



Australian Government

Takeovers Panel

**Reasons for Decision
Molopo Energy Limited 01 & 02
[2017] ATP 10**

Catchwords:

Association – otherwise unacceptable – efficient, competitive and informed market – structural links - shareholder requisition – nominee directors - common directors – extension of time for making application - extension of time for making declaration – conference - undertakings - declaration – orders – divestment of shares – voting restrictions

Corporations Act 2001 (Cth), sections 9, 11, 12(2)(b), 12(2)(c), 53, 249D, 602, 606, 657A, 657B, 657C, 657D

Australian Securities and Investments Commission Act 2001 (Cth) section 194

Australian Securities and Investments Commission Regulations 2001 (Cth) Regulations 16, 35, 38

Australian Securities and Investments Commission Regulatory Guide 5: Relevant interests and substantial holding notices

Ford, Austin & Ramsay’s Principles of Corporations Law [23.250]

Takeovers Panel v Keybridge Capital Limited, in the matter of Molopo Energy Limited [2017] FCA 469, Palmer Leisure Coolum Pty Ltd v Takeovers Panel [2015] FCA 1498, Queensland North Australia Pty Ltd v Takeovers Panel [2015] FCAFC 68, Molopo Energy Limited v Keybridge Capital Limited [2014] NSWSC 1864, Attorney-General (Cth) v Alinta Limited [2008] HCA 2, Re Takeovers Panel [2002] FCA 1120, ACCC v CC (NSW) Pty Ltd (No 8) (1999) 92 FCR 375, Adsteam Building Industries Pty Ltd & Anor v The Queensland Cement and Lime Co Ltd & Ors (1984) 14 ACLR 456

Kasbah Resources Ltd [2016] ATP 19, Merlin Diamonds Limited [2016] ATP 18, Ainsworth Game Technology Limited 01 & 02 [2016] ATP 9, World Oil Resources Limited [2013] ATP 1, Minemakers Limited [2012] ATP 8, Real Estate Capital Partners USA Property Trust [2012] ATP 6, CMI Limited 01R [2011] ATP 5, CMI Limited [2011] ATP 4, Viento Group Limited [2011] ATP 1, Blue Energy Limited [2009] ATP 15, Mount Gibson Iron Limited [2008] ATP 4, Golden Circle Ltd 02 [2007] ATP 24, Australian Pipeline Trust 01 [2006] ATP 27, Orion Telecommunications Limited [2006] ATP 23, Bridgewater Lake Estate Ltd [2006] ATP 3, Winepros Limited [2002] ATP 18

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

INTRODUCTION

- The Panel, Shirley In’t Veld, Karen Phin and John Sheahan QC (sitting President), made a declaration of unacceptable circumstances in relation to the affairs of Molopo Energy Limited. The two applications (heard together) concerned whether Keybridge Capital Limited and Aurora Funds Management Limited,¹ both substantial shareholders in Molopo Energy Limited, were associated with one another in relation to Molopo with a combined shareholding in Molopo of 37.87%, in contravention of s606.² Molopo’s application extended to whether the relationship between a broader group including Keybridge and Aurora was such that they were associated or it was otherwise unacceptable to have aggregated control. The Panel declared the circumstances unacceptable as it considered that

¹ As responsible entity for Aurora Global Income Trust and Aurora Fortitude Absolute Return Fund

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)

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the involvement of Mr Nicholas Bolton, or Mr Bolton together with Mr John Patton, in Keybridge and Aurora gave rise to unacceptable circumstances in relation to the affairs of Molopo.

2. In these reasons, the following definitions apply.

AGIT	Aurora Global Income Trust (ARSN 127 692 406)
AFARF	Aurora Fortitude Absolute Return Fund (ARSN 145 894 800)
ASG	Australian Style Group Pty Ltd (ACN 108 841 103)
ASH	Australian Style Holdings Pty Ltd (ACN 108 602 491)
Aurora	Aurora Funds Management Limited (ACN 092 626 885), including as responsible entity of AFARF and AGIT
Aurora Trust	Aurora Investment Unit Trust
Bentley	Bentley Capital Limited (ACN 008 108 218)
Keybridge	Keybridge Capital Limited (ACN 088 267 190)
Molopo	Molopo Energy Limited (ACN 003 152 154)
Mr Bolton	Mr Nicholas Bolton
Relevant Persons	Messrs Farooq Khan, Simon Cato, William Johnson, Nicholas Bolton, John Patton and Jim Hallam and Ms Betty Poon, and their controlled entities, including Bentley, Scarborough, ASG, Keybridge and Aurora
Scarborough	Scarborough Equities Pty Ltd (ACN 061 287 045)
Seventh Orion	Seventh Orion Pty Ltd (ACN 613 173 238)

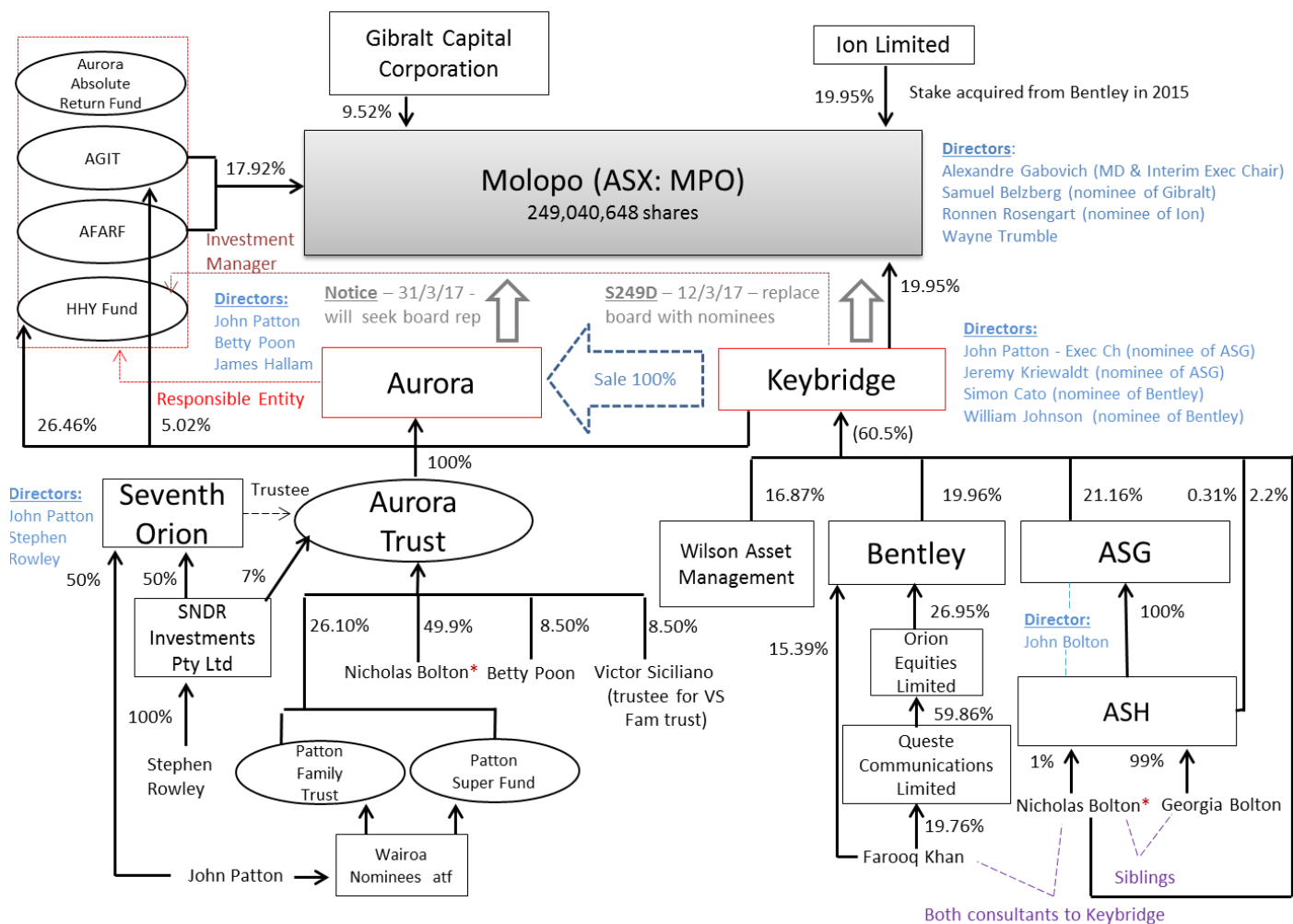
FACTS

3. Molopo is an ASX listed company (ASX Code: MPO) with 249,040,648 shares on issue. Its main asset is cash in the order of \$67 million. Its shares have for some time traded at a substantial discount to its net tangible assets (in the order of 12-16 cents as opposed to NTA of about 27 cents per share).
4. Keybridge is an ASX-listed investment company (ASX Code: KBC). It has a relevant interest in 49,683,828 shares in Molopo (19.95%).
5. Aurora has a relevant interest in 44,629,831 shares in Molopo (17.92%).

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6. Relevant relationships between the parties are shown in the following diagram.



* Disqualified from managing a corporation for 3 years from 17/11/15

7. From about August 2014, Aurora (then owned by Aurora Fund Limited, a company unrelated to the parties to these applications) commenced acquiring shares in Molopo as responsible entity for various funds.
8. In about January 2015, Scarborough (a subsidiary of Bentley) had a relevant interest in 19.98% of Molopo, which it transferred to Bentley³ and which was subsequently sold to Ion Limited.⁴ As part of the sale agreement, Bentley and Mr Khan agreed not to (and to procure their related parties and associates not to) acquire any Molopo shares for 12 months.
9. On 16 February 2015, Keybridge announced the acquisition of Aurora. At the time, Aurora had a relevant interest in less than 5% of Molopo. Keybridge paid \$4.3 million (part deferred, adjustable).⁵

³ Bentley 604 dated 29/1/15

⁴ See Ion 603 dated 26/8/15

⁵ It appears this may have been adjusted to \$3.5m

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10. In about July 2015, the board of Keybridge comprised 3 non-executive directors – Andrew Moffatt (Chair), Craig Coleman and Bill Brown; and 2 executive directors – Mr Bolton and Antony Sormann.⁶ Mr Bolton was managing director of Keybridge.⁷ He resigned in December 2015 following an ASIC order disqualifying him from being a director of, or taking part in managing, a corporation for 3 years.⁸
11. By 1 July 2015, Keybridge had a relevant interest of 19.68% in Molopo.⁹
12. On 30 May 2016, Keybridge announced that it had received a notice from Bentley requisitioning a meeting of Keybridge shareholders.¹⁰ The Bentley requisition sought to remove Andrew Moffatt as a director of Keybridge, and appoint two Bentley nominees – William Johnson and Simon Cato. At the time the board of Keybridge comprised 2 non-executive directors – Andrew Moffatt (Chair) and Bill Brown; and 1 executive director – Antony Sormann.
13. On 27 June 2016, Keybridge announced that it had agreed to sell Aurora to Seventh Orion, as trustee for the Aurora Trust, for up to \$1.8 million. The sale completed on 30 June 2016. Keybridge had been seeking to sell Aurora and had held discussions with a number of parties, at least one of whom had signed a contract but it was not exchanged. One of the parties expressing an interest in acquiring Aurora was ASG.
14. Ultimately, Seventh Orion bought Aurora, holding the shares on trust for the Aurora Trust. Mr Bolton holds 49.9% of the units in the Aurora Trust. John Patton holds 26.1% of the units. Mr Sormann dealt with Mr Patton about the Aurora sale agreement. Mr Bolton brought the Aurora investment opportunity to Mr Patton's attention.
15. On 30 June 2016, Mr Patton was appointed as managing director of Aurora.
16. On 1 July 2016, Keybridge filed a substantial shareholder notice advising that its relevant interest in Molopo had reduced to 18.48% as a result of the sale of Aurora.¹¹ Keybridge stated:

Pursuant to the Sale Agreement [Keybridge] disposed of 100% of its interest in [Aurora] on 30 June 2016. As such, Aurora is no longer an associate of Keybridge for the purposes of the Corporations Act 2001.

⁶ Keybridge annual report 2015, p18

⁷ ASX announcement 16/2/15

⁸ The disqualification commenced on 17 November 2015 and ceases 16 November 2018. On 18 November 2015, Mr Bolton applied to the Administrative Appeals Tribunal (AAT) for a stay against the disqualification and sought confidentiality orders regarding ASIC's decision to disqualify Mr Bolton. The AAT dismissed Mr Bolton's application regarding the stay and confidentiality orders on 17 December 2015. Mr Bolton's appeal against ASIC's disqualification is still before the AAT.

⁹ Keybridge 604 dated 1/7/15

¹⁰ ASX Announcement 30/5/16

¹¹ Keybridge disclosed voting power in Molopo of 18.48% (netting the disposal and recent purchases of 1,704,222 shares)

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17. Since the sale of Aurora to Seventh Orion, Aurora's acquisitions in Molopo have been made as follows:

Date	Number of Securities	%
At 30/06/2016 (already held)	4,670,536	1.88%
20/07/2016 (by settlement of an equity derivative)	418,385	0.17%
11/10/2016 - 31/10/2016	3,687,009	1.48%
2/11/2016 - 1/12/2016 ¹²	15,516,347	6.23%
30/11/2016 - 07/02/2017	3,039,415	1.22%
08/02/2017 - 16/02/2017	2,770,404	1.11%
17/02/2017 - 03/03/2017	4,009,119	1.61%
09/03/2017 - 20/03/2017	10,443,616	4.19%
21/03/2017	75,000	0.03%
Total		17.92%

18. On 29 July 2016, the Keybridge general meeting requisitioned by Bentley was held. Mr Andrew Moffatt (Chair) was removed as a director, and Messrs Johnson and Cato (directors of Bentley) were elected as directors.
19. On 10 August 2016, Mr John Patton was appointed as a non-executive director of Keybridge,¹³ nominated by ASG. Mr John Bolton, the father of Mr Bolton, is the sole director of ASG and ASH. He became the sole director following Mr Bolton's disqualification. Ms Georgia Bolton holds 99% of ASG's holding company. Mr Bolton holds 1% of ASG's holding company.
20. Also on 10 August 2016, Mr Sormann agreed that he would resign from the board of Keybridge when its annual accounts had been completed.
21. By 19 September 2016, Keybridge had increased its relevant interest to 19.15% of Molopo.¹⁴
22. On 13 October 2016:
- (a) Mr Sormann resigned from the board of Keybridge¹⁵
 - (b) Mr John Patton was appointed as Chair of the board of Keybridge and
 - (c) Mr Jeremy Kriewaldt was appointed a director of Keybridge, nominated by ASG.¹⁶
23. The other two directors of Keybridge were nominated by Bentley.
24. On 13 October 2016, Mr Khan entered a consultancy agreement with Keybridge.
25. On 14 October 2016, Mr Bolton entered a consultancy agreement with Keybridge.

