



Australian Government

Takeovers Panel

Reasons for Decision

**Molopo Energy Limited 03R, 04R & 05R Variation
[2020] ATP 18**

Catchwords:

Variation of orders

Corporations Act 2001 (Cth), sections 611 (item 9), 657D(3)

Aurora Funds Management Limited v Australian Government Takeovers Panel (Judicial Review) [2020] FCA 496

Molopo Energy Limited 12R [2018] ATP 19, Molopo Energy Limited 10 & 11 [2018] ATP 12, Molopo Energy Limited 03R, 04R & 05R [2017] ATP 12, Molopo Energy Limited 01 & 02 [2017] ATP 10

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
N/A	N/A	YES	N/A	YES	N/A

INTRODUCTION

- The Panel, Michelle Jablko (sitting President), Christian Johnston and Tara Page, varied the final orders made on 7 July 2017 by the sitting Panel in *Molopo Energy Limited 03R, 04R & 05R*.¹ The variation stays the sale of the Molopo shares vested in ASIC under the orders until certain Court proceedings are resolved.
- In these reasons, the following definitions apply.

Aurora	Aurora Funds Management Ltd as responsible entity for the Aurora Fortitude Absolute Return Fund and Aurora Global Income Trust
Court Proceedings	the Supreme Court of Victoria proceedings brought by Molopo against its former directors (Case numbers S ECI 2018 00120, S ECI 2019 01336 and S ECI 2020 01566)
Initial Panel	the sitting Panel in <i>Molopo Energy Limited 01 & 02 [2017] ATP 10</i>
Keybridge	Keybridge Capital Limited (ASX: KBC)
Molopo	Molopo Energy Limited (ASX: MPO)
Orders	the final orders dated 7 July 2017 made by the Review Panel
Orders 2 and 3	has the meaning given in paragraph 4
Orient / Drawbridge transactions	has the meaning given in paragraph 9

¹ [2017] ATP 12

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Review Panel	the sitting Panel in <i>Molopo Energy Limited 03R, 04R & 05R</i> [2017] ATP 12
Variation 1, 2 or 3	the potential variations described in paragraph 13
Vested Shares	ordinary shares in the issued capital of Molopo that are currently vested in ASIC, specifically 39,540,910 shares previously held by Aurora and 3,666,285 shares previously held by Keybridge

FACTS

Original Panel proceedings

3. The Review Panel made a declaration of unacceptable circumstances on 30 June 2017. It considered that Keybridge and Aurora were associated in relation to Molopo and had contravened sections 606 and 671B.² Further, or in the alternative, the Review Panel agreed with the Initial Panel that the actions of Mr Nicholas Bolton and Mr John Patton³ gave rise to a control effect that was otherwise unacceptable in relation to the affairs of Molopo.
4. The Review Panel made final orders on 7 July 2017. The Orders included orders that the Vested Shares be sold by an appointed seller retained by ASIC to any purchasers not associated with Aurora and Keybridge with the proceeds of sale being to the account of Aurora and Keybridge (**Orders 2 and 3**).
5. Details of the decision are set out in the Review Panel's reasons.⁴

Federal Court proceedings

6. On 8 September 2017, Aurora applied to the Federal Court for a judicial review of the Review Panel's decision.
7. On 21 November 2017, the Federal Court suspended the operation of Orders 2 and 3 until the final determination of its proceedings.
8. On 17 April 2020, the suspension was lifted upon the dismissal of the judicial review proceedings.⁵

Court Proceedings against former directors

9. Between July 2017 and March 2018, Molopo undertook a series of transactions with foreign entities that transferred most of Molopo's cash (approximately \$55 million) offshore (referred to as the **Orient / Drawbridge transactions**).⁶

² Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

³ combined with the material financial interests each had in Keybridge and Aurora, and the influence that each exerted over Aurora and to an extent over Keybridge

⁴ *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12

⁵ *Aurora Funds Management Limited v Australian Government Takeovers Panel (Judicial Review)* [2020] FCA 496

⁶ These transactions are described in *Molopo Energy Limited 10 & 11* [2018] ATP 12 and *Molopo Energy Limited 12R* [2018] ATP 19

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10. In September 2017, Keybridge commenced legal action against Molopo and one of its former directors for statutory oppression and breaches of the ASX Listing Rules in connection with these transactions.
11. On 30 May 2018, Keybridge commenced further proceedings in the Supreme Court of Victoria against Molopo and its then directors including for statutory oppression, false and misleading conduct and breaches of the ASX Listing Rules in connection with the transactions.
12. On 18 July 2018, following the replacement of all of Molopo's directors, Molopo effectively replaced Keybridge as a plaintiff to the proceedings. Subsequently, further proceedings were brought against other former directors of Molopo.

