



Australian Government

Takeovers Panel

**Reasons for Decision
Molopo Energy Limited 09
[2017] ATP 22**

Catchwords:

Decline to make a declaration – frustrating action – conference – confidential information

Australian Securities and Investments Commission Act 2001 (Cth), section 192

Australian Securities and Investments Commission Regulations 2001 (Cth), regulations 35, 37, 42

Panel Guidance Note 12 – Frustrating Action

Molopo Energy Limited 08 [2017] ATP 20, RNY Property Trust [2017] ATP 18, 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	YES	NO	NO	NO

INTRODUCTION

1. The Panel, Chelsey Drake, Peter Hay (sitting President) and Denise McComish, declined to make a declaration of unacceptable circumstances on an application by Aurora Funds Management Limited (as responsible entity of the Aurora Fortitude Absolute Return Fund) in relation to the affairs of Molopo Energy Limited. The application concerned Aurora’s off-market takeover bid for Molopo. The Panel was not satisfied that a proposed payment by Molopo would constitute a frustrating action giving rise to unacceptable circumstances and declined to make a declaration.
2. In these reasons, the following definitions apply.

Aurora	Aurora Funds Management Ltd as responsible entity for the Aurora Fortitude Absolute Return Fund
Aurora’s bid	Aurora’s off-market takeover bid for Molopo announced on 12 September 2017
Molopo	Molopo Energy Limited
No Material Transactions Condition	the defeating condition in Aurora’s bid set out below in paragraph 8
Orient	Orient FRC Ltd

FACTS

3. Molopo is an ASX listed entity (ASX: MPO). It has been the subject of a number of Panel proceedings.¹
4. On 27 July 2017, Aurora announced an off-market takeover bid for Molopo offering consideration valued at \$0.18 per share.
5. On 22 August 2017, Molopo announced that it had acquired 50% of the shares in Orient for US\$7 million (AUD\$8.75 million) from Dr Gil Feiler pursuant to a share sale agreement executed on 25 July 2017.² The announcement stated that Orient would participate in an exploration and development project for up to a 50% working interest to explore for oil and gas in a mature oil province in South Florida, U.S.A.
6. On 12 September 2017, Aurora announced the “withdrawal” of its previously announced proposed bid on the basis that Molopo’s investment in Orient triggered a proposed condition in similar terms to the No Material Transactions Condition.
7. On 12 September 2017, Aurora also announced a revised off-market takeover bid for Molopo offering consideration valued at \$0.135 per share. As in the case of its withdrawn proposed bid, 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 unquoted Aurora Fortitude Absolute Return Fund units. The announcement stated that the consideration had been reduced to reflect the estimated value dilutive impact of Molopo’s acquisition of shares in Orient. Aurora lodged its bidder’s statement on 26 October 2017.
8. One of the defeating conditions of Aurora’s bid provides:

Except for any proposed transaction reasonably full details of which are publicly announced by Molopo before the Announcement Date, none of the following events occurs during the period starting on the Announcement Date and ending at the end of the Offer Period without the written consent of Aurora:

...

- (4) *Molopo, or any subsidiary of Molopo, incurs or commits to, or grants to another person a right the exercise of which would involve Molopo or any subsidiary of Molopo incurring or committing to any capital expenditure or liability for one or more related items of greater than \$2 million, or makes an announcement about such a commitment.*

9. Molopo is also the subject of a proposed competing off-market takeover bid announced by WAM Capital Limited (**WAM**) on 8 November 2017. One of the

¹ *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, Molopo Energy Limited 08 [2017] ATP 20*

² Molopo went into a trading halt on 25 July 2017 which had been requested by it “pending the announcement of a strategic investment”. On 27 July 2017, after the announcement of Aurora's proposed bid, Molopo announced that the investment had been completed and requested a suspension pending a technical announcement about the transaction

conditions of WAM's proposed bid is in similar terms to the No Material Transactions Condition.³

10. On 22 November 2017, Aurora became aware that Molopo proposed to make a payment in order to fund certain costs of Orient that Aurora submitted would trigger the No Material Transactions Condition.