¹² On 29 November 2016, Aurora became a substantial holder with 9.75%: See Aurora 603 dated 1/12/16

¹³ On the same day Mr Bill Brown resigned as a director of Keybridge – ASX announcement 10/8/16

¹⁴ Keybridge 604 dated 20/9/16

¹⁵ He remained a director of Molopo

¹⁶ ASX announcement 13/10/16

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26. On 2 December 2016, Mr Sormann resigned as a director of Molopo. On that day he emailed the other directors of Molopo stating:

I have thought long and hard over the last few days and had some wise counsel from a couple of Mentors in relation to the current situation I face having departed Keybridge and noting what they are now doing in combination to take control of Molopo.

27. On 13 March 2017, Molopo announced that it had received a requisition under s249D from Keybridge for a general meeting to remove Molopo's directors and appoint three directors nominated by Keybridge – Anthony Hartnell, William Johnson and David Sanders. This followed Molopo's rejection of Keybridge's request to appoint one director.
28. The resolutions will be considered at the annual general meeting which was originally scheduled for 30 May 2017 but was postponed to 20 June 2017.
29. On 31 March 2017, Aurora nominated Mr Ben Norman to the Molopo board. A resolution to appoint Mr Norman will be considered at this meeting.

Molopo board changes

30. In May 2015, the board of Molopo comprised Samantha Tough (Chair) and David Sanders (representing Bentley) and Antony Sormann (representing Keybridge).¹⁷ Mr Sanders resigned on 27 August 2015 following the sale of Bentley's Molopo shares to Ion Limited. Mr Sormann resigned on 2 December 2016. Mr Alexandre Gabovich and Mr Wayne Trumble were appointed directors on 27 February 2017. Mr Gabovich was appointed managing director on 8 March 2017 and interim executive chairman on 5 April 2017. Ms Tough resigned on 24 March 2017.
31. The current board comprises Wayne Trumble, Ronnen Rosengart (representing Ion appointed 29 April 2016), Samuel Belzberg (representing Gibralt, appointed 31 July 2015) and Alexandre Gabovich.

APPLICATION

ASIC application

32. By application dated 11 April 2017, the Australian Securities and Investment Commission sought a declaration of unacceptable circumstances. It submitted that "*Aurora is acting, or is proposing to act, in concert with Keybridge in relation to the affairs of Molopo for the purposes of Chapter 6 of the Act, and accordingly, that Aurora and Keybridge are associates*".
33. ASIC submitted that Keybridge and Aurora:
- (a) share numerous structural links
 - (b) have maintained (and likely still maintain) common knowledge of relevant facts and strategies
 - (c) have multiple common investments

¹⁷ Molopo Chairman's Address dated 29/5/15

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- (d) engage in significant collaboration in relation to a number of listed entities (and presumably therefore also Molopo) and
 - (e) share a goal of unlocking value in Molopo.
34. This indicated, ASIC submitted, that Keybridge and Aurora were acting in concert or have a relevant agreement in relation to the affairs of Molopo, and accordingly were associates for the purposes of Chapter 6.
35. In summary, ASIC submitted that, if Aurora and Keybridge are associated, they would have collective voting power of approximately 37% and *“together they have considerable control over Molopo”*.
36. It further submitted that there were contraventions of s606, as a result of Aurora's continued acquisitions of Molopo shares, and s671B by the continuing non-disclosure of the association. It submitted that *“the parties' failure to acquire their interests in accordance with Chapter 6 of the Act and their failure to disclose their true collective voting power undermines the efficiency and competitiveness of the market for Molopo's shares”*.

Molopo application

37. By application also dated 11 April 2017, Molopo sought a declaration of unacceptable circumstances. Its application overlaps with ASIC's but is broader.
38. Molopo submitted that:
- (a) there was *“a calculated and systemic plan by several associated persons to take control of Molopo without payment of any premium to shareholders for doing so and without disclosing their association to the market in contravention of sections 606 and 671B of the Corporations Act.”* and
 - (b) even if association was not made out, *“the matters set out in [its] application, at the very least, evidence a relationship between the Relevant Persons that has an unacceptable effect on control or is otherwise unacceptable having regard to the principles in s602.”*
39. Molopo submitted that:
- (a) there were structural links and other collaborative conduct between the Relevant Persons, including common directorships and one being appointed to replace another who had resigned
 - (b) there were common investments and dealings
 - (c) the parties had common knowledge of relevant facts, particularly in light of Mr Patton's involvement and
 - (d) there were actions which were uncommercial, including the sale of Aurora to Seventh Orion and Aurora's acquisition of shares despite there being no announcement to ASX of any material matter that may affect the price or value of Molopo shares.
40. It submitted that *“the actions of the Relevant Persons evidence an agreed strategy to control Molopo at a shareholder and board level, without paying an appropriate premium for control”*.

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Interim orders sought

41. ASIC sought interim orders restraining Keybridge and Aurora and their respective associated entities from exercising any voting rights over Molopo shares, acquiring any further relevant interests in Molopo and disposing of any Molopo shares.
42. Molopo sought interim orders preventing any of Keybridge and Aurora and their respective associated entities acquiring further shares in Molopo or exercising voting rights attached to their shares in excess of 20% until further order of the Panel.

Undertakings

43. Keybridge and Aurora provided undertakings (which we accepted) to the effect that they would not dispose of, or acquire, any shares in Molopo without giving 2 clear business days' notice (Annexure A).

Final orders sought

44. ASIC sought final orders that:
 - (a) any Molopo shares acquired by Keybridge and Aurora since 4 July 2016 be vested for sale
 - (b) Keybridge and Aurora and their respective associated entities lodge a substantial shareholder notice disclosing their voting power in Molopo and their association and
 - (c) Keybridge and Aurora and their respective associated entities be prohibited from making any further acquisitions of Molopo shares that would exceed in their combined shareholding exceeding 20%, unless permitted by s611.
45. Molopo sought final orders:
 - (a) for disclosure of the association in accordance with s671B
 - (b) preventing the exercise of any voting rights attached to the shares of Keybridge and Aurora and their respective associated entities in excess of 20% and
 - (c) vesting for sale shares held in excess of 20% by Keybridge and Aurora and their respective associated entities (and that they not receive any profit on the sale of those shares).

DISCUSSION

46. We have considered all the relevant material, but address specifically only those things that we consider necessary to explain our reasoning.

Association and unacceptable circumstances

47. Section 12 sets out the tests for association as applied to Chapter 6. There are two relevant tests here:
 - (a) s12(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

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agreement for the purpose of controlling or influencing the composition of a company's board or conduct of its affairs and

- (b) s12(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.

48. For ss12(2)(b) and (c) purposes, the affairs of a body include:

- (a) the promotion, formation, membership, control, business, trading, transactions and dealings, property, liabilities, profits and other income, receipts, losses, outgoings and expenditure of the body
- (b) the internal management and proceedings of the body
- (c) the ownership of shares, debentures and interests in a management investment scheme made available by the body and
- (d) the power of persons to exercise, or control the exercise of, voting rights.¹⁸

49. A relevant agreement is an agreement, arrangement or understanding:

- (a) whether formal or informal or partly formal and partly informal and
- (b) whether written or oral or partly written and partly oral and
- (c) whether or not having legal or equitable force and whether or not based on legal or equitable rights.¹⁹

50. As stated by the Panel in *CMI Limited 01R*,²⁰ the cases make it clear that there is significant overlap between the concepts of "acting in concert" and "relevant agreement" in s12.

51. An understanding means an understanding – "plainly a word of wide import"²¹ – as to some common purpose or object in relation to the company in question.

52. Often establishing an association requires the Panel "to draw inferences from patterns of behaviour, commercial logic and other evidence suggestive of association."²² In *Mount Gibson Iron Limited*,²³ the Panel said circumstances which are relevant to establishing an association include:

- (a) a shared goal or purpose
- (b) prior collaborative conduct
- (c) structural links

¹⁸ Section 53

¹⁹ Section 9

²⁰ [2011] ATP 5 at [33]-[34]

²¹ *Adsteam Building Industries Pty Ltd & Anor v The Queensland Cement and Lime Co Ltd & Ors* (1984) 14 ACLR 456 at 459

²² *Winepros Limited* [2002] ATP 18 at [27]

²³ *Mount Gibson Iron Limited* [2008] ATP 4. These factors have been applied in several Panel decisions including *Ainsworth Game Technology Limited 01 & 02* [2016] ATP 9, *Viento Group Limited* [2011] ATP 1, *CMI Limited* [2011] ATP 4 and *World Oil Resources Limited* [2013] ATP 1, *Merlin Diamonds Limited* [2016] ATP 18

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- (d) common investments and dealings
 - (e) common knowledge of relevant facts and
 - (f) actions which are uncommercial.
53. Keybridge submitted, and we accept, that the following propositions regarding association are established:
- (a) There is no automatic association between corporations under section 11 merely because they have one or more common directors.²⁴ The Panel has accepted that the mere fact of common directorships does not establish association.²⁵
 - (b) Proving an associate relationship is difficult²⁶ and may fail because of a lack of evidence.²⁷
 - (c) Acting in concert connotes knowing conduct, the result of communication between the parties – not simultaneous actions which occur spontaneously (or coincidentally).²⁸ It contemplates a consensus between the parties as to a common purpose or objective,²⁹ but does not require any physical or overt act.³⁰
54. We also note that a common investment does not necessarily support the existence of association, depending on the circumstances.³¹
55. There have been occasions when the Panel has found that parties were associated and, in the alternative, considered that those circumstances gave rise to unacceptable circumstances.³²

Decision to conduct proceedings

56. We decided to conduct proceedings. ASIC provided detailed information of, among other things, structural links and common investments and dealings between Aurora and Keybridge. Molopo provided correspondence from Mr Sormann expressing his concern that Keybridge and Aurora may be taking control of Molopo.
57. Keybridge and Aurora made preliminary submissions that both applications were out of time. We sought submissions on whether we should extend time for ASIC and Molopo to make their applications.³³

²⁴ Ford, *Austin & Ramsay's Principles of Corporations Law Online* [23.250]

²⁵ *Orion Telecommunications Limited* [2006] ATP 23 at [97]

²⁶ *Re Winepros Ltd* (2002) 43 ACSR 566

²⁷ *Bridgewater Lake Estate Ltd* [2006] ATP 3 [8]

²⁸ ASIC Regulatory Guide 5.133

²⁹ ASIC Regulatory Guide 5.134

³⁰ ASIC Regulatory Guide 5.135

³¹ *Kasbah Resources Ltd* [2016] ATP 19 at [20]

³² See *Ainsworth Game Technology Limited 01 & 02* [2016] ATP 9 at [92] to [110] and *Mount Gibson Iron Limited* [2008] ATP 4 at [105] to [107]

³³ Section 657C

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58. Keybridge submitted, in effect, that it was open to us, if we were minded to conduct proceedings on ASIC's application, to decline to conduct on Molopo's application. It submitted that it would *"have no objection to the Panel in that matter accepting the submissions contained in Molopo's 02 Application as submissions in the Molopo 01 proceedings."* We considered that there was merit in conducting proceedings on Molopo's application as well as ASIC's. Molopo's application was broader in scope than ASIC's application. We directed that the applications be considered together.³⁴

Conference

59. The President convened a conference for 10 May 2017, and interviewed Mr Sormann. Mr Sormann had been invited to make a submission on the brief but declined to provide a response. We decided to conduct a conference, after issuing a brief and receiving submissions and rebuttals, to clarify matters arising from the submissions and rebuttals and otherwise to inform ourselves on matters relating to the proceedings.³⁵ In particular, the conference was held:
- (a) to explore the circumstances surrounding Mr Sormann's resignations from Keybridge and Molopo
 - (b) to explore the circumstances surrounding certain emails from Mr Sormann (which suggested actions in combination by Keybridge and Aurora as regards Molopo) and
 - (c) to receive documents from Mr Sormann pursuant to a summons.
60. We held the conference by telephone on 10 May 2017, although Mr Patton and a legal representative of Aurora attended in person. Mr Sormann and his lawyer also attended in person.
61. We decided not to make a transcript.³⁶ A recording of the conference was made available to the parties. We granted leave to the parties to be legally represented at the conference, on terms including that the lawyers would speak only if called upon.³⁷ All the parties attended and abided by the terms.
62. The President was in the room when Mr Sormann gave evidence. The other Panel members were on the teleconference. Our general impression however was shared.
63. Mr Sormann became a director of Keybridge on 6 March 2014³⁸ *"largely at the behest of [Mr Bolton] and therefore representing his interests"*. It is clear that Mr Bolton regarded Mr Sormann as a representative of ASG.
64. Mr Sormann resigned as a director of Keybridge on 13 October 2016, having made that decision after the Keybridge board changed in August.

³⁴ See ASIC Regulation 16(1)(a)

³⁵ ASIC Regulation 35

³⁶ ASIC Regulation 38(3)

³⁷ ASIC Act s194

³⁸ ASX App 3X dated 7/3/14

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65. Mr Patton, as representative of ASG,³⁹ joined the Keybridge board (and Mr Bill Brown resigned).

Preliminary findings

66. Having considered the issues, submissions, rebuttals and the conference, we made preliminary findings and invited submissions on them. Our preliminary findings were, in summary, that:
- (a) an association had been established between Keybridge and Aurora in relation to Molopo and
 - (b) even if association was not established, the relationship between Keybridge and Aurora gave rise to unacceptable circumstances because of the effect on control or potential control of Molopo.
67. The purpose of preliminary findings in this case was to allow the parties an opportunity to respond to our thinking. After considering the submissions and rebuttals on our preliminary findings, we have, on balance, decided that we are not satisfied to the requisite level that Keybridge and Aurora are associated.
68. Our decision was finely balanced and was made following consideration of (among other things) affidavits provided by Mr Patton, Mr Kriewaldt and by directors and officers of Aurora, late in the process, in response to our preliminary findings.
69. Molopo submitted that our conclusion on association was a “*significant reversal*” from our preliminary findings. However, preliminary findings are not conclusions.
70. In summary, the circumstances largely support a conclusion of association. However, we have, on balance, hesitated to come to that conclusion in the face of the direct evidence from individuals in Keybridge and Aurora regarding the absence of a consensus as to their dealings concerning Molopo. We were persuaded that the circumstances were nevertheless unacceptable even if they did not involve an association as such.
71. These reasons are structured a little differently from other Panel reasons dealing with association matters. This is because of our findings. We think that the indicia usually supporting an association in this case support our conclusion on unacceptability.
72. We therefore identify the role that Mr Bolton played and then look at the indicia of association, before detailing our conclusions on association and unacceptability.