DISCUSSION

13. On 14 July 2020, Aurora sought a variation of the Orders to, in the alternative:
 - (a) allow Aurora to obtain its Vested Shares back under the 'creep' provisions⁷ (**Variation 1**), submitting that more than 3 years had passed since the date of the Orders, so putting aside the first 6 month period where Aurora was prohibited by the Orders from obtaining any further shares under creep, Aurora theoretically could have acquired all of the Vested Shares back under the creep provisions
 - (b) allow the Vested Shares to remain vested with ASIC, with the creep clock being turned back on until the outcome of the Court Proceedings is known (**Variation 2**) or
 - (c) stay the sale of the Vested Shares until such time as the outcome of the Court Proceedings is known (**Variation 3**).
14. Aurora submitted that, among other things, circumstances had changed materially since the date of the Orders "*as a direct consequence of the unlawful actions taken by the former Molopo directors*". In particular, it submitted that a variation was warranted because:
 - (a) of the lack of liquidity in Molopo's shares which have been suspended from trading on the ASX since 27 July 2017 and were "*on track to be de-listed and then liquidated*"⁸ and
 - (b) the uncertain value of Molopo and its shares which was inextricably linked to its assets, which were in a state of flux pending the outcome of the litigation against the former directors.
15. Aurora submitted that the actions taken by the former Molopo directors had materially and adversely impacted the value of Molopo since the date of the Orders. It submitted that, at the time the Orders were made in 2017, Molopo had a net asset

⁷ Section 611, item 9

⁸ Molopo advised that no formal decision has been made in relation to any proposed actions to be taken by Molopo once the Court Proceedings are concluded

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backing of 22.4 cents per share.⁹ Noting that the current Molopo board had ascribed nil value to the Orient / Drawbridge Transactions, Aurora submitted that at the time of its application, it carried its investment in Molopo at 0.5 cents per share (adopting the same valuation basis as that used in 2017).

16. Given that the current Molopo board is pursuing legal action against the former Molopo directors in an effort to recover some of the lost value (which is most likely to be funded by Molopo's insurance policy, should it be successful), Aurora submitted that the sale of the Vested Shares today would have the effect of being "*both punitive and prejudicial*" to the interests of its funds' unitholders.
17. Section 657D(3) provides that:

The Panel may vary, revoke or suspend an order made under this section. Before doing so, it must give an opportunity to make submissions in relation to the matter to:

 - (a) *each person to whom the order is directed; and*
 - (b) *each party to the proceedings in which the order was made; and*
 - (c) *ASIC.*
18. We gave parties, persons to whom the relevant Orders are directed and ASIC an opportunity to make submissions, as required by section 657D(3). We have considered all the submissions, but address specifically only those submissions we consider necessary to explain our reasoning.
19. ASIC submitted that the change in circumstances did not undermine the basis for the original Orders. Nevertheless, it submitted that it was open to us to consider a variation to prevent unfair prejudice due to those circumstances, acknowledging that there was currently significant uncertainty as to the value of Molopo's shares, and considerable loss to Aurora if it were to progress now. ASIC submitted that "*these circumstances likely impact the assessment of whether the prejudice to Aurora as a result of the orders outweighs the benefit of those orders to the persons it seeks to protect (i.e. Molopo's shareholders as a whole)*".
20. Each of Aurora, Keybridge and Mr Nicholas Bolton¹⁰ made submissions that they disagree with the decisions of the Review Panel and the Federal Court on judicial review. Keybridge submitted that the Review Panel's decision and Orders were made while the former directors of Molopo were planning and implementing the actions that led to the loss of value at Molopo. It further submitted that in its view Molopo's original application to the Panel, by seeking to remove Keybridge's and Aurora's influence, assisted the former directors to take the actions that they did.
21. It is not possible for us to properly assess Keybridge's submissions. Even if Molopo's original application was improperly motivated or assisted the former directors in the actions that they took (on which we make no comment), in our view, these

⁹ Based on Molopo's audited financial statements for the year ended 30 June 2017

¹⁰ Mr Bolton was a party to *Molopo Energy Limited 03R, 04R & 05R* and acknowledged that the Orders did not affect him other than through his interests at Keybridge

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circumstances do not undermine the basis for the Orders. Even though, as Keybridge submitted, Keybridge and Aurora have not had the benefit of voting the Vested Shares for three years (so the Orders had protected the rights and interests of parties affected by the unacceptable circumstances during that period), it remains the case that Orders 2 and 3 are unfulfilled.

