



**Australian Government**

**Takeovers Panel**

**Reasons for Decision**

**Molopo Energy Limited 03R, 04R & 05R Variation  
[2022] ATP 20**

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

1. The Panel, Michelle Jablko (sitting President), Christian Johnston and Tara Page, varied the final orders made on 7 July 2017 (as varied on 18 September 2020) by the sitting Panel in *Molopo Energy Limited 03R, 04R & 05R*.<sup>1</sup> The variation stays the sale of the Molopo shares vested in ASIC under the orders until certain court proceedings are resolved.

2. In these reasons, the following definitions apply.

<b>Aurora</b>	Aurora Funds Management Ltd as responsible entity for the Aurora Fortitude Absolute Return Fund and Aurora Global Income Trust
<b>Canadian Court Proceedings</b>	has the meaning given in paragraph 8
<b>Court Proceedings</b>	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)
<b>Initial Panel</b>	the sitting Panel in <i>Molopo Energy Limited 01 &amp; 02 [2017] ATP 10</i>
<b>Keybridge</b>	Keybridge Capital Limited (ASX: KBC)
<b>Molopo</b>	Molopo Energy Limited (ASX: MPO)
<b>Orders</b>	the final orders dated 7 July 2017 made by the Review Panel
<b>Orders 2 and 3</b>	has the meaning given in paragraph 4

<sup>1</sup> [2017] ATP 12 and [2018] ATP 18

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<b>Review Panel</b>	the sitting Panel in <i>Molopo Energy Limited 03R, 04R &amp; 05R</i> [2017] ATP 12
<b>Variation 1, 2 or 3</b>	the potential variations described in paragraph 10
<b>Vested Shares</b>	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.<sup>2</sup> Further, or in the alternative, the Review Panel agreed with the Initial Panel that the actions of Mr Nicholas Bolton and Mr John Patton<sup>3</sup> 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.<sup>4</sup>

### *Molopo Energy Limited 03R, 04R & 05R - 2020 Variation*

6. On 18 September 2020, following application by Aurora, the Panel varied the Review Panel's orders to stay the sale of the Vested Shares until the Court Proceedings were resolved and any appeal rights had lapsed.
7. Details of the decision are set out in the Panel's reasons.<sup>5</sup>

### *Canadian Court Proceedings*

8. In 2011, legal proceedings were commenced in the Court of the Queen's Bench of Alberta in Canada against a wholly owned subsidiary of Molopo, Molopo Energy Canada Limited (**Canadian Court Proceedings**).
9. The Canadian Court Proceedings relate to alleged breaches of various agreements relating to the joint venture activities of the Molopo group in Canada.

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

<sup>3</sup> 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

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

<sup>5</sup> *Molopo Energy Limited Variation 03R, 04R & 05R* [2020] ATP 18

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## DISCUSSION

10. On 25 May 2022, Aurora sought a variation of the Orders to, in the alternative:
- (a) allow Aurora to obtain its Vested Shares back under the 'creep' provisions<sup>6</sup> (**Variation 1**), submitting that more than 5 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 27% of additional Molopo shares under the 'creep' provisions (which is in excess of the Vested Shares)
  - (b) allow the Vested Shares to remain vested with ASIC, with the 'creep clock' being turned back on until the outcome of the Canadian Court Proceedings is known (**Variation 2**) or
  - (c) stay the sale of the Vested Shares until such time as the outcome of the Canadian Court Proceedings is known (**Variation 3**).
11. Aurora submitted that, among other things, circumstances had changed since the date of the Orders. In particular, it submitted that a variation was warranted because:
- (a) of the lack of liquidity in Molopo's shares which have been removed from the ASX official list on 1 April 2021 and as *"such, there is no ready market to determine the market value of Molopo's shares"*
  - (b) the uncertain value of Molopo with the current cash backing of circa 9.45 cents per share, pending the outcome of the Canadian Court Proceedings against Molopo that is on foot
  - (c) *"Aurora currently have two (2) directors on the Molopo Board, being Mr Hartnell AM and Mr Patton, who have both worked constructively with the other two (2) Molopo Board members to restore shareholder value"*
  - (d) 
12. 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."*

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<sup>6</sup> Section 611, item 9