Role of Nicholas Bolton

ASG

73. ASG has a relevant interest in 21.16% of Keybridge. Bentley (with Scarborough) has a relevant interest in 19.96% of Keybridge.
74. Mr Bolton holds 1% of ASG’s holding company (ASH). The remaining 99% is held by his sister, Georgia Bolton. He holds 2.2% of Keybridge directly.

³⁹ ASX announcement – Keybridge 10/8/16

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75. Mr Bolton's father, John Bolton, is the sole director of:
 - (a) ASG (appointed on 10 October 2013) and
 - (b) ASH (appointed in December 2015 after Mr Bolton was disqualified from managing a corporation).
76. Ordinarily one might expect that the principal actors in relation to decisions by ASH and ASG would be Mr John Bolton and Ms Georgia Bolton. This is not borne out by the evidence.
77. Moreover, Mr Bolton made a submission that sought to reinforce what one might expect in the ordinary course. He submitted that *"my 1% of shares gives me no control over Board composition or the conduct of the company."* That is literally true. He also submitted that *"I have had no discussion whatsoever with the 99% shareholder Georgia Bolton about Keybridge, Molopo, Seventh Orion, Aurora or any of the affairs of ASH's subsidiaries."*
78. Mr Bolton also submitted, in response to our preliminary findings, that it was the role of a director to manage a company, not a major shareholder. As a general proposition, that is also true.
79. However, in this case the evidence suggests that it was otherwise.
80. Mr Sormann said that he had never had any dealings with Ms Georgia Bolton and never had a *"personal dialogue"* with Mr John Bolton about Keybridge.
81. Ms Georgia Bolton submitted (through Mr Bolton) that *"Since 21 June 2016, I have had no communication of any nature with any party about Seventh Orion, Keybridge, Molopo or Aurora."* Thus, as almost sole owner of ASG, which is itself a substantial shareholder in Keybridge, she has had no discussions at all with any party concerning Keybridge. Mr Bolton submitted that it was unremarkable that Ms Georgia Bolton did not play an active role in ASH or ASG because she was a shareholder not a director. We do not accept that. In our experience, a 99% shareholder would ordinarily have at least some contact. Her purely passive role supports a finding that Mr Bolton takes an active, likely dominant, role in the affairs of ASH, ASG, and their investments. Other evidence supports this.
82. Similarly, but more narrowly, Mr John Bolton (through Mr Bolton) submitted that *"Since 21 June 2016, I have had no communication of any nature with a director or officer of Molopo or an adviser"* adding that, other than meeting Mr Patton socially at Keybridge's AGM and at HHY's annual meeting, he did not believe that he had communicated with any other director or officer of Keybridge during that period.
83. Mr Bolton submitted that it was unremarkable that Mr John Bolton did not have any discussions with any director or officer of Molopo as ASG was a shareholder of Keybridge not Molopo. Perhaps it is unremarkable in the case of Molopo. However, Mr Bolton does not address Mr John Bolton's comment regarding Mr Patton. This is surprising since ASG is the largest shareholder in Keybridge.
84. Subsequently Mr Bolton produced emails between Mr John Bolton and the Keybridge directors to rebut our preliminary finding that Mr John Bolton did not take an active part in the running of ASG (except for formalities). ASIC also

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produced a number of emails where Mr John Bolton forwarded relevant materials relating to ASG's holding in Keybridge to Mr Bolton.

85. ASIC also submitted that:

There also remains the simple fact that, Mr J Bolton is Mr N Bolton's father. Further, although Mr J Bolton has been a director of ASG since 10 October 2013, he was only appointed a director of ASH on 17 December 2015 (being the same date that Mr N Bolton was banned from managing corporations by ASIC). This timing cannot be mere coincidence. The more likely explanation is that Mr J Bolton stepped in as director of ASG and ASH following Mr N Bolton's banning, to help Mr N Bolton. It is not uncommon that a father will assist his children in times of need and indeed it is not uncommon that close family members will work together to achieve an aim.

86. We accept that Mr John Bolton assisted his son by becoming the sole director of ASG, and the director of ASH, when Mr Bolton could no longer undertake those roles. However, the material does not satisfy us that Mr John Bolton acted in the roles independently of Mr Bolton.

87. As for Mr John Bolton having had only “social” contact with Mr Patton, we note that Mr Patton was ASG’s nominee on the Keybridge board and he was a director of Seventh Orion (which bought Aurora from Keybridge, the deal having been introduced to him by Mr Bolton). Again, Mr John Bolton’s relatively passive role contrasts with the leading role of his son.

88. Furthermore, other evidence clearly leaves an impression that communications involving Mr John Bolton are, for the most part, of a formal kind; that is, of a type made by or to the director of a shareholder rather than by or to the most influential person in the camp of the shareholder. Two things are striking:

- (a) the limited number of such communications and
- (b) more significantly, that Mr Bolton appears to be the principal actor in so far as ASG is concerned. For example, by email dated 8 August 2016, Mr John Bolton sent Keybridge Mr Patton’s consent to act as a director (as ASG’s nominee). He indicated that Mr Kriewaldt’s consent was to follow after “due diligence”. The evidence however indicates that Mr Bolton was entirely or substantially responsible for selecting and procuring Mr Patton and Mr Kriewaldt for these roles. In this vital matter for ASG, Mr John Bolton appears to have had little role to play. By further example, when Keybridge sends letters to Mr John Bolton regarding Mr Patton’s nomination, Mr John Bolton forwards them to Mr Bolton who then forwards them to Mr Patton. It is also noteworthy that the letter itself says that Keybridge received the nomination from Mr Nicholas Bolton.

89. In summary, it appears to us that Mr Bolton did, and does, have an active and influential role in ASG’s affairs, in particular, so far as they concern Keybridge.

90. In addition we would mention the following (without attempting to be exhaustive) as support for our finding on the role of Mr Bolton:

- (a) in February 2016, Mr Bolton emailed a term sheet (signed by Mr John Bolton) to Mr Sormann proposing that ASG acquire Aurora. Mr Bolton and Mr

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Sormann subsequently emailed on numerous occasions in relation to ASG's proposed acquisition of Aurora

- (b) in February 2017, Keybridge's company secretary sent an email to Mr Bolton with a query regarding ASG's substantial holder notice and he responded and
- (c) Bentley dealt with Mr Bolton on behalf of ASG regarding Keybridge. For example, on 1 June 2016, Mr Khan emailed Mr Bolton stating that the priorities for their forthcoming meeting were:

- 1. *Meet with you (alone) to discuss 'the way forward'*
- 2. *Meet with Antony (with you and without bill [Brown]) to put forward a potential 'way forward' and get an update on the discussions with Moffatt.*

Mr Sormann said that he understood "*the way forward*" to mean how to facilitate Keybridge board changes without convening a shareholders' meeting. He said that Messrs Khan and Bolton had asked his views on this.⁴⁰ Mr Sormann thought that Mr Bolton was acting in the capacity of a substantial shareholder (which we took to be a reference to ASG's holding in addition to his personal, much smaller, holding).

Keybridge

- 91. Mr Bolton was managing director of Keybridge until December 2015 when he resigned after he was disqualified from managing a corporation. He was privy to its transactional history and strategy. For example, he arranged the transaction in which Keybridge purchased Aurora in February 2015.⁴¹ And, as noted, he represented Keybridge's major shareholder, ASG.
- 92. Despite Mr Bolton lacking formal status as an officer of Keybridge after his resignation, we consider that his active involvement and substantial influence in Keybridge (at least since about mid-May 2016 when Bentley acquired a substantial holding in Keybridge) are easily inferred.
- 93. Keybridge submitted that Mr Bolton "*was not involved in any decision making by Keybridge in relation to its Molopo stake.*" In our view, that can only be correct if understood in a direct or formal sense as opposed to an indirect or practical sense.
- 94. As noted above, two directors of Keybridge were nominated by ASG and two were nominated by Bentley. Mr Sormann said at the conference that Mr Bolton had wanted equal representation on the Keybridge board between ASG and Bentley. This is consistent with a conversation between Mr Kriewaldt and Mr Bolton (see paragraph 230).
- 95. Mr Bolton was appointed a consultant to Keybridge effective 13 October 2016. He has a broad remit. Mr Khan (a director of Bentley, which is a substantial shareholder in Keybridge) is also a consultant to Keybridge. Their appointments became effective on the same day (upon Mr Sormann's resignation from the

⁴⁰ Mr Moffatt (chair) to resign and Bentley nominees to be appointed

⁴¹ AIB ASX announcement 16/2/15

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Keybridge board), were signed a day apart, were substantially in the same terms and were at the same fees.

96. Mr Patton signed both consultancy agreements on behalf of Keybridge. The agreements state that Mr Patton was the Keybridge director to whom each was to report. Mr Patton deposed that they report to Mr Johnson in relation to Molopo. He said in his affidavit *“In the case of Keybridge’s investment in Molopo, Nick Bolton and Farooq Khan do not report to me in relation to Molopo matters. Instead, they report to William Johnson”*. This is cast in the present tense, saying nothing of the past. We believe it is relevant that:
- (a) the creation of information barriers in Keybridge, separating him from consideration of matters concerning Molopo, came late and, we have found, were not fully effective
 - (b) the first contemporaneous evidence of Mr Patton withdrawing from formal board consideration of issues concerning Molopo appears in the minutes of Keybridge’s board meeting of 23 November 2016 and
 - (c) on 13 October 2016, when the consultancy agreement was signed, it included an unqualified reporting obligation. In our view, this has some significance.
97. On 19 October 2016, Mr Patton and Mr Bolton were recipients of an email from Mr Khan in which he discussed a conversation with a potential purchaser of Keybridge’s Molopo stake. The price offered was obviously too low. Mr Khan concluded *“My view is that we should get the cash position of Keybridge up and then creep to the maximum possible amount and then launch a scrip bid using Keybridge con notes. Let’s chat tomorrow on this.”*
98. Mr Bolton attended a Keybridge strategy meeting on 26 October 2016. Mr Khan was also present, along with Mr Patton and Mr Johnson. The object of the meeting was, according to Mr Johnson’s email of 14 October, to *“map out a clear director (sic) for KBC – from both a strategic and operational perspective”*. The agenda included the following:
- (a) *“Investments co-invested by [Keybridge] and [Aurora] – Manage association”* Keybridge in response to our preliminary findings said that the intention of this item was to raise it for discussion
 - (b) a standing invitation for Mr Bolton and Mr Khan to attend Keybridge board meetings. Even though Mr Bolton is the former CEO of Keybridge, we regard this as most unusual, and note that on the prudent advice of Mr Kriewaldt the invitation was not in fact extended
 - (c) the appointment of Mr Bolton and Mr Khan to Keybridge’s investment committee (which we understand may have been an informal arrangement to advise Mr Sormann during August, September and October 2016). They were not appointed to this either and
 - (d) in relation to Molopo, two options being sale at 24c or launching a bid.
99. The agenda, in our view, reflected that Keybridge viewed Mr Bolton’s role as significant.

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100. It was agreed at the meeting that Keybridge would increase its stake in Molopo. This appears from an email from Mr Johnson of 27 October 2016 (ie, the following day) copied to Mr Bolton and Mr Patton and others. Mr Patton did not raise the issue of a conflict on this course of correspondence.
101. Mr Bolton and Mr Patton were also included in email communications on 9 November 2016 from Mr Johnson concerning Keybridge's approach to Molopo about a new nominee director.
102. Mr Patton first raised the issue of a conflict on 10 November 2016 in response to Mr Johnson's email about Keybridge topping up its Molopo stake to 19.9%. Obviously Mr Johnson was unaware of any need to keep Mr Patton at arms' length.
103. On 2 December 2016, Mr Johnson sent his comments on Molopo's response to Keybridge's approach to Molopo about a new nominee director to Mr Bolton, Mr Patton and others. Both were included in a flurry of subsequent emails on the topic,⁴² despite the letter saying that Mr Patton had "*recused himself*" from discussions.
104. On 11 January 2017, Mr Johnson emailed to suggest a board meeting to discuss a possible sale of Keybridge's Molopo stake, with Mr Bolton to attend. The email was copied to Mr Patton, along with details of the proposal. This communication from Mr Johnson is quite telling as it comes three weeks after ASIC served notices on Keybridge seeking information in relation to its interests in Molopo. Understandably, Mr Bolton, "*on advice of John Patton*", said that he would not attend. This followed Mr Bolton contacting Mr Kriewaldt to ask whether he should attend, to which Mr Kriewaldt replied that he know of no reason why not but Mr Bolton should ask Mr Patton. Mr Kriewaldt went on:

I subsequently understand from material provided in the Proceedings that Mr Bolton had been engaged as a consultant to Aurora in relation to the acquisition of shares in Molopo and I now understand why Mr Patton gave that advice.
105. Nevertheless, on 17 February 2017, Mr Khan met Mr Bolton in Sydney. They discussed what further actions Keybridge might take in relation to Molopo. Mr Khan sent an email that they had agreed that they should send a share register request to Molopo and wait to see if Mr Johnson and Mr Sanders were appointed to the board of Molopo. If they were not appointed, it was proposed to serve a requisition calling for the removal of the Ion representatives. Mr Bolton in response to our preliminary findings denied that he offered an opinion. Mr Johnson responded to Mr Khan's email by saying "*Sounds like a plan!*"
106. Keybridge submitted in effect that Mr Bolton's activities were to be explained by his status as a consultant. However, Mr Bolton was involved in at least one matter that, in our view, was properly the preserve of Keybridge's directors. Mr Jeremy Kriewaldt had approached Mr Hartnell to join the Molopo board as Keybridge's nominee. Mr Hartnell asked about fees and whether Keybridge would "*stand behind payment*". Mr Khan emailed to say "*I have just finished speaking to Nick and we would both support this.*"

