



Australian Government

Takeovers Panel

**Reasons for Decision
Molopo Energy Limited 10 & 11
[2018] ATP 12**

Catchwords:

Declaration – orders – variation of orders – conference – summons – confidential information – disclosure – failure to disclose – supplementary target’s statement – frustrating action – poison pill – efficient, competitive and informed market – equal opportunity – continuous disclosure – tracing notice – directors’ duties – misleading submission to Panel – compensation – costs

Corporations Act 2001 (Cth), sections 602, 644, 647(2), 647(3), 657A(3), 671B, 672B, 1041H, 1309

Australian Securities and Investments Commission Act 2001 (Cth) sections 199(1), 200(1)(a), Australian Securities and Investments Commission Regulations 2001 (Cth), Reg 16(1)(a)

ASX Listing Rules, Chapter 11 and Rules 5.45 and 11.1.3

GN 4 – Remedies General, GN 12 – Frustrating Action, GN 18 – Takeover Documents

Molopo Energy Limited 09 [2017] ATP 22, Molopo Energy Limited 03R, 04R & 05R [2017] ATP 12, The President’s Club Limited 02 [2016] ATP 1, Foster’s Group Limited [2011] ATP 15, Nexus Energy Limited [2006] ATP 17, Patrick Corporation Limited 04 [2006] ATP 16, Austral Coal Limited 03 [2005] ATP 14

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

INTRODUCTION

1. The Panel, Christian Johnston (sitting President) Rebecca Maslen-Stannage and John O’Sullivan, made a declaration of unacceptable circumstances in relation to the affairs of Molopo Energy Limited. The application concerned an off-market takeover bid for Molopo by Aurora. The Panel found that Molopo’s failure to disclose certain transactions and events in accordance with its disclosure obligations meant that the acquisition of control over voting shares in Molopo has not taken place in an efficient, competitive and informed market. In addition, by virtue of Molopo taking those actions, Aurora’s bid may be withdrawn or lapse in circumstances where Molopo shareholders were not offered a choice between those actions and Aurora’s bid. The Panel made compensation and costs orders in favour of Aurora.

2. In these reasons, the following definitions apply.

- 8 May Announcement** The ASX announcement described in paragraph 21
- Annual General Meeting** Molopo’s annual general meeting held on Thursday, 31 May 2018
- Aurora** Aurora Funds Management Limited as responsible entity of the Aurora Fortitude Absolute Return Fund
- Aurora’s Bid** Aurora’s off-market takeover bid for Molopo announced on 12 September 2017

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Combination Transaction	The transactions entered into pursuant to a contribution agreement between Orient and Drawbridge Holdings pursuant to which Orient agreed to (i) assign Orient's interest in the Orient Project to Orient US at completion and (ii) transfer its 100% interest in Orient US to Drawbridge Holdings, in consideration for receipt of a 30% non-voting interest in Drawbridge Holdings
Declaration Application	The Panel application described in paragraph 27
Drawbridge Holdings	Drawbridge Energy Holdings Ltd, a British Virgin Islands entity
EDA	The Exploration and Development Agreement, effective 1 July 2017, between Kerogen and Orient
ESGM	ESGM Investments Limited (said to be Dr Gil Feiler's special purpose vehicle)
Former Directors	Messrs Baljit Johal, Matthew Cudmore and Richard Matthews
Gibralt	Gibralt Capital Limited
ION	ION Limited
Kerogen	Kerogen Florida Energy Company LP
Keybridge	Keybridge Capital Limited
Molopo	Molopo Energy Limited
Orient	Orient FRC Ltd
Orient / Drawbridge Transactions	The Orient Transactions and the Combination Transaction
Orient Project	Orient's up to 50% working interest to explore for oil and gas in a mature oil province in South Florida, U.S.A. pursuant to the EDA
Orient Transactions	The acquisition by Molopo of 50% of Orient from Dr Gil Feiler, the redemption by Orient of 50% of Orient from ESGM and any loans by Molopo (or any of Molopo's subsidiaries) to Orient (or any of Orient's subsidiaries) or otherwise made in connection with the Orient Project
Orient US	Orient FRC (US) LLC
Variation Application	The Panel application described in paragraph 32

FACTS

3. Molopo is an ASX listed company (ASX code: MPO). Its shares have been suspended since 27 July 2017 as a result of failing to satisfy ASX's requirement for a sufficient level of operations.

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4. At the time of the Declaration Application, Molopo had the following substantial shareholders (based on substantial holder notice disclosure):

Keybridge – 20.52%¹

ION – 19.95%

ASIC – 17.35%

Gibralt – 9.04%

ASIC holds Molopo shares on trust for Aurora (15.88% of Molopo) and Keybridge (1.47% of Molopo) in connection with a divestment order made by the Panel in *Molopo Energy Limited 03R, 04R & 05R*.² That decision is currently subject to a judicial review by Aurora³ and the Panel's divestment order is suspended until the final determination of the judicial review.

