



**Australian Government**

**Takeovers Panel**

# MEDIA RELEASE

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No: TP18/42

Friday, 8 June 2018

## **Molopo Energy Limited 10 & 11 - Declaration of Unacceptable Circumstances**

The Panel has made a declaration of unacceptable circumstances (Annexure A) in relation to an application dated 11 May 2018 by Aurora Funds Management Ltd in its capacity as responsible entity of the Aurora Fortitude Absolute Return Fund (**Aurora**) in relation to the affairs of Molopo Energy Limited (**Molopo**) (see [TP18/34](#)).

There is no suggestion that the current directors of Molopo (who were elected at Molopo's AGM on 31 May 2018) are responsible for these circumstances.

### **Background**

Molopo is currently the subject of an off-market takeover bid by Aurora. On 8 May 2018, Molopo released an announcement advising of several transactions and events during the preceding four months that had not been previously disclosed to the market.

The Panel considered that unacceptable circumstances arose from these and other matters, including:

- Molopo shareholders have not been given enough information to enable them to assess the merits of Aurora's bid and have not had a reasonable and equal opportunity to participate in any benefits accruing under Aurora's bid.
- Former directors of Molopo (who were not re-elected at Molopo's AGM on 31 May 2018) by their action, including such action which may contribute to Aurora's bid not proceeding, have not given Molopo shareholders a reasonable and equal opportunity to participate in any benefits accruing under Aurora's bid.

### **Declaration**

The Panel considered that the circumstances were unacceptable:

- having regard to the effect on the control, or potential control, of Molopo or the acquisition, or proposed acquisition, by a person of a substantial interest in Molopo

- in the alternative, having regard to the purposes of Chapter 6 set out in s602
- in the further alternative, because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6.

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

The sitting Panel was Christian Johnston (sitting President), Rebecca Maslen-Stannage and John O'Sullivan.

The Panel is considering what, if any, final orders to make and will publish details in due course. The Panel will also publish its reasons for the decision in due course on its website [www.takeovers.gov.au](http://www.takeovers.gov.au).

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## ANNEXURE A

# CORPORATIONS ACT SECTION 657A

## DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

### MOLOPO ENERGY LIMITED 10 & 11<sup>1</sup>

#### CIRCUMSTANCES

1. Molopo Energy Limited (**Molopo**) is an ASX listed entity. Its shares have been suspended since 27 July 2017 as a result of failing to satisfy ASX's requirement for a sufficient level of operations.
2. On 27 July 2017, Aurora Funds Management Limited as responsible entity of the Aurora Fortitude Absolute Return Fund (**Aurora**) announced an off-market takeover bid for Molopo offering consideration valued at \$0.18 per share payable in cash (capped at \$5 million in total) or unquoted units in the Aurora Fortitude Absolute Return Fund.
3. On 22 August 2017, Molopo announced that it had acquired 50% of the shares in Orient FRC Ltd (**Orient**) for US\$7 million from Dr Gil Feiler pursuant to a share sale agreement executed on 25 July 2017. The announcement stated that Orient would participate in an exploration and development project, pursuant to an exploration and development agreement (**EDA**) with Kerogen Florida Energy Company LP (**Kerogen**), for up to a 50% working interest to explore for oil and gas in a mature oil province in South Florida, U.S.A. (the **Orient Project**). None of the current directors of Molopo, being those elected on 31 May 2018 (the **Current Directors**), or Messrs Baljit Johal, Matthew Cudmore and Richard Matthews (the **Former Directors**) were on the board of directors of Molopo at the time the Orient transaction was executed or announced.
4. On 12 September 2017, Aurora withdrew its previously announced proposed bid on the basis that Molopo's acquisition of shares in Orient triggered a proposed defeating condition of the bid and announced a revised bid offering reduced consideration valued at \$0.135 per share to reflect the estimated value

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<sup>1</sup> The Panel is still considering the application in *Molopo Energy Limited 11* seeking a variation of the final orders made in *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12 to allow Aurora to be able to vote Aurora's shares in Molopo that are currently vested in the Commonwealth of Australia. The decision in *Molopo Energy Limited 03R, 04R & 05R* is currently subject to a Federal Court application dated 8 September 2017 for judicial review made under section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and section 39B of the *Judiciary Act 1903* (Cth) by Aurora Funds Management Limited as responsible entity for Aurora Global Income Trust and Aurora Fortitude Absolute Return Fund

dilutive impact of the Orient transaction and the operating losses incurred during the half year ended 30 June 2017.