⁴² Seven emails were sent on the 2 December Keybridge letter

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107. All of this suggests a significant role for Mr Bolton in Keybridge, including in relation to its investment in Molopo.
108. Keybridge denied in submissions that Mr Bolton was acting as a consultant in relation to the acquisition of Molopo shares, but accepted that he *“as the former chief executive officer and a former director of Keybridge, was contacted by Keybridge from time to time so that he could provide background and details of various investments of Keybridge of which he had considerable knowledge.”*

Aurora

109. Seventh Orion bought Aurora. It holds the shares on trust for the Aurora Trust. Mr Bolton has a 49.9% interest in the Aurora Trust. Mr Patton holds 26.1% of the Aurora Trust, Betty Poon holds 8.5%, Victor Siciliano 8.5% and Stephen Rowley, indirectly, 7%.
110. Mr Patton initially held all the shares in Seventh Orion. Mr Rowley now holds 50% and is a director. Mr Rowley deposed that Mr Patton had informed him that *“he had received some legal advice suggesting that the introduction of another director may be beneficial, although not essential”*. Mr Rowley has business dealings with Mr Bolton, including commencing a coffee business together and Mr Rowley has a *“friendly relationship”* with Mr Bolton.
111. The directors of Aurora are Mr Patton, Ms Poon and Mr Hallam.
112. Mr Bolton introduced Mr Patton to Keybridge as a potential purchaser of Aurora. Mr Bolton also introduced Mr Patton to legal advisers who may have been able to assist with the transaction.
113. Mr Sormann said that he thought he was dealing with Mr Patton, but he did receive a confidentiality deed signed by Mr Bolton and a couple of calls from Mr Bolton during the negotiations to discuss Mr Bolton’s understanding of where the transaction was up to. Clearly, as Mr Sormann said in the conference, Mr Bolton displayed an active interest in how the transaction was progressing.
114. Mr Sormann said that he learned of Mr Bolton’s interest in the Aurora Trust after the sale of Aurora and was *“not particularly surprised”*. There is evidence that it was important that Mr Bolton have no more than 49.9% of the Aurora Trust. This may have been as a result of Mr Sormann indicating to Mr Patton (according to Mr Patton’s file note):
- Subject to some minor points, we are the preferred party...*
- (c) nominee entity that is controlled by me and/or Wilson Hanna (so not Aust Style)*
- If we can get these changes through then [Mr Sormann] has the authority to get this deal signed.*
115. Further, Mr Patton deposes that Mr Sormann said that he (ie, Mr Sormann) *“had authority to do the deal with me if the purchasing entity was controlled by me (or my entity, Wilson Hanna) and not Australian Style Group Pty Ltd (ASG), an entity associated with Mr Bolton”*.
116. Notwithstanding the intention to keep Mr Bolton at arms’ length, Mr Patton involved Mr Bolton closely in relation to the acquisition of Aurora, inviting him to

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“feel free to make any changes to the heads of agreement”. Mr Patton in his affidavit stated that it made sense to enlist Mr Bolton’s assistance for a number of reasons including his knowledge of the business and *“as the largest investor in the Aurora Investments Unit Trust, it was in his interests for Seventh Orion to acquire Aurora”*. Aurora submitted in response to our preliminary findings that Mr Patton consulted Mr Bolton over the acquisition of Aurora because of *“the tight sale timeframe, its complexity and Mr Bolton’s prior experience with it”*.

117. Mr Bolton in response to our preliminary findings denied hiding his involvement in Aurora, saying that he was actively involved in his personal capacity and his involvement was known to Keybridge. This may be accepted. He also submitted that his involvement was *“not indicative of the governance of Aurora post-completion.”* This also may be accepted so far as it goes, in that, post-completion, Aurora had a new board. However, it does not follow that Mr Bolton did not continue to have an active and influential role in Aurora’s affairs. We conclude that he did.
118. One effect of these arrangements was that they concealed Mr Bolton’s involvement in Aurora from third parties. Aurora submitted in response to our preliminary findings that a unit trust was used because Mr Patton had not previously worked with Mr Bolton or any of the management team and he *“wanted to ensure the structure enabled him to have effective (or negative) control despite not being a majority equity holder.”* It is not obvious to us that this explains a trust structure as opposed to a corporate one.
119. Perhaps there was a tax purpose to the structure, as submitted by Ms Poon and Mr Siciliano, but the structure obscures the involvement of Mr Bolton. We conclude that this was likely to have been seen as an advantage by Mr Bolton, even if it was not the only reason for the structure.
120. It is clear that Mr Bolton remained involved in the affairs of Aurora. On 28 September 2016, Mr Bolton copied to Mr Patton an email exchange he had initiated with a potential vendor of Molopo shares. On 17 October 2016, he said to a different potential seller of Molopo shares that he was *“consulting for a firm that is interested in acquiring a block of [Molopo] shares.”* A feature of these emails is that, on their face, it is possible the inquiry was on behalf of either Keybridge or Aurora.
121. Aurora has, however, submitted:

... despite describing himself as ‘consulting’, Mr Bolton was not engaged as a consultant by Aurora. Rather, because he knew Molopo shareholders who may consider selling, Mr Bolton offered to introduce Aurora to them (leaving Aurora to negotiate any acquisition).
122. The absence of a formal consultancy does not mean that Mr Bolton was not in fact consulting. And we note that the second approach seems to have resulted in a transaction, finalised by Mr Bolton.
123. Further, Mr Bolton and Mr Patton consulted together. Mr Patton outlined the involvement as:
 - (a) him canvassing Mr Bolton’s views from time to time

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- (b) Aurora requesting Mr Bolton to assist with discrete, largely administrative tasks. In this respect, Ms Poon's and Mr Siciliano's affidavits state in effect that Mr Bolton provided assistance to them on administrative matters and
- (c) Aurora on a few occasions using Mr Bolton's network to be introduced to potential counter-parties for transactions.
124. However, Mr Patton also deposed that, during the month leading up to the acquisition of Aurora, he received 65 emails from Mr Bolton (an average of two a day) and in the six months to 31 December 2016, 45 emails (an average of one every four days). Aurora in response to preliminary submissions added that, in relation to Keybridge, Mr Patton received from Mr Bolton "*circa 41 emails ...between 13 October 2016 to 31 December 2016, averaging close to 1 every 2 days.*"
125. Moreover, Mr Patton consulted Mr Bolton in relation to workings of the various funds and Mr Bolton took advice from Mr Patton, such as whether he should attend a meeting of the Keybridge board.
126. Mr Patton in his affidavit cited 9 examples where Mr Bolton made suggestions in relation to the affairs of Aurora that Aurora did not agree to or give effect to. ASIC submitted in response that:
- ...if Mr N Bolton is not involved in the affairs of Aurora other than for administrative tasks, it is unclear why Mr N Bolton would even attempt to suggest all of these corporate action proposals to Mr Patton. The more plausible explanation is that Mr N Bolton regularly provides ideas in relation to the affairs of Aurora to Mr Patton, some of which are implemented and some of which are not. The fact that Mr Patton does not implement all of Mr N Bolton's suggestions (if this is correct) does not mean that Mr N Bolton does not have significant influence in Aurora's affairs. On the contrary, Mr N Bolton would be more likely to regularly provide suggestions if they are often implemented.*
127. We agree with ASIC. We think that the examples display a close business relationship between Mr Bolton and Mr Patton.
128. Ms Poon deposed that "*Mr Bolton has not attended any Aurora board meetings, and I have not seen any evidence of his control or influence over the board of Aurora, or any of its directors. In particular, I have not seen any evidence of his contributing to any decision or strategy relating to Aurora's investments in Molopo.*" Whether or not this is so, it does not deny Mr Bolton's significant role and influence, primarily via Mr Patton. In addition, it appears that Ms Poon was not involved in many of the informal but important communications that occurred.
129. We consider Mr Bolton, either alone or together with Mr Patton, effectively controls or has substantial influence over the relevant affairs of Aurora, that is to say, the affairs of Aurora so far as they concern its stake in Molopo. Mr Bolton's involvement in Seventh Orion's acquisition of Aurora, his 49.9% interest in the Aurora Trust, the work undertaken by Mr Bolton for Aurora and the frequent communication between Mr Bolton and Mr Patton support our conclusion.

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Mr Patton

130. Mr Patton was appointed to the Keybridge board as a nominee of ASG. The Keybridge board understood as much. While Mr Bolton had previously put Mr Patton forward, on the day of his appointment he was put forward by Mr Cato and Mr Johnson. These directors of Keybridge were representatives of Bentley.
131. Mr Patton's appointment to Keybridge's board resulted in many conflicts. This might have been thought a disqualifying factor, but it was not by Keybridge.
132. Keybridge submitted that Mr Patton was appointed to represent the interests of ASG. Mr Patton has no interest in ASG, other than a connection to Mr Bolton. In substance, and taken with the evidence concerning Mr Bolton's role in ASG, this suggests he represented Mr Bolton.

Structural links

133. In our view significant structural links exist between Keybridge and Aurora.
134. Mr Patton was Melbourne-based. On 16 December 2016, Keybridge moved its registered office to Melbourne (in the same office, or at least on the same floor, as Aurora, Seventh Orion and Wilson Hanna). However, it moved its administration to Perth.
135. ASG is Keybridge's largest shareholder, with 21.16%. Bentley is a substantial holder in Keybridge with 19.96%.
136. The directors of Keybridge are Messrs Patton, Johnson, Cato and Kriewaldt. Two are Bentley representatives and two are ASG representatives. Messrs Khan and Bolton also consult for Keybridge.
137. The directors of Bentley are Messrs Khan, Johnson and Cato.
138. The directors of Aurora are Messrs Hallam and Patton and Ms Poon. Aurora's shares are held on trust for the Aurora Trust, of which Mr Bolton holds 49.9% and Mr Patton holds 26.1%.
139. Keybridge is the largest unit holder in HHY Fund, of which Aurora is responsible entity. Keybridge holds 26.4% of HHY Fund and is the investment manager of HHY Fund. It engages Mr Siciliano, a unit holder in the Aurora Trust and Aurora's portfolio manager, as its adviser on the Fund.
140. By reason of Mr Patton's directorships on the boards of Aurora and Keybridge, there is a significant level of information "cross-over" (as we have found that information barriers were not fully effective in relation to Molopo). By reason of Mr Bolton's ownership interest in each and level of influence (as we have found) there is a community of interest, as well as additional cross-over of information.
141. At the time when Mr Sormann was the acting managing director of Keybridge, he appears to have been close to Mr Bolton. It was, of course, his job to secure a good price for Aurora. On 22 February 2016, he emailed Mr Bolton (presumably for ASG, as Seventh Orion had not been incorporated) noting that Keybridge had received an offer for Aurora, and inviting Mr Bolton to make an offer. In response

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to a query about whether the offer that had been received was capable of acceptance, Mr Sormann indicated that the offer was above “*expected book value*”.

142. Mr Bolton subsequently emailed a Term Sheet to Keybridge signed by Mr John Bolton for ASG.
143. On 26 May 2016, a draft contract was sent to ASG and Mr Bolton responded with questions, which were addressed.
144. Ultimately the purchaser was Seventh Orion. It paid \$750,000 plus deferred consideration.
145. On 16 June 2016, heads of agreement with Wilson Hanna (of which Mr John Patton is a director) were signed. Mr Patton had asked Mr Bolton his thoughts on the draft heads of agreement and subsequently Mr Bolton remained involved in the transaction. It is clear that Mr Bolton had a significant level of involvement in the making of the offer by Wilson Hanna. He also signed a confidentiality agreement in relation to the acquisition.
146. Mr Patton stated in his affidavit that he consulted with Mr Bolton because he wanted his perspective on how to secure the best price and terms for Aurora and Mr Bolton was well placed to provide useful information given his knowledge of Aurora and Keybridge. This reflects an additional level of information “cross-over”. It also supports our finding that Mr Bolton has a significant interest in, and influence over, Aurora since it appears that he assisted with Seventh Orion’s purchase even though ASG was itself interested in the purchase.
147. Keybridge uses Mr Bolton as a consultant. It submitted that, while Mr Bolton was not acting as a consultant for it in relation to the acquisition of Molopo shares, he “*as the former chief executive officer and a former director of Keybridge, was contacted by Keybridge from time to time so that he could provide background and details of various investments of Keybridge of which he had considerable knowledge.*” We take this to mean he was contacted about Keybridge’s investment in Molopo.
148. Keybridge submitted later, in rebuttals, that “*Mr Khan and Mr Bolton were both acting as consultants providing advice and assistance to Keybridge*” when discussing actions Keybridge might take in relation to its Molopo shareholding following the termination of earlier sale discussions and Molopo’s refusal to appoint a Keybridge nominee to its board when it then appointed two new directors.
149. Mr Patton joined the Keybridge board on 10 August 2016; roughly one month after Keybridge had sold Aurora to Seventh Orion. Mr Patton is, and was then, subject to conflicts of interest. Mr Ho pointed out a list of current “issues” on 3 April 2017 that included Metgasco, HHY, NAC, Molopo and a number of others. Aurora submitted in response to our preliminary findings that the only conflict at the time of appointment was HHY Fund, the other conflicts having arisen since. We note the Metgasco and Molopo conflicts may have existed. They certainly became apparent by the Keybridge board meeting of 23 November 2016.
150. Mr Patton first formally raised his conflicted position regarding Molopo with Keybridge on 10 November 2016. The board first recognised the position on 23 November 2016. Mr Patton’s position apparently did not arise for consideration

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when Aurora was starting to build its stake in Molopo or when Mr Patton attended a Keybridge strategy meeting on 26 October 2016 (that included a discussion of Keybridge’s investment in Molopo).

151. In our view the structural links are extensive.

Shared goal or purpose

152. ASIC submitted in relation to the relevant circumstance of a shared goal or purpose that it was reasonable to infer that Aurora and Keybridge wanted to control the Molopo board and ultimately Molopo’s significant cash assets. It submitted that:

- (a) Aurora’s intentions were evident from an investment proposal that Mr Patton circulated to the other Aurora directors on 18 November 2016 (which was to “*move to a 19.9% as a balance of power stake, seek Board representation*”) and
- (b) Keybridge’s intentions were evident from its letter to Molopo of 27 February 2017 (in which it sought board representation).