<sup>7</sup> 

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13. 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.
14. In our view, a variation that would allow Aurora (and Keybridge) to take back the Vested Shares (Variation 1 or Variation 2) is not warranted given the object of the Orders.<sup>8</sup>
15. However, we consider a stay (Variation 3) would prevent any unfair prejudice arising from the current circumstances. To the extent Molopo's efforts are successful, we consider that Aurora and Keybridge should not be denied the potential benefits flowing from those efforts.
16. No person objected to a stay of the sale of the Vested Shares. 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.
17. 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.
18. Noting Aurora's submission that "*at previous Annual General Meetings, the current Molopo Chairman has advised that he plans to liquidate [Molopo] and return all cash to shareholders, once the Court proceedings are concluded. Based on the Chairman's commentary, this now appears to extend to the Canadian litigation*". Accordingly, we proposed to further vary the Orders to provide a pathway for the Parties to undertake a winding up of Molopo that did not breach the Orders.
19. ASIC submitted that it had various concerns relating to the variation orders "*raising uncertainties or anomalies depending on the timing or sequence of events*" relating primarily to the mechanics of how the Vested Shares would be returned to Aurora and Keybridge if Orders 1, 2 and 3 were revoked in the event that Molopo provides notice to its shareholders to convene a meeting to pass a resolution to be voluntarily wound up.
20. We amended the proposed Orders to address ASIC's concerns.

## DECISION

21. For the reasons above, we made the variation orders set out in Annexure A, so that (in summary):
  - (a) Orders 1, 2 and 3 are revoked, if:
    - (i) Molopo provides notice to the shareholders to convene a meeting to pass a resolution to voluntarily wind up Molopo pursuant to section 491 of the

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<sup>8</sup> The Panel held a similar view at *Molopo Energy Limited Variation 03R, 04R & 05R* [2020] ATP 18 at [28]

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Corporations Act or to undertake any other transaction that will result in the winding up of Molopo and

- (ii) both Aurora and Keybridge request in writing that ASIC transfer the Vested Shares to them and
- (b) if any resolution contemplated by Order 16 is not passed or is withdrawn, Orders 1, 2 and 3 are reinstated with effect from the date that is 2 months after the shareholder meeting, and for the avoidance of doubt Order 4 applies, with effect from the same date.

**Michelle Jablko**

**President of the sitting Panel**

**Decision dated 14 July 2022**

**Reasons given to parties 25 July 2022**

**Reasons published 1 August 2022**

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**Advisers**

<b>Party</b>	<b>Advisers</b>
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.

The Panel's orders were varied on 18 September 2020.

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

**THE PANEL ORDERS**

The final orders made on 7 July 2017 (as varied on 18 September 2020) are varied by:

1. Staying Orders 2 and 3 until the earlier of the date:
  - (a) that is 6 months after the Court Proceedings and the Canadian Court Proceedings are resolved (whether by settlement, judgement or otherwise) and any appeal rights have lapsed and
  - (b) when Order 16 takes effect.
2. Including the following in Order 12:

Canadian Court Proceedings      The proceedings in the Court of Queen's Bench of Alberta in respect to the joint venture activities of Molopo Energy Canada Limited.
3. Including new Orders 15, 16, 17 and 18 as follows:
  15. 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 Canadian Court Proceedings have resolved.
  16. Orders 1, 2 and 3 are revoked, if
    - (a) the Company provides notice to the shareholders to convene a meeting to pass a resolution to voluntarily wind up the Company pursuant to section 491 of the *Corporations Act 2001* (Cth) or to undertake any other transaction that will result in the winding up of the Company and
    - (b) both Aurora and Keybridge request in writing that ASIC transfer the Sale Shares to them

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17. The Company and ASIC must do all things necessary to give effect to Order 16, including:
  - (a) doing whatever is necessary to ensure that Keybridge and Aurora are registered with title to the Sale Shares in the form approved by ASIC and
  - (b) until Keybridge and Aurora are registered, complying with any request by Keybridge and Aurora in relation to the Sale Shares.

For the avoidance of doubt, Order 5 does not apply to any transaction necessary to give effect to Order 16.

18. If any resolution contemplated by Order 16 is not passed or is withdrawn, Orders 1, 2 and 3 are reinstated with effect from the date that is 2 months after the shareholder meeting, and for the avoidance of doubt Order 4 applies, with effect from the same date.

**Allan Bulman**  
**Chief Executive**  
**with authority of Michelle Jablko**  
**President of the sitting Panel**  
**Dated 14 July 2022**