5. Aurora lodged its bidder's statement on 26 October 2017. One of the defeating conditions of Aurora's bid is that Molopo does not incur or commit to any capital expenditure or liability for one or more related items of greater than \$2 million (unless previously announced or consented to by Aurora). Aurora's bid is currently scheduled to close on 20 June 2018 (unless withdrawn or further extended).
6. On 8 November 2017, WAM Capital Limited (**WAM**) announced a proposed competing off-market takeover bid for Molopo at \$0.135 per share cash and subject to similar conditions as the Aurora bid.
7. On 24 November 2017, Aurora made an application to the Panel submitting that a payment proposed by Molopo would trigger the 'no material capital commitment or liability' defeating condition and, if made, would frustrate Aurora's takeover bid. The Panel considered that Aurora was sufficiently put on notice by Molopo's 22 August 2017 announcement that some such payment was likely.<sup>2</sup> Factors relevant to the Panel's decision included submissions by Molopo to the effect that *"Molopo would make announcements as are required to update the market at the appropriate time"* and *"it is in the nature of an oil exploration venture that drilling and other costs, and the timing of such costs, vary and such variations are not always sufficiently material to warrant additional disclosure"*.<sup>3</sup>
8. On 28 November 2017, Molopo released its target's statement in which Molopo's directors unanimously recommended that shareholders reject Aurora's bid. Molopo's directors at the time did not include any Current Directors or Former Directors, except Messrs Johal and Cudmore.
9. On 11 December 2017, Molopo announced that it had advanced Orient US\$4.5 million by way of shareholder loan. Molopo's directors at the time did not include any Current Directors but included all the Former Directors.
10. The 11 December 2017 announcement stated that the payment part satisfied the expected requirement that Orient hold funds of at least US\$20 million, being the estimated contract value for the drilling program, to demonstrate to the proposed operating partner that Orient had the financial capacity to comply with its obligations and progress the Orient Project. The announcement referred to the requirement under the terms of the EDA for Orient to spud the first commitment well by no later than 1 May 2018.
11. To date, no funds have been spent on spudding the first commitment well. The US\$4.5 million was applied<sup>4</sup> as follows:
  - (a) on 7 December 2017 and 13 December 2017, US\$190,000 and US\$310,000 respectively was paid to representatives of ESGM Investments Limited

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<sup>2</sup> See *Molopo Energy Limited 09* [2017] ATP 22

<sup>3</sup> At [23]

<sup>4</sup> As submitted by Molopo

(said to be Dr Feiler's special purpose vehicle) (ESGM) for the reimbursement of lease renewal and land management payments made by or on behalf of ESGM (that, as at those dates, Molopo had yet to contribute to)

- (b) on 28 December 2017, US\$2 million was deposited with Drawbridge Energy Operations & Management LLC, who were providing operating services at that time, with such funds utilised for the renewal of existing leases and the acquisition of new leases
  - (c) on 9 February 2018, US\$1.955 million was utilised as part of the redemption payment of US\$7 million for the acquisition of the shares in Orient held by ESGM (see paragraph 20) and
  - (d) US\$45,000 was utilised for miscellaneous and ancillary expenses (including land management payments).
12. On 4 January 2018, WAM withdrew its proposed bid on the basis that the additional expenditure commitments announced by Molopo on 11 December 2017 triggered the 'no material transactions' condition of its proposed bid.
  13. On 12 January 2018, Aurora announced an intention to increase its bid consideration to \$0.153 per share if Aurora's relevant interest exceeded 30% (by number), all of the defeating conditions were fulfilled or waived,<sup>5</sup> Molopo did not spend any further funds on the Orient Project and Molopo did not breach the 'no material capital commitment or liability' condition.
  14. On 19 January 2018, Molopo issued its first supplementary target's statement noting that a condition to Aurora's conditional increase could not be satisfied because Molopo would be required to fund further amounts in relation to the Orient Project as previously announced, including in its 11 December 2017 announcement. Molopo's directors at the time did not include any Current Directors but included all the Former Directors.
  15. On 1 February 2018, Molopo released its activities and cashflow statement for the quarter ending 31 December 2017 showing cash and cash equivalents at the end of the quarter of \$48.021 million and estimating total cash outflows for the next quarter of \$1.9 million.
  16. On 21 February 2018, Molopo responded to an ASX query letter in which it indicated that the US\$4.5 million loaned to Orient would be used when required to comply with its obligations under the EDA and confirmed that Molopo was in compliance with its continuous disclosure requirements in ASX Listing Rule 3.1.
  17. On 19 March 2018, Molopo issued its second supplementary target's statement in which Molopo's directors reiterated reasons previously relied upon for