153. ASIC submitted that it was reasonable to infer that collaboration between Keybridge and Aurora existed, “*particularly given the fact that there are other very substantial Molopo shareholders and it is only through collaboration that Keybridge and Aurora can achieve their goals in relation to Molopo*”.

154. Molopo submitted that there was an agreed strategy amongst the Relevant Persons (a wider group than Keybridge and Aurora) “*to control Molopo at a shareholder and board level.*” The strategy involved the sale of Aurora to “*a ‘friendly’ associated party*” then Aurora acquiring a significant interest in Molopo so as to consolidate control.

155. Molopo submitted that an email from Mr Sormann evidenced the shared goal. On 2 December 2016, Mr Sormann emailed other directors of Molopo stating:

I have thought long and hard over the last few days and had some wise counsel from a couple of Mentors in relation to the current situation I face having departed Keybridge and noting what they are now doing in combination to take control of Molopo.

156. One of the mentors Mr Sormann spoke to was his father. We think this indicated a level of discomfort on Mr Sormann’s part about what was going on around him.

157. Mr Sormann said he was referring to a board appointment by Keybridge and Aurora becoming a substantial holder in Molopo. He added that he “*had a perception that Aurora was making its investment in support of Keybridge’s ambitions to appoint the directors.*”

158. Mr Sormann became a director of Molopo on 29 December 2014 as Keybridge’s representative (he was then executive director of Keybridge).

159. On 23 September 2016, Mr Sormann emailed Ms Tough (chair of Molopo) saying:

As you also know, I am finding my position at Keybridge increasingly untenable, and do not see myself staying at the Company much longer...

160. He said a similar thing to Keybridge some months later. Mr Sormann resigned as a director of Molopo on 2 December 2016, having been requested to do so by

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Keybridge (as he was no longer their representative). Keybridge “instructed” Mr Sormann to vote for Mr Sanders’ appointment in his place, but he was unable to get Mr Sanders appointed. By email dated 14 December 2016 to Mr Victor Ho (company secretary of Keybridge), copied to Mr Patton:

... I felt that my position had been made untenable by the Substantial Holder notice lodged by Aurora.

161. Mr Sormann explained the references to “untenable”. He said that he had been excluded from discussions regarding the future direction of Keybridge, and raised this with Ms Tough because he did not want Molopo to think that he was taking information back to Keybridge.
162. Keybridge submitted that there was no shared goal with Aurora, rather it tried to sell its Molopo stake and tried to maintain a representative on the Molopo board and only when frustrated in both those aims, sought to put to all shareholders the “*decision on the composition of the board of Molopo*”. Keybridge submitted that it had alternative goals - a representative on the Molopo board, Molopo to deploy some or all of its cash in profitable investments, Molopo to return cash to shareholders and voluntary liquidation.
163. We note that, at Keybridge’s 26 October 2016 strategy meeting, the attendees considered that a potential sale of Keybridge’s Molopo stake had fallen through, in part because the potential buyer was not convinced that it could obtain a board seat.
164. ASIC submitted that Keybridge was pursuing its goal to gain influence on, or control of, the Molopo board while also negotiating a sale of its Molopo shares. This is consistent with Keybridge’s submission. Mr Khan was, around the same time, recommending increasing Keybridge’s stake in Molopo.
165. On 12 March 2017, Keybridge lodged a section 249D requisition with Molopo. This was not the first time. In November 2014, Keybridge requisitioned a shareholders’ meeting of Molopo shareholders to consider a return of capital and board changes.⁴³ The NSW Supreme Court ruled that the requisition to return capital was invalid. However the Court held that Keybridge’s other requisition – to appoint directors – was valid.⁴⁴ Subsequently, the Molopo board was reconstituted without the need for a meeting and included Mr Sormann and Mr David Sanders.⁴⁵
166. Aurora also sought board representation on the Molopo board. Aurora submitted that it had considered seeking representation since 16 February 2017. This is around the time when Keybridge considered requesting a meeting to consider composition of the Molopo board.
167. On 22 March 2017, Mr Patton on behalf of Aurora wrote to Ms Tough seeking board representation. Aurora had sought representation on the Molopo board prior to this letter. This was 10 days after Keybridge’s s249D requisition. On

⁴³ ASX announcement by Keybridge 11/11/14

⁴⁴ *Molopo Energy Limited v Keybridge Capital Limited* [2014] NSWSC 1864

⁴⁵ ASX announcement by Molopo 29/12/14

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31 March 2017, Aurora gave notice to Molopo seeking to have Mr Ben Norman on the AGM agenda for election to the board.

168. Aurora submitted that *“it wished to influence the deployment of Molopo’s substantial cash resources, and to ensure that Molopo did not resile from its past repeated public representations that it would obtain shareholder approval before making any material acquisition or investment in any sector.”*
169. Keybridge and Aurora each had a significant investment in Molopo. It is not surprising that each wanted board representation. The question is whether they went further. We considered whether Aurora’s acquisitions furthered a plan.
170. In early November 2016, Mr Siciliano prepared an investment proposal for Aurora to acquire up to 19.9% in Molopo as a ‘balance of power’ stake. He stated in his affidavit:
 - (a) *“the Molopo shareholder base appeared to be dysfunctional”*
 - (b) *he “considered it unlikely that Keybridge and Ion would support each other’s strategy” and*
 - (c) *therefore “as a new entrant with a fresh motivation I believed that Aurora could drive its own strategy that all shareholders could live with (i.e. a strategy to support no major shareholder’s primary objective, but nonetheless a strategy those shareholders would consider to be satisfactory), such as providing an exit for all shareholders at or near Molopo’s underlying NTA”.*
171. The strategy was *“as agreed by Mr Patton”*.
172. Mr Patton submitted Mr Siciliano’s investment proposal to Mr Hallam. Mr Hallam *“had some concerns”* and attached mark-up of the proposal in which he said:
 - (a) *“Does [Aurora] funds and/or executives/shareholders have related party issues”* and
 - (b) *“[Keybridge] holds 19% - how do we manage conflicts and being viewed as a collective holding”.*
173. We initially considered that Mr Hallam was giving voice to concerns that the parties were associated. However, he deposed that his concerns *“centred around the investment merits and the potential related party issues given Mr Patton was a director of Keybridge and Keybridge was also the investment manager of the HHY Fund”*. Aurora submitted in response to our preliminary findings that Mr Hallam raised this issue as a matter of process.
174. Keybridge and Aurora have harmonious goals in relation to Molopo. Each of them focused on influencing, or controlling, the use of Molopo’s cash by investment that lifted the share price closer to NTA, or return of cash, or in some other way. There were also coincidences in the timing of acquisitions and the seeking of board representation. However, on balance, we consider that goals which overlap and coincidences in timing have not in this case established that Keybridge and Aurora have an understanding in the strict sense.
175. We initially considered that the role of Mr Bolton in Keybridge and Aurora justified a finding that there was a shared goal.

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176. ASIC submitted that Mr Bolton appeared instrumental in the operations of Aurora and had a significant degree of involvement with respect to Keybridge's operations. It submitted that Mr Bolton:
- (a) in relation to Aurora was -
... actively involved in negotiating the purchase of Aurora, finding counter-parties to share acquisitions and potential investment proposals, assisting in drafting various announcement and meeting materials for Aurora, and identifying flaws in voting documentation to benefit Aurora. Of note, Mr Bolton's involvement is not solely through Mr Patton, but he also has direct communications with Aurora's director/employees (i.e. Ms Betty Poon and Mr Victor Siciliano). Aurora's directors (other than Mr Hallam as evident from his s19 interview) and employees are aware of Mr Bolton's involvement and take instruction from Mr Bolton without questioning his role or authority with respect to Aurora's operations. (We note that Ms Poon's affidavit somewhat contradicts this) and
 - (b) in relation to Keybridge operations had -
... input on various strategies, voting preferences and communications to externals. In particular, we note that Mr Bolton and Mr Khan agreed the strategy for obtaining Molopo Board representation on 17 February, provided significant input on how Keybridge should vote at the NAC AGM and agreed the salary to be paid to Mr Hartnell as one of Keybridge's nominees to the Molopo Board. Mr Bolton also has involvement in more administrative related tasks at Keybridge (such as the design of its website and commenting on Keybridge's proposed market announcements etc).
177. We note that Mr Bolton was involved in the organisation of the settlement instructions for Aurora's purchase of Molopo shares from Mr Skyler Wichers.
178. Aurora submitted that *"Mr Bolton is not instrumental in the operations of Aurora. He is not involved in the day-to-day management of Aurora and plays no role in deliberations or decisions by the board of directors of Aurora..."*
179. Aurora also submitted that:
- (a) the examples ASIC provided were *"limited instances of Mr Bolton interacting with Mr Patton."*
 - (b) *"Mr Bolton is an investor in the AI Unit Trust and as such has a commercial interest to see Aurora succeed and to provide assistance to the Aurora management team when requested"* and
 - (c) it was unreasonable to *"conflate"* ad hoc assistance, when Aurora's resources were stretched, with Mr Bolton being *"instrumental"* in its operations.
180. We think the interactions between Mr Patton and Mr Bolton were more than *"limited."*
181. However, we do not think the interactions get us to the point of a shared goal between Keybridge and Aurora having been established.

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182. Keybridge submitted:

...Mr Bolton did not attend any Keybridge Board meetings and was not involved in Board communications in relation to Keybridge. He was, however, a paid consultant to Keybridge and accordingly Keybridge's Board and management consulted Mr Bolton from time to time on various matters, including to a very limited extent matters concerning Molopo. As outlined in previous submissions the whole of the Board and management of Keybridge was new and it was important for the new Board and management to receive information regarding the many, varied and complex assets of Keybridge and Mr Bolton was well placed to provide such information.

183. While we conclude that Mr Bolton's involvement in Keybridge and Keybridge's investment in Molopo was more than "to a very limited extent" the evidence does not allow us, in the end, to find that Keybridge and Aurora had reached a consensus in relation to Molopo. In particular, at the level of decision-making in relation to Molopo, we accept that Mr Patton was excluded by Keybridge from about mid-November 2016.

184. However Mr Bolton's role in relation to Keybridge's and Aurora's investments in Molopo, together with Mr Patton, is a key factor leading to our conclusion that unacceptable circumstances exist in relation to the affairs of Molopo.

185. Confidential evidence was provided to us by Aurora relevant to its commercial objects concerning Molopo, about which we say little, for obvious reasons. It is sufficient to note that, having given it careful consideration, we do not find it assists Aurora's submission that it had materially divergent objectives from Keybridge. If we had been minded to draw any inference from the material it would have been to the contrary.

Prior collaborative conduct

186. ASIC submitted that Aurora and Keybridge had collaborated in relation to other listed entities, and it was reasonable to infer that collaboration extended to Molopo. ASIC identified:

- (a) treating shareholdings in Naos Absolute Opportunities Company Limited (NAC) as a voting bloc and
- (b) defending Aurora's position as responsible entity of HHY Fund, AGIT and AFARF.

NAC voting bloc

187. In about November 2016, Keybridge and Aurora held, if aggregated, approximately 11.4% of NAC.

188. The NAC annual general meeting for 2016 was to be held on 18 November 2016. Three resolutions were proposed – remuneration report, auditor remuneration and re-election of one director.

189. By email dated 14 November 2016, Mr Ho (Keybridge) emailed Messrs Patton, Bolton, Johnson, Khan and Siciliano, noting that Keybridge held shares in NAC for itself and AFARF, and that HHY held shares. He asked:

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I am not sure about voting on the HHY holding as the corro goes to [Aurora]

Can I please have the Investment Committee's position on voting directions by COB Tuesday so that voting can be lodged Tuesday night (Perth time) and Wednesday morning...by [Aurora].

190. The investment committee comprised Mr Patton and Mr Johnson, although Mr Patton did not participate in relation to Molopo.
191. The exchanges were:
- (a) Mr Patton supported all resolutions, saying “[Mr Johnson], I’m supportive of all the resolutions. Do you concur?”
 - (b) Mr Bolton suggested “Vote against REM report (as we can probably defeat it) and abstain on others (as we can’t defeat). Nuisance value. Best to give them a reason to get us out, or bring them to the table.”
 - (c) Mr Khan opposed all resolutions, saying “My inclination is to vote against all resolutions. We owe them nothing and our intention should be made clear ... It also sends a clear signal we are to be dealt with our (sic) we will be hostile”.
 - (d) Mr Johnson agreed with Mr Khan
 - (e) Mr Patton queried whether to vote against only the REM report and
 - (f) Mr Bolton agreed with Mr Patton, saying “however note that it's not necessary for Keybridge/HHY to vote the same way as Aurora.”
192. ASIC submitted that the need for Mr Bolton to “point out to experienced businessmen that it is not necessary for Keybridge and HHY to vote the same way as Aurora” suggested it was usual for them to do so.
193. Mr Bolton submitted that he made the comment (paragraph 191(f)) to demonstrate that Keybridge (as manager of HHY) could ask Aurora (as responsible entity) to vote in a particular way but it was Aurora’s decision. He submitted that this “nuance of managed investment schemes” could easily be lost.
194. It is not clear why Mr Bolton made the statement but we doubt it conveyed the message he submitted was its purpose.
195. We consider that Mr Bolton’s participation in the exchange indicated his view of the Keybridge and HHY Fund shares as a ‘bloc’, and also that he had a role in Aurora.

Defending Aurora as responsible entity

196. ASIC submitted that Keybridge and Aurora collaborated to protect Aurora's position as responsible entity.
197. A major unit holder in Aurora funds, Wilson Asset Management, had requisitioned meetings to remove Aurora as the responsible entity of HHY, AGIT and the Aurora Property Buy-Write Income Trust (**Buy-Write**).
198. On 12 September 2016, Mr Johnson emailed Messrs Sormann, Patton and Cato that “[Keybridge] should increase its holding in HHY if we wish to defend the position of

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Aurora as Responsible Entity.” The estimated cost was \$270,000. Keybridge increased its holding in HHY from 21.08% to 24.03%. (It was also suggested that Keybridge increase its voting power in Molopo to above 19% for an estimated cost of \$200,000.)