APPLICATION

Declaration sought

11. By application dated 24 November 2017, Aurora sought a declaration of unacceptable circumstances. It submitted that the proposed payment by Molopo would breach the No Material Transactions Condition and constitute a frustrating action giving rise to unacceptable circumstances.
12. Aurora submitted that the effect of the circumstances was to interfere with the reasonable and equal opportunity of Molopo's shareholders to participate in Aurora's bid and/or inhibit the acquisition of control over voting shares in Molopo taking place in an efficient, competitive and informed market.

Interim order sought

13. Aurora sought an interim order prohibiting Molopo from making the payment until the application had been finally determined by the Panel.
14. The Panel was not required to make an interim order because Molopo undertook not to make the payment for a period that allowed the application to be determined.

Final order sought

15. Aurora sought a final order prohibiting Molopo from making the payment or alternatively, from doing so without the prior approval of its shareholders by simple majority.

DISCUSSION

Decision to conduct proceedings

16. Molopo made a preliminary submission that the Panel should not conduct proceedings including on the basis that Molopo had "*clearly disclosed its contractual obligations to fund the costs of the Orient Project*" in its announcement of 22 August 2017.
17. Prior to deciding whether to conduct proceedings, we asked Molopo to provide documentation evidencing Molopo's obligation to make the proposed payment and the amount and timing of the payment. Molopo advised that the relevant documentation was protected by confidentiality provisions and it did not have the consent of relevant counterparties to disclose the documentation. In addition, around the same time, Molopo lodged its target's statement in relation to Aurora's bid, which provided no clarification regarding the proposed payment. We decided to conduct proceedings in order to determine whether the proposed payment had

³ WAM became a party to these proceedings (submitting that it did so to keep informed, as a competing bidder) but did not play an active role or make submissions on the substantive issues before the Panel

been sufficiently disclosed prior to Aurora’s bid such that it was unlikely to be unacceptable.

Confidential information

18. In response to our brief, Molopo submitted that it would only provide redacted copies of the documentation to the Panel and ASIC and requested that the documentation be withheld from the other parties, noting its confidentiality obligations to its counterparties.
19. The sitting President convened a conference⁴ for the purpose of receiving evidence and documents from Mr Baljit Johal, Managing Director and Chairman of Molopo, who was summonsed⁵ to attend the conference and produce unredacted documents. The conference was held on 4 December 2017 by teleconference. A legal representative of Molopo attended in person to produce documents to the Panel.
20. We considered the documentation on a confidential basis (and subsequently asked Molopo questions regarding the documentation) to see whether it could provide a stronger basis for the arguments made in Aurora’s application. All the confidential material and Molopo’s further submissions were given to ASIC, with Molopo’s consent.
21. We had asked the other parties whether they would be willing to waive any right they would otherwise have under procedural fairness to receive and make submissions in relation to confidential material produced only to the Panel. Aurora did not agree to do so, submitting that it needed more information regarding the proposed payment in order to determine whether it triggered a defeating condition of its bid and to make properly informed submissions in response to the Panel’s brief.
22. We considered that the confidential material did not provide a stronger basis for Aurora’s case. We have not formed any views on whether some of the confidential information should be disclosed, either now or at some stage in the future. We did not consider such matters to be within the scope of Aurora’s application.
23. We advised the parties and ASIC that, subject to considering their submissions, we were minded not to make any declaration of unacceptable circumstances and briefly summarised our reasons below.⁶ We were satisfied that there was nothing in the confidential information that made a difference to our proposed decision that Molopo’s proposed payment was not an unacceptable frustrating action, and accordingly, the information was not otherwise relevant and should be disregarded. We informed parties that Molopo had made confidential submissions that, to the extent we considered them relevant to Aurora’s application, were to the effect that:
 - (a) Molopo’s announcement of 22 August 2017 sufficiently disclosed details of the funding framework for the Orient project and best estimates of certain costs, based on the facts available to Molopo’s directors at the time

