



Australian Government

Takeovers Panel

**Reasons for Decision
Molopo Energy Limited 07
[2017] ATP 17**

Catchwords:

Request to vary final orders – standstill – creep – divestment

Corporations Act 2001 (Cth), sections 602, 606, items 7 and 9 of section 611, 657D; Australian Securities and Investments Commission Act 2001 (Cth), section 184

Molopo Energy Limited 03R, 04R & 05R [2017] ATP 12; Molopo Energy Limited 01 & 02 [2017] ATP 10, Sovereign Gold Company Limited [2016] ATP 12

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NA	NA	NA	NA	NA	NA

INTRODUCTION

1. The Panel, Peter Day, Ian Jackman SC (sitting President) and Tony Osmond declined a request by Keybridge Capital Limited to vary the final orders made in the *Molopo Energy Limited 03R, 04R & 05R* proceedings.
2. In these reasons, the following definitions apply.

Aurora	Aurora Funds Management Limited
Keybridge	Keybridge Capital Limited (ASX: KBC)
Molopo	Molopo Energy Limited (ASX: MPO)
Review Proceedings	<i>Molopo Energy Limited 03R, 04R & 05R [2017] ATP 12</i>

FACTS

3. In the Review Proceedings, we made a declaration of unacceptable circumstances in relation to review applications dated 1 June 2017 by Keybridge and Molopo.
4. Among other things, we considered that:
 - (a) Keybridge and Aurora were associated in relation to Molopo by no later than 26 October 2016 and contravened s606¹ and the substantial holder notice provisions and
 - (b) the actions and influence of Mr Nicholas Bolton and Mr John Patton gave rise to unacceptable circumstances in relation to the affairs of Molopo from no later than 10 August 2016.
5. On 7 July 2017, we made orders including orders to the effect that 3,666,285 Molopo shares held by Keybridge and 39,540,910 Molopo shares held by Aurora (being the

¹ 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)

number of Molopo shares acquired by Keybridge and Aurora respectively since 10 August 2016) be vested in ASIC for sale (**Vesting Orders**).

6. We also made an order that:

None of the Associated Parties [Keybridge and Aurora] or their respective associates may, directly or indirectly, acquire any shares in the Company [Molopo] before the date that is six months after the date of these orders.

(the **Standstill Order**).

7. On 27 July 2017, Aurora² announced that it intended to make a takeover bid for Molopo, subject to a number of conditions (the **Aurora Bid**).

APPLICATION

8. By application dated 24 August 2017, Keybridge sought a variation of the Standstill Order.³

9. Keybridge submitted, among other things, that:

- (a) the parties were not provided an opportunity to make submissions in relation to the Standstill Order as it was not included in the proposed draft orders
- (b) the Panel's purpose in making the Standstill Order was to impose a standstill consistent with the policy underpinning Item 9 of s611,⁴ but the terms of the Standstill Order went beyond that purpose
- (c) the Standstill Order has the effect of denying Molopo shareholders the opportunity to sell their shares into the Aurora Bid for a six month period which would significantly reduce competitive tension if a competing takeover bid for Molopo was made by a third party
- (d) the wide scope of the Standstill Order unfairly prejudices Keybridge, Aurora and all Molopo shareholders as it potentially deprives them of an opportunity to dispose of their shares in a manner that is otherwise permitted by the Corporations Act and
- (e) the Standstill Order should be varied to substitute an order in the same terms as the order made in *Sovereign Gold Company Limited* [2016] ATP 12, being:

None of the Associated Parties may:

- (a) ...
- (b) *rely on Item 9 of s611 earlier than six months after these orders come into effect.*

10. We note that an order to the effect of the Standstill Order (but for 12 to 18 months) was proposed by Molopo in the Review Proceedings and addressed by each of

² as responsible entity for the Aurora Fortitude Absolute Return Fund

³ as the Review Proceedings had been completed, the substantive President of the Panel appointed us under ASIC Act s184 to consider this request

⁴ referring to *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12 at [291]-[294]

Keybridge, Aurora and ASIC in rebuttal submissions. We consider that provided each of the parties with a sufficient opportunity to make submissions about the matter to satisfy s657D(1). Each of them, and ASIC, were given a further opportunity in these proceedings to make submissions and rebuttals in relation to the Standstill Order and whether it should be varied under s657D(3).

DISCUSSION

11. We invited submissions from Keybridge as to whether there was a specific action that Keybridge was proposing to take which would be prohibited by the Standstill Order.
12. Keybridge submitted that it *“has had discussions with a Molopo shareholder about the possible acquisition by Keybridge of further shares in Molopo which would require Molopo shareholder approval pursuant to Item 7 of section 611 of the Corporations Act”*. It submitted that the Standstill Order would prevent any such acquisition being settled prior to 7 January 2018 and would unfairly prejudice the potential vendor.
13. ASIC submitted that it is not clear that the potential selling Molopo shareholder would be unfairly prejudiced by having to defer its proposed sale until 7 January 2018. ASIC also queried what benefits the broader Molopo shareholder base would derive from the transaction apparently contemplated by Keybridge’s discussions, unlike a takeover bid that may benefit all shareholders with a control premium.
14. In our view, Keybridge’s request for a variation is premature, given it relates only to a *“possible acquisition”*. There is nothing to suggest that the variation requested by Keybridge is currently required to ensure an efficient and competitive market for Molopo shares or to prevent unfair prejudice to any person. If Keybridge develops a concrete proposal, it can make a further request. The Standstill Order does not prevent Keybridge continuing its negotiations with the Molopo shareholder in the meantime.
15. The Standstill Order was intended to protect rights and interests by allowing the market time to understand what has been occurring in Molopo and to make decisions accordingly.⁵ It seeks to provide the market with a clear and simple *“pause”* and for that reason we considered that it requires a wider scope than Item 9 of s611, noting that the order can be varied under s657D(3) if that is warranted. The Standstill Order was also intended to limit acquisitions by Keybridge and Aurora while the Vesting Orders are carried out. Given that, we presently consider that we would be unlikely to vary the Standstill Order before the shares the subject of the Vesting Orders are sold. However, we have not ruled that out.

⁵ *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12 at [294]

DECISION

16. For the reasons above, Keybridge has not satisfied us that there is currently any need to vary the Standstill Order. We are open to considering a further request for a variation of the orders should that be required by a more concrete and specific proposal.

Ian Jackman SC

President of the sitting Panel

Decision dated 5 September 2017

Reasons given to parties 22 September 2017

Reasons published 27 September 2017

Takeovers Panel

Reasons - Molopo Energy Limited 07
[2017] ATP 17

Advisers

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