199. Keybridge undertook its purchases at a time when it was in need of cash. According to Keybridge board minutes of 22 September 2016, under the heading “KBC Cash Position” it said “*The Board noted the current position and the need to sell an asset in the short to medium terms. The Board to consider various options.*”
200. ASIC submitted that investments in other funds were made to defend Aurora's position. In AGIT and Buy-Write, Aurora’s directors proposed that Aurora invest in AFARF (up to 19.9%), in Aurora Absolute Return Fund (up to 4.9%) and AFARF invest in Buy-Write (up to 4.9%).
201. On or about 1 December 2016, days before the requisitioned meetings, Keybridge subscribed for units in AGIT and Buy-Write. Mr Ho noted in an email: “*we need to invest and have the units allotted by Friday as the EGMs for [AGIT] and [Buy-Write] are on next Tuesday*”.
202. On 2 December 2016, AGIT, issued units to Aurora (up to 19.9%),⁴⁶ Keybridge (4.9%)⁴⁷ and (ASIC submits) Bentley/Scarborough (4.9%). Ms Poon (Aurora) confirmed allocations ‘*per phone call by Nick*’. Ms Poon deposed that the reference was in relation to Keybridge’s investment allocations in the Aurora funds. However, her email was in response to Mr Patton asking for Aurora’s investment to be increased. In our view, this is also evidence of a significant level of involvement by Mr Bolton in Aurora.
203. The meetings were due to be held on 6 and 7 December 2016. On 7 December 2016, Mr Ho asked Keybridge’s accounts department to prepare redemption forms for the two funds. On 9 December 2016, the Buy-Write units were redeemed.
204. The examples of Keybridge and Aurora acting together, in our view, while considerable do not get us to the point of drawing an inference that they have been acting together in relation to Molopo.

Common investments and dealings

205. Aurora submitted in response to our brief that its initial acquisitions of Molopo shares in July 2016 were undertaken by its investment manager, Mr Ward, who was not required to seek the approval of the directors of Aurora, or otherwise notify them (and did not do so) before making the acquisitions. However, in response to our preliminary findings, Aurora submitted that the July 2016 purchase of Molopo shares was due to the closing out of a swap.

⁴⁶ Aurora AIB substantial holder notice 6/12/16

⁴⁷ Keybridge AIB substantial holder notice 25/1/17

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206. Subsequently, from 7 to 30 October 2016, the current investment manager (Mr Siciliano) bought more Molopo shares. Aurora submitted:

These acquisitions were undertaken by Aurora's investment manager, Victor Siciliano, acting within the scope of the investment mandate delegated to him by Aurora and consistently with Aurora's investment strategy of acquiring Molopo shares while the trading price was at a deep discount to the assessed value of Molopo. Mr Siciliano was not required to seek the approval of the directors of Aurora, or otherwise notify them, before making these acquisitions (and did not do so).

207. There are no denials of either investment manager telling Mr Bolton what he was doing. Mr Bolton has not denied knowing.

208. On 10 November 2016, an investment proposal was prepared for the board and Aurora “continued to pursue [its] investment strategy of acquiring Molopo shares at a deep discount to assessed value.” The positioning was stated as “Move to a (sic) 19.99% as a balance of power stake, seek Board representation.” The proposal analysed the discount the Molopo share price trades at to its net tangible assets (effectively its net cash), and there did not appear to be any in-depth analysis of risk, particularly of the litigation liability.

209. Keybridge submitted that the decisions by Aurora to acquire Molopo shares were co-incidences of which it had no knowledge. However, Mr Patton had that knowledge. We conclude that Mr Bolton, a consultant to Keybridge, also had that knowledge.

210. Mr Bolton is invested in Aurora, through the Aurora Trust, and in Keybridge, through ASG and directly. Mr Khan is invested in Keybridge, through the Bentley group. Keybridge is invested in HHY Fund, for which Aurora is the responsible entity. Mr Patton sits on both Aurora and Keybridge boards.

211. There are a considerable number of common investments and dealings.

Common knowledge of the relevant facts

212. Keybridge made a preliminary submission that “an effective Chinese wall was in place with respect to Mr John Patton's knowledge of Keybridge's holding in Molopo and its actions and intentions with respect to the same.” The existence of information barriers was not formally documented until the board meeting of Keybridge on 23 November 2016. Keybridge submitted in response to our preliminary findings that “It was not until mid-November 2016 that it became necessary to put in place the information barrier for Mr Patton in relation to Molopo.”

213. Molopo submitted, on the other hand, that “the ‘Chinese Wall’ was purely for appearance purposes.” ASIC submitted there was limited evidence that the information barrier (ie, the Chinese Wall) operated effectively. ASIC submitted that there was no effective information barrier separating Mr Patton from Keybridge's deliberations about Molopo at key points in time.

214. Included in ASIC's evidence in support:

- (a) Keybridge's acquisition of Molopo shares in September 2016, which Mr Johnson asked Mr Patton to manage

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- (b) Keybridge's board minutes for 21 October 2016, which detail its proposals for investment in Molopo, and which are signed by Mr Patton. (We note also that they refer to dealing in HHY)
 - (c) an email from Mr Johnson on 27 October 2016 that Keybridge's meeting had agreed to “*top back up in Molopo*” “*if John [Patton] agrees*”. This was followed on 10 November 2016 by an email referring to a meeting between Messrs Johnson and Patton. Mr Johnson could not remember if he had “*mentioned that we think it would be a good idea for [Keybridge] to top up its holding in Molopo to 19.9%*.” It was not until 10 November 2016 that Mr Patton emailed to say that he was conflicted and would leave the decision to Mr Johnson and
 - (d) an email from Mr Sormann on 14 December 2016 regarding his departure from the board of Molopo, indicating that he had discussed his conduct as a director of Molopo with Mr Patton.
215. Mr Patton explained in his affidavit that Mr Sormann called him to discuss issues regarding Mr Sormann’s share loan.
216. As Molopo submitted: “*ASG could have appointed another nominee that wouldn’t require an information barrier, but it did not.*”
217. Keybridge submitted that Mr Patton was excluded from all communications except a few instances of inadvertence, which were corrected. We are not prepared to accept that he was excluded from all communications. There may have been instances where he was not included, but by and large he appeared to be involved in many, if not most, of the relevant communications.
218. ASIC submitted that “*Aurora and Keybridge have maintained (and likely still maintain) common knowledge of relevant facts and strategies.*” We agree. The appointment of Mr Patton to Keybridge’s board immediately created a conflict issue to be addressed in relation to HHY Fund. Subsequently, each of Keybridge and Aurora had a strategy for its investment in Molopo, which raised a further problem. As noted by Mr Ho, there are other problems as well.
219. We think that, even if information barriers were ultimately established, they existed more in form than substance. From 10 November 2016, there is some evidence that there was an information barrier. But it was plainly less than completely effective. More importantly, by then Mr Patton was fully apprised of Keybridge’s strategy while executing Aurora’s.
220. It is relevant to note here that a similar position subsisted in an earlier period as regards Mr Sormann. His position was not dissimilar to Mr Patton’s – from 29 December 2014 to 13 October 2016 he was a director of both Keybridge and Molopo. He gave evidence that there was an information barrier in place in Keybridge, in that he was excluded from board discussions concerning it. Nevertheless he was quite aware of Keybridge’s strategy concerning Molopo. As late as September 2016, Mr Sormann was being copied into emails regarding the

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buying of Molopo shares and had responded.⁴⁸ For example, on 12 September 2016 an email from Mr Sormann responded: “*How many do we buy to go just over 19%.*” Significantly, Mr Sormann did not raise any alert that such emails may have been in breach of an information barrier.

221. In our view, information barriers in Keybridge concerning Molopo seem to have been very loose affairs.
222. In the end, we conclude that through Mr Patton, if not also Mr Bolton, there is common knowledge of relevant facts.

Actions which are uncommercial

223. Mr Khan and Mr Bolton’s consulting agreements with Keybridge are nearly identical, having the same retainer, having commenced at the same time, and having very similar deliverables. Both provide for services including the “*generation of investment ideas, corporate and board planning and strategies and executive management and corporate and commercial affairs*”. Keybridge submitted in response to our preliminary findings that the agreements were “standard form” and the roles were different. However, Keybridge had an experienced board; its explanation of the need for these two consultants is not persuasive.
224. It was part of the sale proposal of Aurora that Keybridge retain the management rights for HHY,⁴⁹ although Keybridge did not have the necessary expertise. Thus Keybridge needed to hire someone with expertise. It contracted Mr Siciliano. While this is not uncommercial it does, in our opinion, tend to evidence a pattern of working together.
225. In the same vein, the appointment of Mr Patton to executive duties is not uncommercial as much as evidencing a pattern of working together. Following Mr Sormann’s resignation as a Keybridge director, Mr Patton was engaged by Keybridge in an executive role. Keybridge submitted that this was because Keybridge’s CFO/Company Secretary and back-office operations were based in Melbourne and so was Mr Patton. However, Keybridge’s company secretary is Mr Ho, who is also Bentley’s company secretary, and company secretarial inquiries are directed to West Perth.⁵⁰ Moreover, Mr Patton could not (if the information barrier was effective) deal with Keybridge’s Molopo investment, which was its largest investment representing 25% of net assets (at 30 November 2016).⁵¹
226. We note also that Keybridge’s registered office in Melbourne is the same address (or the same floor) as that of Aurora, Seventh Orion and Wilson Hanna (Mr Patton’s firm).
227. Molopo submitted that the sale of Aurora was uncommercial. While there is evidence that Aurora was sold because it was not doing well, there is reason to think that the acquisition was indeed uncommercial. The business had been shopped around without success, its funds under management were declining and

⁴⁸ His email to Ms Tough suggested he was unaware of these sales. This cannot have been correct

⁴⁹ Eg, proposal put on 10 February 2016

⁵⁰ Half Year Report of Keybridge 31/12/16 – ASX announcement 28/2/17 p1

⁵¹ ASX announcement 24/1/17

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its fee income was at risk. Harmonious investing would give the acquisition a commercial basis, but on the evidence we cannot go so far as to infer association.

228. Molopo also submitted that it was uncommercial for Aurora to acquire Molopo shares because Molopo had made no announcement that might affect the price or value of Molopo shares. We do not agree. Molopo has cash giving it a net tangible asset per share materially exceeding its share price.

Association?

229. Keybridge submitted that *“every kind of association for the purposes of Chapter 6 requires, as a factual matter, some form of meeting of the minds between the alleged associates.”* We agree. The indicia above make 3 propositions clear to us:

- (a) Mr Bolton effectively controls or has substantial influence over the relevant affairs of ASG
- (b) Mr Bolton, either alone or together with Mr Patton, effectively controls or has substantial influence over the relevant affairs of Aurora and
- (c) Mr Bolton plays a significant role in the relevant affairs of Keybridge.

230. We are inclined to think Mr Bolton’s role in Keybridge could only have been possible with the agreement, or perhaps acquiescence, of Bentley, which had two nominee directors on the Keybridge’s board. In Mr Kriewaldt’s affidavit he deposes to a discussion with Mr Bolton that:

Mr Bolton explained to me that ASG and Bentley Capital Ltd (Bentley), both of which held approximately 20% of Keybridge's issued share capital, respectively, thought that the board should have two members proposed by each of them and should operate, in effect on the basis that three directors would need to vote in favour of any proposal (with the chairman not having a casting vote).

231. Keybridge submitted that *“Neither Molopo nor ASIC’s Application appear to make any allegations of collaborative conduct between Aurora and Keybridge in relation to the affairs of Molopo. To the contrary the Applications appear to rely on inferences to be drawn from common shareholdings and directors and Mr Nicholas Bolton’s involvement with both Keybridge and Seventh Orion, as well as collaborative conduct between Aurora and Keybridge in relation to entities other than Molopo....”*

232. We agree with Keybridge that Mr Bolton was instrumental, and think that he was probably encouraging each of Keybridge and Aurora into consistent strategies without them necessarily forming a meeting of the minds.

233. We accept that reaching a level of an understanding requires *“a consensus as to what is to be done, rather than a mere hope that something will be done”*. It requires that *“at least one party ‘assume an obligation’ or give an ‘assurance’ or ‘undertaking’ that it will act in a certain way. A mere expectation that as a matter of fact a party will act in a certain way is not enough, even if it has been engendered by that party.”*⁵²

⁵² *ACCC v CC (NSW) Pty Ltd (No 8)* (1999) 92 FCR 375 at 408.

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234. In the end, we consider on balance, and given the information available in the time available for inquiry, that the requisite level of satisfaction for “*as a factual matter, some form of meeting of the minds between the alleged associates*” is not present. In other words, following a review of the submissions and rebuttals on the preliminary findings, and considering the affidavits we received, we think there is insufficient evidence, when the whole of the evidence is considered, to establish that Keybridge and Aurora are associated in relation to Molopo.

Unacceptable circumstances?

235. Molopo submitted that its application evidenced “*a relationship between the Relevant Persons that has an unacceptable effect on control or is otherwise unacceptable having regard to the principles in s602.*”

236. The purposes of Chapter 6 set out in s602 incorporate the ‘Eggleston principles’ of time, information and opportunity, and also that the acquisition of voting shares should take place in an efficient, competitive and informed market.

237. Section 657A, like its forerunner provisions, is a broad power. The NCSC described the power in terms of “*an obligation of propriety*”. The section overlays the black letter of the law, applying policy whether or not the law has been complied with. Thus s657A(1) says:

The Panel may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of this Act.

238. While we are not satisfied of an association in relation to Molopo between Keybridge and Aurora, we think that the relationship between Keybridge and Aurora nevertheless gives rise to unacceptable circumstances because of the effect on control or potential control of Molopo.

239. We take from the material the following propositions:

- (a) Mr Bolton is the largest unit holder in the Aurora Trust and effectively controls or has substantial influence over the relevant affairs of Aurora
- (b) Mr Bolton effectively controls or has substantial influence over the relevant affairs of Keybridge’s largest shareholder, ASG
- (c) Mr Bolton has significant knowledge of the investment strategies of each of Keybridge and Aurora in relation to Molopo
- (d) Mr Bolton has capacity significantly to influence the investment strategies of each of Keybridge and Aurora in relation to Molopo
- (e) Mr John Patton is conflicted in his role at Keybridge in relation to the acquisition or use of Molopo shares given his role at Aurora. Information barriers established in Keybridge to address such conflicts were established late and have not been fully effective and
- (f) Despite Mr Patton being fully appraised of Keybridge’s strategy in relation to Molopo, there is no evidence of Aurora establishing an information barrier when it embarked on its strategy for Molopo.