22. In considering the prejudice to Aurora of the change in circumstances, we considered it appropriate to consider the contribution of any actions of Aurora to the change in circumstances.
23. Clearly, Aurora took a risk that there could be a change in the value of Molopo when it sought the suspension of Orders 2 and 3 in the Federal Court. At the same time, we acknowledge that Aurora had the right to seek a judicial review, the Federal Court delays were outside its control and its actions had not caused the change in circumstances.
24. We queried whether Aurora had any avenues for seeking compensation for the expected loss of value upon the sale of the Vested Shares. Aurora submitted that it could take action directly against Molopo but was concerned that this would distract Molopo from its own recovery efforts. Aurora noted that it had taken action to mitigate the loss by making an application to the Panel (*Molopo Energy Limited 10 & 11*) that led to a declaration that was used to obtain a return of some funds to Molopo and also prevented further funds being transferred offshore.
25. There is no doubt that there has been a considerable loss in the value of Molopo shares. However, pending a divestment of shares, there is always a possibility that the value of the shares could change between the date of the order and the sale. In our view, this was a risk that Aurora must have accepted when it pursued the judicial review and alone is not sufficient to justify a variation.
26. Nonetheless, the circumstances that have led to the loss are exceptional, there is no active market for Molopo shares and the Molopo shares are currently very difficult to value in light of the lack of liquidity and the pending litigation. We acknowledge that Aurora and Keybridge have both taken actions to uncover, and mitigate the loss from, the actions taken by Molopo's former directors.
27. Keybridge submitted that it was appropriate that the Vested Shares be reverted back to it in order to minimise the significant prejudice that would be suffered on the sale of the Vested Shares. ASIC submitted that the return of the Vested Shares to Aurora and Keybridge was contrary to the intent of order 5 of the Orders that prohibits the acquisition of the Vested Shares by Aurora, Keybridge and their associates.
28. In our view, the prejudice caused by the sale of the Vested Shares at this time does not outweigh the object of the Orders such that a variation that allows Aurora (and Keybridge) to take back the Vested Shares (Variation 1 or Variation 2) is warranted.
29. However, we consider a stay (Variation 3) would prevent any unfair prejudice arising from the current circumstances. To the extent Molopo's recovery efforts are successful, Aurora and Keybridge will not be denied the potential benefits flowing from those efforts. A stay on the sale also allays Aurora's and Keybridge's concerns

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regarding the motivations of any acquirers of the Vested Shares, in particular, on the recovery efforts of the current Molopo board.

30. No person objected to a stay of the sale of the Vested Shares, except to note the continuing effect of Orders 2 and 3 on voting. The Orders prevent the exercise of voting rights attaching to the Vested Shares by Aurora, Keybridge and any of their respective associates. In addition, ASIC does not (as a matter of practice) exercise any rights attaching to shares vested in it by an order of the Panel. Accordingly, the voting power of other Molopo shareholders is proportionally increased while the Vested Shares remain vested.
31. Both Aurora and Keybridge made submissions expressing concern that a small shift in the voting balance in Molopo, in light of the enhanced voting power arising from the Orders, could lead to a change in the composition of the Molopo board and a potential change to the outcome of the Court Proceedings. Keybridge submitted that during any stay the Vested Shares should be voted in support of two of Molopo's current directors so that they constitute at least 50% of Molopo's directors.
32. While we are conscious of the continuing impact of the Orders on voting, we are not prepared to vary the orders to deal with any voting concerns in the abstract. Instead, we varied the orders to include the right of any party and ASIC to apply for further orders in relation to the Orders. Any concerns regarding voting at any future shareholder meeting involving a Chapter 6 transaction or changes to the composition of the Molopo board can be brought back to the Panel.

DECISION

33. For the reasons above, we made the variation orders set out in Annexure A.

Michelle Jablko

President of the sitting Panel

Decision dated 18 September 2020

Reasons given to parties 8 December 2020

Reasons published 11 December 2020

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Advisers

Party	Advisers
Aurora	-
Molopo	Stephen R Williams



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Annexure A

**CORPORATIONS ACT
SECTION 657D
VARIATION OF ORDERS**

MOLOPO ENERGY LIMITED 03R, 04R & 05R VARIATION

The Panel in *Molopo Energy Limited 03R, 04R & 05R* made a declaration of unacceptable circumstances on 30 June 2017 and final orders on 7 July 2017.

Pursuant to section 657D(3) of the *Corporations Act 2001* (Cth)

THE PANEL ORDERS

The final orders made on 7 July 2017 are varied by:

1. Staying Orders 2 and 3 until the Court Proceedings are resolved (whether by settlement, judgement or otherwise) and any appeal rights have lapsed.
2. Including the following in Order 12:

Court Proceedings The Supreme Court of Victoria proceedings brought by the Company against its former directors (Case numbers S ECI 2018 00120, S ECI 2019 01336 and S ECI 2020 01566)

Variation Panel The Panel as constituted for the purposes of considering the order variation request made by Aurora dated 14 July 2020 or, if one or more of that Panel's members are unavailable, a Panel constituted under section 184 of the *Australian Securities and Investments Commission Act 2001* (Cth)

3. Including new Orders 13 and 14 as follows:

"Other

13. The Company shall notify the parties, ASIC and the Panel executive, as soon as practicable and within no later than 3 business days, when the Court Proceedings have resolved.

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14. Any party (including the Company on the action of any two directors) and ASIC each have the liberty to apply to the Variation Panel for further orders in relation to these orders (as varied)."

**Tania Mattei
Counsel
with authority of Michelle Jablko
President of the sitting Panel
Dated 18 September 2020**