



Australian Government

Takeovers Panel

**Reasons for Decision
Molopo Energy Limited 08
[2017] ATP 20**

Catchwords:

Decline to conduct proceedings – announcement of bid – efficient, competitive and informed market – frustrating action

Corporations Act 2001 (Cth), sections 608(2), 608(3), 657D, 657F(1), 657G

Procedural Rules, rule 2.1.1(f), 3.1.1(a)

Molopo Energy Limited 07 [2017] ATP 17, Molopo Energy Limited 06 [2017] ATP 14, Molopo Energy Limited 03R, 04R & 05R [2017] ATP 12, Molopo Energy Limited 01 & 02 [2017] ATP 10

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

INTRODUCTION

1. The Panel, Karen Evans-Cullen, Peter Hay (sitting President) and Denise McComish, declined to conduct proceedings on an application by Molopo Energy Limited in relation to its affairs. The application concerned an announcement by Aurora Funds Management Limited as responsible entity of the Aurora Fortitude Absolute Return Fund that it intended to make a new off-market takeover bid for 100% of the ordinary shares in Molopo Energy Limited. Molopo submitted, amongst other things, that the proposed bid was not a genuine bid and that acceptances of offers under the proposed bid would contravene the letter or spirit of a previous order of the Panel. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

Aurora	Aurora Funds Management Limited as responsible entity of the Aurora Fortitude Absolute Return Fund
Keybridge	Keybridge Capital Limited
Molopo	Molopo Energy Limited
Order 9	An order made by a review Panel in <i>Molopo Energy Limited 03R, 04R and 05R</i> ¹ that “None of [Keybridge and Aurora] or their respective associates may, directly or indirectly, acquire any shares in [Molopo] before the date that is six months after the date of these orders”
Orient	Orient FRC Ltd

¹ [2017] ATP 12

Proposed Bid Intended off-market takeover bid for 100% of the ordinary shares in Molopo, announced by Aurora on 12 September 2017²

FACTS

3. Molopo is an ASX listed entity (ASX: MPO). As at 30 September 2017, Molopo's principal assets were \$55 million in cash and a 50% interest in Orient (which had a value of US\$7 million). Molopo's principal activities in 2015 and 2016 were to manage litigation matters, preserve cash reserves and assess acquisition opportunities in the oil and gas sector.
4. Molopo has been the subject of a number of Panel proceedings.³ In *Molopo Energy Limited 03R, 04R and 05R*,⁴ the review Panel made a declaration of unacceptable circumstances and orders in relation to the affairs of Molopo, including Order 9, which restricts Aurora and Keybridge from acquiring any shares in Molopo for a period of 6 months from the date of that order. Order 9 was made with the stated purpose of protecting "rights and interests by allowing the market time to understand what has been occurring in Molopo and to make decisions accordingly".⁵
5. On 27 July 2017, Aurora announced its intention to make an off-market takeover bid for all the issued fully paid ordinary shares in Molopo, offering consideration with a value of \$0.18 per share. On 12 September 2017, Aurora announced that it had withdrawn that offer due to Molopo's acquisition of Orient triggering its 'no material transactions' defeating condition. Aurora indicated that it intended to make a revised bid for Molopo (the Proposed Bid), offering consideration with a value of \$0.135 per share.⁶ The announcement stated that the Proposed Bid would be subject to a number of defeating conditions, including conditions regarding 'prescribed occurrences', 'no material transactions' (exceeding \$2 million) and the conduct of Molopo's business.

APPLICATION

Declaration sought

6. By application dated 23 October 2017, Molopo sought a declaration of unacceptable circumstances. Molopo submitted that Aurora was reckless in announcing the Proposed Bid, on the basis that the Proposed Bid could not practically proceed

² Aurora lodged its bidder's statement in connection with the Proposed Bid on 26 October 2017. The Panel did not form any views on the adequacy of Aurora's bidder's statement – the application was made prior to the lodgement of the bidder's statement and did not contain any submissions on the bidder's statement. No submissions were received in relation to the bidder's statement after it was lodged

³ *Molopo Energy Limited 01 & 02* [2017] ATP 10, *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12, *Molopo Energy Limited 06* [2017] ATP 14, *Molopo Energy Limited 07* [2017] ATP 17

⁴ [2017] ATP 12

⁵ *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12 at [294]. See also *Molopo Energy Limited 07* [2017] ATP 17 at [15]

⁶ As in its earlier offer, Aurora proposed that Molopo shareholders would be able to elect to receive the bid consideration in cash (capped at \$5 million in total) or the equivalent value in new Aurora Fortitude Absolute Return Fund units

until after the standstill period in Order 9 has ended and that Aurora was using the Proposed Bid as an artifice to maintain Molopo in corporate stasis.

7. Molopo submitted that the effect of the circumstances was to inhibit the business and operations of the Molopo board of directors to the detriment of all shareholders as a whole and prevent Molopo's shares from resuming trading on the ASX. Molopo submitted that these circumstances meant that the control, or potential control, of Molopo was likely to be affected otherwise than in an efficient, competitive and informed market.

Interim orders sought

8. Molopo sought interim orders preventing Aurora from lodging a bidder's statement in relation to the Proposed Bid and requiring Aurora to announce publicly to the market that the Proposed Bid cannot proceed (on the basis that it would violate Order 9) pending determination of its application.
9. On 24 October 2017, after considering Molopo's application, the substantive President decided not to make interim orders. The President considered that there was no urgency to make any interim orders, noting that there was no material to suggest that any unacceptable circumstances (if found) could not be remedied by final orders.
10. The President noted that the question of interim orders could be revisited by the sitting Panel.