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<sup>5</sup> Aurora indicated at that time that its intention would be to waive the 50% minimum acceptance condition if Aurora were to have a relevant interest in more than 30% (by number)

rejecting Aurora's bid. Molopo's directors at the time did not include any Current Directors but included all the Former Directors.

18. On 23 April 2018, Molopo responded to a further ASX query letter with questions relating to the Orient Project. It disclosed that Drawbridge Energy Operations & Management LLC had been appointed as "operator" under the EDA and that Dr Feiler had not to date executed any shareholder loan agreement with Orient.
19. On 30 April 2018, Molopo announced a clarification to its 22 August 2017 announcement confirming that the resources reported in the report from Morning Star Consultants, LLC (**Morning Star**) dated 1 June 2017 referred to in that announcement "*were reported for the benefit of [Kerogen] which classified the resources applicable to the Orient Project as 'prospective resources'*" and that Morning Star subsequently prepared a revised report for Molopo "*on the basis that Molopo had completed the acquisition of its interest in the Orient Project (ie. to report on these resources as of 25 July 2017 when Molopo acquired an interest in Orient)*". The announcement stated that Morning Star issued a report to the directors of Molopo dated 18 September 2017 which upgraded the classification of the resource volumes applicable to the Orient Project from "*prospective resources*" to "*contingent resources*" as of 25 July 2017.
20. On 8 May 2018, Molopo made an ASX announcement disclosing the following actions (Molopo's board at the time consisted of the Former Directors):
  - (a) on 31 January 2018, Orient had redeemed all of the shares in Orient held by ESGM for a redemption amount of US\$7 million
  - (b) during the first quarter of 2018, Molopo (or its subsidiaries) provided total funding to Orient of US\$23.5 million, in addition to the US\$4.5 million provided in December 2017. Of this total amount, US\$7 million was used to fund the redemption of the shares in Orient held by ESGM and US\$21 million was used to fund an intercompany loan from Orient to its wholly owned subsidiary, Orient FRC (US) LLC (**Orient US**)
  - (c) on 21 February 2018, Orient entered into a contribution agreement with a BVI entity, Drawbridge Energy Holdings Ltd (**Drawbridge Holdings**), pursuant to which it agreed to (i) assign Orient's interest in the Orient Project to Orient US at completion and (ii) transfer its 100% interest in Orient US to Drawbridge Holdings, in consideration for receipt of a 30% non-voting interest in Drawbridge Holdings (the **Combination Transaction**)
  - (d) completion of the Combination Transaction occurred on or about 7 March 2018
  - (e) following completion of the Combination Transaction, the loan from Orient to Orient US was extinguished
  - (f) following completion of the Combination Transaction, Molopo stated that it had gained (via Orient's 30% interest in Drawbridge Holdings) a

diversified oil and gas exploration portfolio with indirect interests in several oil and gas projects in Texas, U.S.A. and

