the subject of this declaration.
19. On 30 March 2020, ADIT lodged a supplementary bidder's statement with ASIC. The supplementary bidder's statement included accountant's certificates opining on whether there had been material changes in the financial position of each of HHY Fund and Aurora Fortitude Absolute Return Fund since the date that each fund published its financial statements. Neither certificate included an opinion on the relevant fund's ability to meet its obligations under its funding agreement with ADIT. The certificates were not sufficient to remedy the information deficiencies in ADIT's bidder's statement.

EFFECT

20. By reason of the information deficiencies in ADIT's bidder's statement (including as supplemented on 30 March 2020), Keybridge shareholders:
 - (a) were not given enough information to enable them to assess the merits of ADIT's bid and
 - (b) were required to make decisions whether to accept ADIT's bid on the basis of inadequate information, causing the market for control in Keybridge not to be efficient, competitive and informed.
21. In light of Mr Bolton's economic interest in Aurora Funds Management Limited, Keybridge did not have sufficient procedures in place to mitigate any actual or potential conflict of interest (arising from at least the time ADIT announced its intention to make an off-market takeover bid). In the context of competing bids from WAM Active and ADIT, it was important for Keybridge shareholders to receive advice and information that was not tainted in its independence. Therefore, the effect of the lack of sufficient procedures was that the market for control of Keybridge shares was not efficient, competitive and informed.
22. WAM Active acquired a substantial interest in Keybridge (purportedly under a takeover bid) in circumstances where its bid had closed subject to defeating conditions.

CONCLUSION

23. 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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- (i) the control, or potential control, of Keybridge or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Keybridge
- (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the Act and
- (c) in the further alternative, because certain of the unacceptable circumstances constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6 of the Act.
24. 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 section 657A(3).

DECLARATION

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

Tania Mattei
Counsel
with authority of Sharon Warburton
President of the sitting Panel
Dated 7 April 2020



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Takeovers Panel

Annexure C

**CORPORATIONS ACT
SECTION 657D
ORDERS**

KEYBRIDGE CAPITAL LIMITED 04, 05 & 06

The Panel made a declaration of unacceptable circumstances on 7 April 2020.

THE PANEL ORDERS

WAM Active's bid

1. For a period of 6 months after the date of these orders, WAM Active must not exercise any voting rights in respect of any Keybridge shares in which WAM Active has a relevant interest above the Creep Limit.
2. Order 1 does not apply to any shares WAM Active acquires through a takeover bid made after the date of these orders but continues to apply otherwise.
3. Unless a Court makes orders or a declaration inconsistent with this Order, from and including the date of these orders WAM Active must comply with a request from any Processed Shareholder to reverse the transaction by which WAM Active acquired any Processed Shares from that Processed Shareholder.
4. All Unprocessed Acceptances are immediately cancelled.
5. WAM Active must:
 - (a) as soon as practicable, and in any event within 2 business days, provide to the Panel:
 - (i) a draft notice to be sent to all Unprocessed Shareholders informing them that their acceptances have been cancelled and
 - (ii) a draft notice to be sent to all Processed Shareholders informing them that their acceptances have been processed, the effect of Order 3 and that WAM Active's bid closed at 7.00pm (Sydney time) on 3 March 2020 subject to defeating conditions
 - (b) make any changes to either draft notice if requested by the Panel and
 - (c) as soon as practicable after the Panel confirms it has no comments or no further comments on the draft notice to be sent to all Unprocessed Shareholders, send the relevant notice by express post to all Unprocessed Shareholders with no other accompanying documents and

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- (d) unless a Court makes orders or a declaration inconsistent with Order 3, as soon as practicable after the later of:
- (i) the Panel confirming it has no comments or no further comments on the draft notice to be sent to Processed Shareholders and
 - (ii) any date set by the Panel that is not later than 21 days after the date of these orders,

send the relevant notice by express post to all Processed Shareholders with no other accompanying documents.

ADIT's bid

6. Each ADIT Accepting Shareholder has a right to withdraw their acceptance into ADIT's off market bid for Keybridge. The withdrawal right commences on the date of these orders and ceases 14 days after the despatch of the notices and enclosed election forms to ADIT Accepting Shareholders in accordance with Order 8(a).
7. ADIT must:
- (a) as soon as practicable, and in any event within 2 business days after the date of these orders, provide to the Panel a draft notice to be sent to all ADIT Accepting Shareholders, which:
 - (i) explains the effect of these orders, including informing ADIT Accepting Shareholders of their right to withdraw their acceptance
 - (ii) explains the effect of the declaration as it relates to ADIT's off market bid for Keybridge and
 - (iii) encloses an election form for the exercise of that withdrawal right and
 - (b) make any changes to the draft notice or election form if requested by the Panel.
8. To give effect to Order 6, ADIT must:
- (a) as soon as practicable after the Panel confirms it has no comments or no further comments on the draft notice and enclosed election form, send those documents by express post to all ADIT Accepting Shareholders with no other accompanying documents and
 - (b) as soon as practicable, take all steps necessary to give effect to the exercise of a withdrawal right by an ADIT Accepting Shareholder. For the avoidance of doubt, any communication from an ADIT Accepting Shareholder requesting a withdrawal of the ADIT Accepting Shareholder's acceptance must be actioned by ADIT, irrespective of whether the shareholder used the form referred to in Order 7(a)(iii).

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9. If any ADIT Accepting Shareholder notifies ADIT that it intends to exercise a withdrawal right, or has exercised a withdrawal right (but the withdrawal has yet to be processed or become effective), ADIT must vote at any meeting of Keybridge the ADIT Accepting Shareholder's shares in accordance with any direction given by the ADIT Accepting Shareholder.
10. Without limiting the means by which an ADIT Accepting Shareholder can notify ADIT for the purpose of Order 9, notification can be given by email sent to either enquiries@aurorafunds.com.au or jpatton@aurorafunds.com.au.
11. ADIT must not take any steps, or allow any steps to be taken, to process any acceptances or transfers received in relation to its off market bid for Keybridge until 14 days after the despatch of the notices and enclosed election forms to ADIT Accepting Shareholders in accordance with Order 8(a).

Other

12. The parties to these proceedings and ASIC have the liberty to apply for further orders in relation to these orders.
13. In these orders the following terms apply:

ASIC	Australian Securities and Investments Commission
ADIT	Aurora as responsible entity for Aurora Dividend Income Trust
ADIT Accepting Shareholder	Any person that has accepted ADIT's off market bid for Keybridge as at the date of these orders
Aurora	Aurora Funds Management Limited
Corporations Act	<i>Corporations Act 2001</i> (Cth)
Creep Limit	45,438,354
date of these orders	9 April 2020
Keybridge	Keybridge Capital Limited
Processed Shareholders	Any person who accepted into WAM Active's off market bid for Keybridge that had their acceptance processed by WAM Active
Processed Shares	16,057,929 Keybridge shares registered in the name of WAM Active as a result of it processing acceptances under its off market bid for Keybridge

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Unprocessed Acceptances	Any acceptances received by WAM Active in relation to its off market bid for Keybridge that have not been processed
Unprocessed Shareholders	Keybridge shareholders that have provided Unprocessed Acceptances to WAM Active
WAM Active	WAM Active Limited

**Tania Mattei
Counsel
with authority of Sharon Warburton
President of the sitting Panel
Dated 9 April 2020**