Final orders sought

11. Molopo sought final orders that:
 - (a) Aurora withdraw the Proposed Bid and
 - (b) Aurora and Keybridge each be prohibited from acquiring, or offering to acquire or announcing an intention to acquire, a relevant interest (together with their respective associates) in any Molopo shares, until after the standstill period ends on 7 January 2018.

DISCUSSION

Is the Proposed Bid a genuine bid?

12. Molopo submitted that the Proposed Bid is not a genuine bid, but rather is a 'dummy' bid designed to preclude Molopo from making further acquisitions or investments (or making any further capital commitments) in order to keep Molopo in corporate stasis until such time as Aurora (and/or Keybridge) can control and access Molopo's cash reserves.
13. Molopo submitted that the Proposed Bid would have the contemporaneous purpose of preventing Molopo from seeking to have its shares resume trading on the ASX. We note that Molopo's shares have been suspended from trading on the

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ASX since almost immediately after Aurora first announced an intention to make a bid on 27 July 2017.⁷

14. Aurora submitted that the ‘no material transactions’ defeating condition is a normal takeover bid condition and the bid should not be characterised as a dummy bid or having an ulterior motive because of its inclusion.
15. Molopo submitted that, as a consequence of the acquisition of Orient, and Orient’s participation in an oil and gas exploration and development project in the United States of America, Molopo has commitments to provide funding to Orient to allow Orient to in turn satisfy its obligations in relation to the project. Molopo stated that this funding is expected to “*exceed the ‘\$2 million’ restriction imposed by Aurora’s Proposed Bid*”. It submitted that this amount was below the materiality threshold usually applied to an ASX-listed company under normal accounting practices and standards, and was “*unduly onerous and unreasonable*”.
16. Molopo submitted that it expected Aurora would, for the purposes of seeking to further restrict Molopo from carrying on its business in the ordinary course in relation to Orient, make an application to the Panel alleging that Molopo had undertaken a frustrating action.
17. No such application has been made to date. Given that, we have not formed any views on whether any future action by Molopo that frustrates Aurora’s bid would be unacceptable.
18. Keybridge did not seek to become a party to this matter, however it did draw the Panel’s attention to an undertaking provided by Molopo to the Supreme Court of Western Australia, to the effect that Molopo would provide Keybridge with 5 clear business days’ notice before, amongst other things, entering into a ‘material transaction’ with a value of \$2.5 million or more. While this undertaking was not ultimately material to the Panel’s decision, it was clearly relevant to Molopo’s submissions regarding Aurora’s ‘no material transactions’ condition. The Panel reminds parties that they should disclose all relevant matters of fact known to them when making an application.⁸
19. It is conceivable that a bid may objectively be so unattractive to target shareholders, or have such an adverse effect on the affairs of the target, that it would give rise to unacceptable circumstances for the bid to be made. However in our view, given the circumstances discussed above, Molopo has not established such a basis for preventing the Proposed Bid from being put to Molopo shareholders.

⁷ Molopo has been exploring oil and gas investment opportunities since early in 2015 (see, for example, Molopo’s Notice of Annual General Meeting dated 28 April 2017 p9) and announced on 7 June 2017 that the ASX would require it to demonstrate, by 31 July 2017, a level of oil and gas operations sufficient to warrant the continued quotation of its securities

⁸ See Procedural Rules, rule 2.1.1(f), 3.1.1(a) and Annexure B – Application to the Takeovers Panel at paragraph 2.1

Does the Proposed Bid contravene Order 9?

20. Molopo submitted that Order 9 should be interpreted as prohibiting Aurora from acquiring any ‘relevant interest’⁹ in shares in Molopo, and that this interpretation would be consistent with the Panel’s intention in making Order 9. Molopo noted that Aurora would acquire a relevant interest in Molopo shares on receiving any acceptances of its offers. According to the proposed timetable, offers in connection with the Proposed Bid were expected to be open for acceptance from early November 2017.
21. Aurora submitted that Order 9 clearly only states that Aurora must not “*acquire any shares*” in Molopo during the standstill period.
22. Only a court can conclusively determine what Order 9 requires.¹⁰ The order refers to acquiring shares “*directly or indirectly*”, which would be close to superfluous on Molopo’s interpretation, given the breadth of the term relevant interest.¹¹ The language in Order 9 appears to be a deliberate contrast to the express use of ‘relevant interest’ in the subsequent order (order 10). In our view, acceptance of the Proposed Bid will not necessarily breach Order 9, on its face, where the offer remains conditional. We note that the Proposed Bid’s conditions give Aurora the ability to ensure that the offer remains conditional until after the end of the standstill period.

DECISION

Declaration

23. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

24. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Peter Hay

President of the sitting Panel

Decision dated 30 October 2017

Reasons given to parties 6 November 2017

Reasons published 8 November 2017

⁹ Unless otherwise indicated, all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC) and all statutory references are to the *Corporations Act 2001* (Cth)

¹⁰ Order 9 is an order made under section 657D. Section 657F(1) provides that a person who contravenes an order made under section 657D or 657E commits an offence. Section 657G provides that if a person contravenes, or proposes to contravene, an order made by the Panel under section 657D or 657E, the Court may make any orders it considers appropriate to secure compliance with the Panel’s order

¹¹ See, for example, sections 608(2) and (3)

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Advisers

Party	Advisers
Molopo	King & Wood Mallesons
Aurora	Norton Gledhill