⁴ Under *Australian Securities and Investments Commission Regulations 2001* regulations 35 and 37

⁵ Under *Australian Securities and Investments Commission Act 2001* (Cth) s192 and *Australian Securities and Investments Commission Regulations 2001* regulation 42

⁶ See paragraphs 25-27

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- (b) Molopo would make announcements as are required to update the market at the appropriate time
 - (c) it is in the nature of an oil exploration venture that drilling and other costs, and the timing of such costs, vary and such variations are not always sufficiently material to warrant additional disclosure and
 - (d) there was a risk of material prejudice to Molopo if its proposed payment was delayed.
24. We invited all parties and ASIC to make submissions in relation to the above matters and our proposed decision. We did not receive any submissions opposing or raising substantive issues regarding our proposed decision. ASIC informed us that, following the conclusion of the proceedings, it would be in contact with Molopo to ascertain its intentions to make announcements to update the market at the appropriate time.⁷

Frustrating action

25. We are prepared to assume, without deciding, that Molopo's proposed payment has or would trigger a condition of Aurora's bid or otherwise amount to a frustrating action.⁸ However, we are not satisfied that any such frustrating action would give rise to unacceptable circumstances. *Guidance Note 12 – Frustrating Action* indicates that:
- (a) the Panel has regard to how advanced frustrating action was when a bid is made or communicated in considering whether it gives rise to unacceptable circumstances⁹ and
 - (b) frustrating action announced before a bid or potential bid is unlikely to give rise to unacceptable circumstances.¹⁰
26. We consider that Aurora was sufficiently put on notice regarding the likelihood of one or more payments like the proposed payment being made by Molopo in connection with the Orient project, before it announced its bid, as a result of Molopo's announcement of 22 August 2017. In our view, drawing on our commercial experience, the proposed payment was within the bounds of what Aurora should reasonably have expected to be made by Molopo.
27. We are doubtful whether the proposed payment would in any case be unacceptable having regard to the terms of Aurora's bid,¹¹ the period for which it had been open¹²

⁷ On 11 December 2017, Molopo announced that it had made the proposed payment, including the amount of the payment (US\$4.5 million), and provided further information regarding the cash requirements of the Orient project

⁸ See *Guidance Note 12 – Frustrating Action* at paragraphs 3 and 10

⁹ See *Guidance Note 12 – Frustrating Action* at paragraph 12(e)

¹⁰ See *Guidance Note 12 – Frustrating Action* at paragraph 21(a) and *RNY Property Trust* [2017] ATP 18

¹¹ See *Guidance Note 12 – Frustrating Action* at paragraphs 12(a) and 20(a)(b)

¹² Noting that it was on essentially the same terms, apart from offering reduced consideration, as the proposed bid Aurora announced on 27 July 2017, but also noting the effect of Order 9 in *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12 in preventing Aurora declaring the bid unconditional

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and the likelihood of the bid succeeding. In *Molopo Energy Limited 08*¹³ the Panel was not satisfied that Aurora's bid was so unattractive that it should not even be made. It is a different matter entirely whether factors such as the consideration offered¹⁴ and the effect of WAM's proposed cash bid support a conclusion that frustrating Aurora's bid may not be unacceptable. However, given our conclusion above¹⁵ we do not need to decide that.

DECISION

28. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in s657A(3).¹⁶

Orders

29. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Peter Hay

President of the sitting Panel

Decision dated 8 December 2017

Reasons given to parties 19 December 2017

Reasons published 21 December 2017

¹³ [2017] ATP 20

¹⁴ Noting that the amount of cash offered is capped at \$5 million and the Aurora Fortitude Absolute Return Fund units offered are unquoted and subject to redemption restrictions

¹⁵ At paragraphs 25-26

¹⁶ Unless otherwise specified, all statutory references are to the *Corporations Act 2001* (Cth) (as modified by ASIC) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter

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Advisers

Party	Advisers
Aurora	Piper Alderman Norton Gledhill
Molopo	DLA Piper Australia
WAM	Kardos Scanlan