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240. The actions of Mr Bolton and Mr Patton, combined with the material financial interest each had in Aurora and Keybridge, and the influence that each exerted in Aurora and to an extent in Keybridge, gives rise to a control effect in Molopo that is otherwise unacceptable. Generally speaking, the Panel is concerned with the effect of circumstances and the effect of the circumstances here which, even absent an association, has many of the same characteristics and consequences of an association.

241. In *Alinta*, Crennan and Kiefel JJ said of s657A:

*The policy considerations here reserved to the Panel are potentially of wide range, even with statements of statutory purpose. They may involve matters relevant to the market, corporate behaviour and the interests of stakeholders beyond those directly affected by the proposal. In this regard Panel members may be taken to be qualified to make an assessment by their knowledge and experience.*⁵³

242. As the Panel said in *Ainsworth*:

So, while the legislation should be given full weight, overlaying it is the Panel's power to declare unacceptable circumstances, exercisable even in the absence of a contravention. Even accepting that item 7 is limited to an acquirer, disposer or an associate (as defined in s12), we think that s657A enables us to make a declaration of unacceptable circumstances in the absence of a finding of association, if (at the risk of paraphrasing):

(a) there is a control effect and the circumstances appear to us to be unacceptable (s657A(2)(a)) or

(b) there are otherwise circumstances that appear to us to be unacceptable having regard to the s602 principles (s657A(2)(b)).

That is not to say the Panel can operate at large. Section s657A must operate according to a set of principles. Key principles are set out in s657A itself. Thus the Panel must:

(a) consider the public interest (s657A(2)) and

(b) have regard to the purposes of Chapter 6 set out in s602, the other provisions of the Act and any rules or regulations (s657A(3)).

*The Panel may also consider any other matters it thinks are relevant.*⁵⁴

243. Moreover, the policy of Chapters 6 to 6C might otherwise be frustrated if the aggregation of voting power (as we are minded to think has occurred in this case) could not be remedied and such aggregation led to the detriment of other shareholders in Molopo. It is for this type of reason that Parliament gave the Panel broad powers to deal with circumstances that are “unacceptable”.

⁵³ *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2 at [168]

⁵⁴ *Ainsworth Game Technology Limited 01 & 02* [2016] ATP 9 at [98]-[100]

Extension of time to make application

244. Section 657C(3) says:

An application for a declaration under section 657A can be made only within:
(a) two months after the circumstances have occurred; or
(b) a longer period determined by the Panel.

245. As stated in QNA:

... Before the discretion to extend time may be exercised under s 657C(3) those circumstances require to be proved. There may be a factual contest. There is no difficulty, in that situation, for the Panel first resolving the factual questions and thereafter determining whether or not to extend time under s 657C(3). The legislative scheme here does not suggest a different approach.⁵⁵

246. The first task then is to determine what “circumstances” are relevant in this matter for the purposes of s 657C(3)(a). In *Austral Coal 03* the Panel mentioned two of the relevant considerations for an extension of time under s 657C(3).

247. The first consideration is the principle that the discretion to extend time should not be exercised lightly.⁵⁶ We note, as submitted by Keybridge, “*The time limit was set by the legislature to provide certainty to market participants in the context of takeovers that actions could not be challenged indefinitely*” and take this into account.

248. The second consideration is that it would be undesirable for a matter to go unheard, because it was lodged outside the 2 month time limit, if essential matters supporting it first came to light during the 2 months preceding the application. This consideration has some significance here. The circumstances which came to light during the 2 month period included Keybridge’s s 249D requisition on 12 March 2017 and Aurora’s notice on 31 March 2017 that it would nominate a director of Molopo.

249. Other relevant considerations include whether there is an adequate explanation for any delay, and whether parties to the application or third parties will be prejudiced by the delay. ASIC submitted that the matter was complex, with voluminous documentation. ASIC also submitted that, given its powers, it was appropriate for it to make further inquiries rather than immediately applying to the Panel. We agree.

250. One powerful consideration in favour of extending time is, in our view, that a number of Aurora’s acquisitions occurred within the 2 months preceding the applications. Aurora submitted that it and its unit holders may be prejudiced if an extension were granted since it acquired much of its holding in Molopo more than a month after ASIC had most of the information it needed to form a view on the matter. We do not accept Aurora’s submission. First, prejudice of the kind to which Aurora refers is properly to be taken into account in deciding what, if any, relief is

⁵⁵ *Queensland North Australia Pty Ltd v Takeovers Panel* [2015] FCAFC 68 at [75]

⁵⁶ A similar principle was articulated in *Golden Circle Ltd 02* [2007] ATP 24 at [14], where the Panel said “... *When an application is made late in a process, the prejudice to one or other party is likely to be greater and the Panel requires more cogent reason to intervene.*” This was adopted in *Blue Energy Limited* [2009] ATP 15

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granted if a declaration is made. Secondly, Aurora does not say that it acquired the shares in the belief that ASIC's inquiry was complete. We do not think any such belief would have been reasonable in any event. In those circumstances Aurora may be characterised as having taken a calculated risk.

251. Molopo drafted an application in November 2016, and may therefore be said to have been in a position to commence its application earlier. Instead, Molopo referred the matter to ASIC for investigation. While Molopo's position is weaker than ASIC's, we think it was reasonable for it to refer the matter to ASIC. And having done so, it was reasonable to await the outcome of ASIC's investigation.
252. In any event, as ASIC's application is to proceed the significance of discretionary considerations against extending time for Molopo's application is diminished.
253. Accordingly, we extend time for ASIC's application and Molopo's application, each to the date on which it was made.

Extension of time to make declaration

254. Section 657B says:

The Panel can only make a declaration under section 657A within:

- (a) 3 months after the circumstances occur; or
- (b) 1 month after the application under section 657C for the declaration was made; whichever ends last. The Court may extend the period on application by the Panel.

255. Having considered the factors relevant to an application to Court under s657B,⁵⁷ we considered that an application for extension of time under s657B was warranted. We sought an extension of time from the Federal Court under s657B, which was granted until 31 May 2017.
256. Among other orders, the Court ordered:

*Pursuant to s 657B of the Corporations Act 2001 (Cth), the time in which the plaintiff, comprising the sitting panel of the Takeovers Panel constituted under s 184 of the Australian Securities and Investments Commission Act 2001 (Cth), may make a declaration under s 657A of the Corporations Act in relation to the affairs of Molopo Energy Limited (ACN 003 152 154) pursuant to the application made by that company and/or the application made by the Australian Securities and Investments Commission to the Takeovers Panel, be extended to 5pm on 31 May 2017.*⁵⁸
257. An order of confidentiality in respect of certain exhibits was also made.
258. We appreciate the attitude adopted by the parties, namely that, in making the Court application, each party either consented to, or did not oppose, the extension.

⁵⁷ *Re Takeovers Panel* [2002] FCA 1120, *Palmer Leisure Coolum Pty Ltd v Takeovers Panel* [2015] FCA 1498

⁵⁸ *Takeovers Panel v Keybridge Capital Limited, in the matter of Molopo Energy Limited* [2017] FCA 469

DECISION

259. We considered the cumulative effect of the relevant material. Further, when making our assessment we relied on our skills and experience as practitioners and as members of the sitting Panel.
260. It appears to us that:
- (a) the acquisition of control over voting shares in Molopo has not taken place in an efficient, competitive and informed market and
 - (b) the holders of shares in Molopo do not know the identity of persons who have acquired a substantial interest in Molopo.
261. For the reasons above it appears to us that the circumstances are unacceptable having regard to:
- (a) the effect that we are satisfied they are having, will have or are likely to have on the control, or potential control, of Molopo and
 - (b) in the alternative, the purposes of Chapter 6 set out in section 602
262. 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 s657A(3).

Orders

263. Following the declaration, we made the final orders set out in Annexure C. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'⁵⁹ if 4 tests are met:
- (a) it has made a declaration under s657A. This was done on 30 May 2017.
 - (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 31 May 2017. Each party made submissions and rebuttals.
 - (d) it considers the orders appropriate to, in this situation, protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. For the reasons below, we are satisfied that our orders do this.
264. ASIC submitted that, for the most part, the unacceptable circumstances arose from the date that Seventh Orion acquired Aurora (ie, 30 June 2016) and the shares acquired from that time by Keybridge and Aurora should be vested for sale. Molopo made a similar submission. We note that ASIC's application sought an order vesting any Molopo shares acquired by Keybridge and Aurora after 4 July 2016, but this was based on a different case to the one we have ultimately found.

⁵⁹ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

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265. ASIC submitted that a voting restriction order would not protect the interests of other holders of Molopo shares and persons who may trade in Molopo shares.
266. Aurora submitted that appropriate orders should be limited to:
- (a) disclosing the extent of Mr Bolton's (and as necessary, Mr John Patton's) involvement in Aurora and Keybridge with respect to the affairs of Molopo, including the voting power of Aurora and Keybridge in Molopo. Keybridge made a similar submission and
 - (b) removing any suggestion or possibility of Mr Bolton's influence in respect of (a). Keybridge made a similar submission, limited to the influence of Mr Bolton over Keybridge (ie, not Aurora as well).
267. In our view, an order concerning disclosing, and restricting, the involvement of Mr Bolton and Mr Patton in Keybridge is insufficient to protect the rights and interests, and is likely to be difficult to implement and enforce. So too would be an undertaking.
268. We accept ASIC's and Molopo's submission. In our view, such an order best protects persons whose interests have been affected, namely existing Molopo shareholders and vendors from whom Keybridge and Aurora acquired Molopo shares after 30 June 2016. We accept that Aurora acquired a parcel of 418,385 Molopo shares on 20 July 2016 from the unwinding of an equity derivative and would not include those in the divestiture order.
269. Each of Keybridge and Aurora made submissions that divestiture would be unfairly prejudicial.
270. In Aurora's case, it submitted that it held its investment as a responsible entity whose unit holders were not responsible for the unacceptable circumstances. That, of course, is often the case for shareholders as well. That they gain or lose by the actions of management is a normal incident of such investments and, while perhaps prejudicial, it is not unfair prejudice.
271. Aurora also submitted that a divestment order would likely create substantial overhang in the market. This, too, is a typical consequence of such an order and not unfairly prejudicial.
272. Keybridge submitted that unfair prejudice arose because the unacceptable circumstances did not identify any action taken by Keybridge itself other Mr Patton and Mr Bolton being present at Keybridge's strategy meeting and that information barriers were established (in the Panel's view) late and ineffectively. These are key activities. It also submitted that it could not find any Panel divestiture order having been made in the absence of a finding of a breach of the Corporations Act. There has been an example,⁶⁰ and in any event, the absence of a previous remedy of this type would not be a cause for unfair prejudice.
273. We considered whether divestment of all the shares acquired after 30 June 2016 was appropriate since that would affect Aurora much more than Keybridge.

⁶⁰ *Australian Pipeline Trust 01* [2006] ATP 27; see also *Real Estate Capital Partners USA Property Trust* [2012] ATP 6

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Keybridge submitted that, prior to 30 June 2016, it had voting power in Molopo of 19.68%, which decreased by reason of the sale of Aurora and has not since increased significantly. It submitted that a vesting order:

... should be restricted to the shares acquired by Keybridge in 2017, being those shares acquired after Mr Bolton became a consultant to Keybridge and Mr Patton became an executive director of Keybridge and after they attended the October strategy meeting.

274. We do not agree. The unacceptable circumstances we have found date from 30 June 2016 and in so far as Mr Bolton was a key part of such circumstances it was in relation to both Keybridge and Aurora.
275. Aurora submitted that the Panel should not make a vesting order. However, it did not comment on the proportions in which vesting should occur should we decide to make such an order, despite the orders brief specifically asking “*What proportions of Aurora and Keybridge’s shares should be subject to a vesting order if such an order were made?*”. Accordingly, we are comfortable with the order in the terms we have made.
276. We also made an order that neither Keybridge nor Aurora may vote the shares to be vested in ASIC at the Molopo AGM, currently scheduled for 20 June 2017. This order supports the vesting order.
277. Finally, we note ASIC’s submission that Mr Bolton should be included in the definition of “*Relevant Parties*” so as to subject him to a restraint on the acquisition of Molopo shares. We have not done so because:
- (a) it may be unnecessarily complicating our orders to extend them to entities in which Mr Bolton has an interest, particularly if it became necessary to identify them and
 - (b) we note that any acquisition of Molopo shares by Mr Bolton or an entity connected to him might well amount to new circumstances that could be the subject of a fresh application to the Panel.

Costs

278. Molopo sought an order for costs, submitting that “*Molopo has been put to considerable time and expense beyond what is ordinarily required to make a Panel application and prosecute it given the multiple versions of draft documents, significant volume of material and other ultimately irrelevant documents that required review.*” Molopo referred to *Minemakers* where the Panel made a costs order and noted:

We are satisfied that Minemakers was put to additional expense, beyond what might have been required to make a Panel application and prosecute it, by the multiple versions of the replacement bidder’s statement that needed to be reviewed before the disclosure was sufficiently satisfactory. Adopting the principle from Skywest 03, we consider that UCL failed to conduct itself in a professional and businesslike fashion and the current circumstances warrant the making of a costs order.⁶¹

⁶¹ *Minemakers Limited* [2012] ATP 8 at [75], footnote omitted

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279. ASIC said that it made no submissions on costs.
280. Keybridge submitted that no aspect of the matter justified the Panel departing from its position that costs orders are the exception not the rule. Aurora made a similar submission, noting that ASIC and Molopo had failed to establish the case of association and denying it had supplied irrelevant material.
281. We have decided that it is not appropriate in the circumstances to award costs.

Other matters

282. While we accept that we asked broad questions in our brief, and, as is usual in Panel matters there was limited time to respond, we are inclined to think that we were deluged with irrelevant material which tended to obscure the true position and the fact that some relevant material was not produced. This is not only unhelpful to a speedy resolution of the matter (which Parliament demands), but is not in the spirit which the Panel expects parties to respond.
283. In addition we think that some of the answers we were given were non-responsive, or literally true but incomplete, or tending to evade the point of the question.
284. Molopo considered that it was required by ASX to deal with its cash position in compliance with the listing rules. There is a meeting to consider board changes scheduled for 20 June 2017. This date resulted from Molopo's application to ASIC for relief to postpone its AGM. Aurora applied for an interim order, in effect, to prevent Molopo making any material acquisition or investment in the meantime. We decided against such an order but indicated to Molopo that we would be surprised if it were to undertake a transaction in the days before a shareholder vote given the time that has passed, at least without giving notice that it intended to do so. We also indicated that we had no objection to ASX being informed of our view.
285. Molopo did not inform ASX or wait before going into a trading halt (and subsequent suspension from trading) pending the announcement of a strategic investment. Molopo did not provide any other notice to the parties or the Panel, which we found disappointing.