- (g) on 25 April 2018, Kerogen provided an extension to 1 April 2019 in respect of the drilling deadline for the first commitment well set out in the EDA, subject to a number of conditions including that the application for a drilling permit must be filed on or before 1 August 2018.
21. Following completion of the Combination Transaction, Molopo had approximately \$16.904 million of cash available to it as at 31 March 2018.
  22. The Former Directors of Molopo did not obtain any independent valuations regarding any of the actions announced on 8 May 2018<sup>6</sup> and, in relation to the Combination Transaction, did not seek third party valuation assistance for due diligence, instead relying on their own analysis.
  23. On 11 May 2018, ASX notified Molopo that ASX considered the Orient transaction announced on 22 August 2017 (as modified by the announcement on 8 May 2018) to be a significant change to the nature or scale of Molopo's activities and ASX has exercised its discretion under Listing Rule 11.1.2 to require that transaction to be approved by Molopo shareholders and under Listing Rule 11.1.3 to require Molopo to satisfy the requirements in Chapters 1 and 2 of the Listing Rules as if it were applying for admission to the official list. Further, ASX advised that it considered that Molopo had committed serious breaches of the ASX Listing Rules and may also have breached ss1041H and 1309<sup>7</sup> for making misleading disclosures to ASX.
  24. On 18 May 2018, following Aurora's application to the Panel, Molopo advised its shareholders that it intended to seek shareholder approval and satisfy the ASX readmission requirements, as described above.
  25. On 28 May 2018, Molopo released its third supplementary target's statement outlining its recent announcements and events and stated that its directors continue to unanimously recommend that shareholders reject Aurora's bid. Molopo's board at the time consisted of the Former Directors.
  26. In light of Molopo's announcement on 8 May 2018, Molopo has failed to provide supplementary target's statement disclosure in compliance with s644 following each of the new circumstances described in paragraph 20.
  27. As a result, the target's statement dated 28 November 2017, first supplementary target's statement dated 19 January 2018 and second supplementary target's statement dated 19 March 2018 contain, or until the third supplementary target's statement was released contained, omissions and misleading and deceptive information.

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<sup>6</sup> In respect of Orient, Molopo submitted that the Former Directors had the benefit of existing reports referring to reports dated 11 June 2015, 1 June 2017 and 18 September 2017 (see paragraph 19 regarding the two later reports)

<sup>7</sup> Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

28. The third supplementary target's statement also contains insufficient or misleading information regarding (among other things):
  - (a) each new circumstance and the effect of each circumstance on Molopo shareholders' continuing shareholdings in Molopo
  - (b) Drawbridge Holdings and its assets
  - (c) the controlling shareholder(s) of Drawbridge Holdings
  - (d) the Molopo directors' recommendations with respect to Aurora's bid, noting that certain factual circumstances previously relied upon have changed materially and/or no longer apply and
  - (e) the effect or consequences if the shareholder approval described above is not obtained.
29. The actions announced by Molopo on 8 May 2018 triggered several conditions of Aurora's bid. By virtue of Molopo taking those actions, Aurora's bid may be withdrawn or lapse.
30. By failing to disclose promptly and properly the actions announced on 8 May 2018, in addition to not seeking shareholder approval or making the actions conditional on shareholder approval, Molopo has not offered shareholders a choice between those actions and Aurora's bid (or any potential competing bids).

#### **EFFECT**

31. It appears to the Panel that the acquisition of control, or potential control, of Molopo has not taken place in an efficient, competitive and informed market and Molopo shareholders have not been given enough information to enable them to assess the merits of Aurora's bid.
32. Molopo shareholders have not had a reasonable and equal opportunity to participate in any benefits accruing under Aurora's bid.
33. The Former Directors of Molopo by their action, including such action which may cause or contribute to Aurora's bid not proceeding, have not given all shareholders of Molopo reasonable and equal opportunity to participate in any benefits accruing under Aurora's bid.

#### **CONCLUSION**

34. 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 or are having on:
    - (i) the control, or potential control, of Molopo or
    - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Molopo
  - (b) in the alternative, having regard to the purposes of Chapter 6 set out in s602

- (c) in the further alternative, because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6.
35. In having regard to the purpose set out in paragraph 602(c), the Panel has taken into account the action of the Former Directors of Molopo, including any such action which may cause or contribute to Aurora's bid not proceeding.
36. 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 Molopo.

**Bruce Dyer**  
**Counsel**  
**with authority of Christian Johnston**  
**President of the sitting Panel**  
**Dated 8 June 2018**