John Sheahan QC

President of the sitting Panel

Decision dated 30 May 2017 (declaration), 14 June 2017 (orders)

Reasons given to parties 15 June 2017

Reasons published 23 June 2017

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Reasons – Molopo Energy Limited 01 & 02
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Advisers

Party	Advisers
Molopo	King & Wood Mallesons
Aurora	Norton Gledhill
Keybridge	Bennett + Co



Australian Government

Takeovers Panel

Annexure A

**AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A
UNDERTAKING**

MOLOPO ENERGY LIMITED 01

Keybridge undertakes to the Panel that, without the Panel's consent, it will not, and will procure that each of its associates does not, dispose of, acquire, transfer, charge or otherwise deal with shares in Molopo without providing the Panel with at least two (2) clear business days' notice in advance of any such proposed dealing.

This undertaking continues until the conclusion of the Panel's proceedings. Keybridge agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

In this undertaking the following terms have the corresponding meaning:

Keybridge Keybridge Capital Limited (ACN 088 267 190)

Molopo Molopo Energy Limited (ACN 003 152 154)

**Signed by David Sanders of Bennett + Co
with the authority, and on behalf, of Keybridge Capital Limited**

Dated: 19 April 2017



Australian Government

Takeovers Panel

**AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A
UNDERTAKING**

MOLOPO ENERGY LIMITED 02

Keybridge undertakes to the Panel that, without the Panel's consent, it will not, and will procure that each of its associates does not, dispose of, acquire, transfer, charge or otherwise deal with shares in Molopo without providing the Panel with at least two (2) clear business days' notice in advance of any such proposed dealing.

This undertaking continues until the conclusion of the Panel's proceedings. Keybridge agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

In this undertaking the following terms have the corresponding meaning:

Keybridge Keybridge Capital Limited (ACN 088 267 190)

Molopo Molopo Energy Limited (ACN 003 152 154)

**Signed by David Sanders of Bennett + Co
with the authority, and on behalf, of Keybridge Capital Limited**

Dated: 19 April 2017



Australian Government

Takeovers Panel

**AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A
UNDERTAKING**

MOLOPO ENERGY LIMITED 01

Aurora undertakes to the Panel that, without the Panel's consent, it will not, and will procure that each of its associates does not, dispose of, acquire, transfer, charge or otherwise deal with shares in Molopo without providing the Panel with at least two (2) clear business days' notice in advance of any such proposed dealing.

This undertaking continues until the conclusion of the Panel's proceedings. Aurora agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

In this undertaking the following terms have the corresponding meaning:

Aurora Aurora Funds Management Limited (ACN 092 626 885), including in its capacity as responsible entity for the Aurora Fortitude Absolute Return Fund (ARSN 145 894 800) and Aurora Global Income Trust (ARSN 127 692 406)

Molopo Molopo Energy Limited (ACN 003 152 154)

**Signed by Hugh Scales of Norton Gledhill
with the authority, and on behalf, of Aurora Funds Management Limited, including in
its capacity as responsible entity for the Aurora Fortitude Absolute Return Fund and
Aurora Global Income Trust**

Dated: 19 April 2017



Australian Government

Takeovers Panel

**AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A
UNDERTAKING**

MOLOPO ENERGY LIMITED 02

Aurora undertakes to the Panel that, without the Panel's consent, it will not, and will procure that each of its associates does not, dispose of, acquire, transfer, charge or otherwise deal with shares in Molopo without providing the Panel with at least two (2) clear business days' notice in advance of any such proposed dealing.

This undertaking continues until the conclusion of the Panel's proceedings. Aurora agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

In this undertaking the following terms have the corresponding meaning:

Aurora Aurora Funds Management Limited (ACN 092 626 885), including in its capacity as responsible entity for the Aurora Fortitude Absolute Return Fund (ARSN 145 894 800) and Aurora Global Income Trust (ARSN 127 692 406)

Molopo Molopo Energy Limited (ACN 003 152 154)

**Signed by Hugh Scales of Norton Gledhill
with the authority, and on behalf, of Aurora Funds Management Limited, including in
its capacity as responsible entity for the Aurora Fortitude Absolute Return Fund and
Aurora Global Income Trust**

Dated: 19 April 2017



Australian Government

Takeovers Panel

Annexure B

CORPORATIONS ACT

SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

MOLOPO ENERGY LIMITED 01 AND 02

CIRCUMSTANCES

1. Keybridge Capital Limited (**Keybridge**) currently has a relevant interest in 19.95% of Molopo Energy Limited (**Molopo**). Australian Style Group Pty Ltd (**ASG**) holds 21.16% of Keybridge. ASG is wholly owned by a company whose shareholders are Mr Nicholas Bolton (1%) and Ms Georgia Bolton, Mr Bolton's sister (99%).
2. Aurora Funds Management Limited (**Aurora**)⁶² currently has a relevant interest in 17.89% of Molopo.
3. On or about 30 June 2016, Seventh Orion Pty Ltd (**Seventh Orion**)⁶³ acquired Aurora from Keybridge. At the time, Aurora had a relevant interest in approximately 1.88% of Molopo.
4. The shares in Aurora are held on trust for Aurora Investment Unit Trust, whose unit holders include:
 - (a) Mr John Patton (26.1%) and
 - (b) Mr Bolton (49.9%).
5. Mr Bolton was managing director of Keybridge until December 2015 when he resigned after he was disqualified from managing a corporation.
6. Mr Bolton is a consultant to Keybridge, providing Keybridge with advice and assistance in relation to its investments, including in Molopo.
7. Mr Bolton also provides Aurora with advice and assistance in relation to its investments, including describing himself as a consultant to introduce Aurora to existing Molopo shareholders who might consider selling their Molopo shares.
8. Based on its commercial experience, from the material before it, the Panel considers that:
 - (a) Mr Bolton effectively controls or has substantial influence over the relevant affairs of ASG

⁶² As responsible entity for Aurora Global Income Trust and Aurora Fortitude Absolute Return Fund

⁶³ As trustee for Aurora Investment Unit Trust

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- (b) Mr Bolton, either alone or together with Mr Patton, effectively controls or has substantial influence over the relevant affairs of Aurora and
 - (c) Mr Bolton plays a significant role in the relevant affairs of Keybridge.
9. On or about 30 June 2016, Mr Patton was appointed as managing director of Aurora.
 10. On 10 August 2016, Mr Patton was appointed as a non-executive director of Keybridge, nominated by ASG.
 11. On 20 September 2016, Keybridge filed a substantial holder notice stating that it had acquired 1,682,763 Molopo shares and had voting power of 19.15% in Molopo. Mr Patton was initially tasked with managing the acquisition of those shares on behalf of Keybridge. Ultimately, another Keybridge director instructed Keybridge's broker to acquire the relevant Molopo shares.
 12. From 7 October 2016 to 31 October 2016, Aurora acquired shares in Molopo, with its total interest increasing to approximately 3.5% of Molopo's issued capital.⁶⁴ Mr Patton was consulted, or at the very least informed, in relation to these acquisitions.
 13. On 13 October 2016, Mr Patton was appointed executive Chairman of Keybridge.
 14. On 26 October 2016, Keybridge held a strategy meeting where its strategy in relation to Molopo was discussed. Mr Patton and Mr Bolton were both present at that meeting.
 15. Mr Patton is conflicted in his role at Keybridge in relation to the acquisition or use of Molopo shares given his role at Aurora. Information barriers were established in Keybridge to address such conflicts, but, in the Panel's view, were established late and have not been fully effective.
 16. In early November 2016, at Mr Patton's request, an Aurora investment paper was prepared proposing that Aurora purchase up to 19.9% in Molopo. From 1 November 2016 to 17 March 2017, Aurora acquired shares in Molopo, resulting in its then relevant interest in 17.89% of Molopo's issued capital. The Panel considers that Mr Bolton and Mr Patton have influenced Aurora's acquisition of a substantial interest in Molopo.
 17. On 13 March 2017, Keybridge requisitioned a meeting of Molopo shareholders under s249D⁶⁵ to consider:
 - (a) resolutions for the removal of all the directors of Molopo and
 - (b) the appointment of three new directors nominated by Keybridge.
 18. On 22 March 2017, Mr Patton on behalf of Aurora wrote to the Chair of Molopo seeking that one or more of Aurora's nominees be put to shareholders for election to the Molopo board. Aurora ultimately nominated one director, Mr Ben Norman, to be put to shareholders for election to the Molopo board.

⁶⁴ Aurora had previously acquired 418,385 Molopo shares on or about 20 July 2016 as a result of the unwinding of an equity derivative

⁶⁵ 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)

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19. The Panel considers that Aurora and Keybridge are pursuing consistent strategies in relation to Molopo.
20. The Panel considers that as Mr Bolton:
 - (a) is the largest unitholder in the Aurora Investment Unit Trust and effectively controls or has substantial influence over the relevant affairs of Aurora
 - (b) effectively controls or has substantial influence over the relevant affairs of Keybridge's largest shareholder, ASG
 - (c) has significant knowledge of the investment strategies of each of Keybridge and Aurora in relation to Molopo and
 - (d) has the capacity to influence significantly the investment strategies of each of Keybridge and Aurora in relation to Molopo,

the involvement of Mr Bolton, alternatively the involvement of Mr Bolton together with Mr Patton, in Keybridge and Aurora gives rise to unacceptable circumstances in relation to the affairs of Molopo.

EFFECT

21. It appears to the Panel that:
 - (a) the acquisition of control over voting shares in Molopo has not taken place in an efficient, competitive and informed market and
 - (b) the holders of shares in Molopo do not know the identity of persons who have acquired a substantial interest in Molopo.

CONCLUSION

22. It appears to the Panel that the circumstances are unacceptable circumstances
 - (a) having regard to the effect that the Panel is satisfied they are having, will have or are likely to have on the control, or potential control, of Molopo and
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.
23. 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).

Takeovers Panel

**Reasons – Molopo Energy Limited 01 & 02
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DECLARATION

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

**Bruce Dyer
Counsel
with authority of John Sheahan QC
President of the sitting Panel
Dated 30 May 2017**



Australian Government

Takeovers Panel

Annexure C

**CORPORATIONS ACT
SECTION 657D
ORDERS**

MOLOPO ENERGY LIMITED 01 & 02

The Panel made a declaration of unacceptable circumstances on 30 May 2017.

DIVESTMENT ORDERS

1. The Sale Shares are vested in the Commonwealth on trust for Keybridge and Aurora respectively.
2. ASIC must:
 - (a) sell the Sale Shares in accordance with these orders and
 - (b) account to Keybridge and Aurora respectively for the proceeds of sale, net of the costs, fees and expenses of the sale and any costs, fees and expenses incurred by ASIC and the Commonwealth (if any).
3. ASIC must:
 - (a) retain an Appointed Seller to conduct the sale and
 - (b) instruct the Appointed Seller:
 - (i) to use the most appropriate sale method to secure the best available sale price for the Sale Shares that is reasonably available at that time in the context of complying with these orders, including the stipulated timeframe for the sale and the requirement that none of the Relevant Parties or their respective associates may acquire, directly or indirectly, any of the Sale Shares
 - (ii) to provide to ASIC a statutory declaration that, having made proper inquiries, the Appointed Seller is not aware of any interest, past, present, or prospective which could conflict with the proper performance of the Appointed Seller's functions in relation to the disposal of the Sale Shares
 - (iii) unless the Appointed Seller sells Sale Shares on market, that it obtain from any prospective purchaser of Sale Shares a statutory declaration that the prospective purchaser is not associated with any of the Relevant Parties and

Takeovers Panel

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- (iv) to dispose of all of the Sale Shares within 6 months from the date of its engagement.
4. The Company and the Relevant Parties must do all things necessary to give effect to these orders, including:
 - (a) doing whatever is necessary to ensure that the Commonwealth is registered with title to the Sale Shares in the form approved by ASIC and
 - (b) until the Commonwealth is registered, complying with any request by ASIC in relation to the Sale Shares.
 5. None of the Relevant Parties or their respective associates may, directly or indirectly, acquire any of the Sale Shares.
 6. The Relevant Parties must not otherwise dispose of, transfer or charge any Sale Shares.
 7. None of the Relevant Parties may take into account any relevant interest or voting power that any of them or their respective associates had, or have had, in the Sale Shares when calculating the voting power referred to in Item 9(b) of s611 of the *Corporations Act 2001* (Cth), of a person six months before an acquisition exempted under Item 9 of s611.
 8. Nothing in these orders obliges ASIC to invest, or ensure interest accrues on, any money held in trust under these orders.

AGM VOTING ORDERS

9. At the Company's annual general meeting:
 - (a) Keybridge must vote no more than 46,017,543 ordinary shares⁶⁶ in the issued capital of Company on any resolution and
 - (b) Aurora must vote no more than 5,088,921 ordinary shares⁶⁷ in the issued capital of Company on any resolution.
10. If, notwithstanding order 9, any voting rights greater than the number of shares specified in order 9 are exercised by Keybridge or Aurora, the Company must disregard those votes.

Period for which orders have effect

11. Orders 1 to 5 and 8 are stayed until further order by the Takeovers Panel.
12. All other orders come into effect immediately.

⁶⁶ This number of shares represents Keybridge's current holding of ordinary shares in the Company, less the number of Sale Shares ascribed to Keybridge.

⁶⁷ This number of shares represents Aurora's current holding of ordinary shares in the Company, less the number of Sale Shares ascribed to Aurora.

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Interpretation

13. In these orders the following terms apply.

Appointed Seller	an investment bank or stock broker
ASIC	Australian Securities and Investments Commission, as agent of the Commonwealth
Aurora	Aurora Funds Management Ltd, including as responsible entity for the Aurora Fortitude Absolute Return Fund and Aurora Global Income Trust
Company	Molopo Energy Limited
Keybridge on market	Keybridge Capital Limited in the ordinary course of trading on Australian Securities Exchange and not by crossing or special crossing
Relevant Parties	Keybridge and Aurora
Sale Shares	3,666,285 ordinary shares in the issued capital of Company held by Keybridge 39,540,910 ordinary shares in the issued capital of Company held by Aurora

Allan Bulman
Director
with authority of John Sheahan QC
President of the sitting Panel
Dated 14 June 2017