5. On 27 July 2017, Aurora announced an off-market takeover bid for Molopo offering consideration valued at \$0.18 per share payable in cash (capped at \$5 million in total) or unquoted units in the Aurora Fortitude Absolute Return Fund.
6. On 22 August 2017, Molopo announced that it had acquired 50% of the shares in Orient for US\$7 million from Dr Gil Feiler pursuant to a share sale agreement executed on 25 July 2017.⁴ The announcement described Orient's participation in the Orient Project.
7. On 12 September 2017, Aurora withdrew its previously announced proposed bid on the basis that Molopo's acquisition of shares in Orient triggered a proposed defeating condition of the bid and announced a revised bid offering reduced consideration valued at \$0.135 per share.
8. Aurora lodged its bidder's statement on 26 October 2017. One of the defeating conditions of Aurora's Bid was that Molopo not incur or commit to any capital expenditure or liability for one or more related items of greater than \$2 million (unless previously announced or consented to by Aurora).
9. On 8 November 2017, WAM Capital Limited announced a proposed competing off-market takeover bid for Molopo at \$0.135 per share cash and subject to similar conditions as Aurora's Bid.
10. On 24 November 2017, Aurora made an application to the Panel submitting that a payment proposed by Molopo in connection with the Orient Project would trigger the 'no material capital commitment or liability' defeating condition and, if made, would frustrate Aurora's Bid. The Panel in *Molopo Energy Limited 09* considered that:
- (a) Aurora was sufficiently put on notice by Molopo's 22 August 2017 announcement that some such payment was likely and the proposed

¹ Including 5,088,921 Molopo shares in which Aurora has a relevant interest

² [2017] ATP 12

³ Including as responsible entity for Aurora Global Income Trust

⁴ The share sale agreement was in fact dated 21 July 2017

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payment was within the bounds of what Aurora should reasonably have expected to be made by Molopo and

- (b) it was doubtful whether the proposed payment would in any case be unacceptable having regard to the terms of Aurora's bid, the period for which it had been open and the likelihood of the bid succeeding.⁵
11. On 28 November 2017, Molopo released its target's statement in which Molopo's directors unanimously recommended that shareholders reject Aurora's Bid.
 12. On 11 December 2017, three days after the Panel's decision in *Molopo Energy Limited 09*, Molopo announced that it had advanced Orient US\$4.5 million by way of shareholder loan. It stated that the payment part satisfied the expected requirement that Orient hold funds of at least US\$20 million, being the estimated contract value for the drilling program, to demonstrate to the proposed operating partner that Orient had the financial capacity to comply with its obligations. The announcement also stated that Molopo was responsible for funding 50% of these costs. The announcement referred to the requirement under the EDA for Orient to spud the first commitment well by no later than 1 May 2018.
 13. On 4 January 2018, WAM Capital Limited withdrew its proposed bid on the basis that the expenditure announced by Molopo on 11 December 2017 triggered the 'no material transactions' condition of its proposed bid.
 14. On 12 January 2018, Aurora announced an intention to increase its bid consideration to \$0.153 per share if Aurora's relevant interest exceeded 30% (by number), all of the defeating conditions were fulfilled or waived,⁶ Molopo did not spend any further funds on the Orient Project and Molopo did not breach the 'no material capital commitment or liability' condition.
 15. On 19 January 2018, Molopo issued its first supplementary target's statement noting that a condition to Aurora's conditional increase could not be satisfied because Molopo would be required to fund further amounts in relation to the Orient Project as previously announced.
 16. On 1 February 2018, Molopo released its activities and cashflow statement for the quarter ending 31 December 2017 showing cash and cash equivalents at the end of the quarter of \$48.021 million and estimating total cash outflows for the next quarter of \$1.9 million.
 17. On 21 February 2018, Molopo responded to an ASX query letter in which it indicated that the US\$4.5 million loaned to Orient would be used when required to comply with its obligations under the EDA and confirmed that Molopo was in compliance with its continuous disclosure requirements in Listing Rule 3.1.
 18. On 19 March 2018, Molopo issued its second supplementary target's statement in which Molopo's directors reiterated reasons previously relied upon for rejecting Aurora's Bid.

⁵ See *Molopo Energy Limited 09* [2017] ATP 22 at [26] & [27]

⁶ Aurora indicated at that time that its intention would be to waive the 50% minimum acceptance condition if Aurora were to have a relevant interest in more than 30% (by number)

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19. On 23 April 2018, Molopo responded to a further ASX query letter with questions relating to the Orient Project. It disclosed that Drawbridge Energy Operations & Management LLC had been appointed as “operator” under the EDA and that Dr Feiler had not to date executed any shareholder loan agreement with Orient.
20. On 30 April 2018, Molopo announced a clarification to its 22 August 2017 announcement confirming that the resources reported in the report from Morning Star Consultants, LLC (**Morning Star**) dated 1 June 2017 referred to in that announcement “*were reported for the benefit of [Kerogen] which classified the resources applicable to the Orient Project as ‘prospective resources’*” and that Morning Star subsequently prepared a revised report for Molopo “*on the basis that Molopo had completed the acquisition of its interest in the Orient Project (ie. to report on these resources as of 25 July 2017 when Molopo acquired an interest in Orient)*”. The announcement stated that Morning Star issued a report to the directors of Molopo dated 18 September 2017 which upgraded the classification of the resource volumes applicable to the Orient Project from “*prospective resources*” to “*contingent resources*” as of 25 July 2017.
21. On 8 May 2018, Molopo made an ASX announcement disclosing the following actions:
 - (a) on 30 January 2018, Orient had redeemed all of the shares in Orient held by ESGM for a redemption amount of US\$7 million
 - (b) during the first quarter of 2018, Molopo (or its subsidiaries) provided total funding to Orient of US\$23.5 million, in addition to the US\$4.5 million provided in December 2017. Of this total amount, US\$7 million was used to fund the redemption of the shares in Orient held by ESGM and US\$21 million was used to fund an intercompany loan from Orient to its wholly owned subsidiary, Orient US
 - (c) on 21 February 2018, Orient entered into a contribution agreement⁷ with Drawbridge Holdings contemplating the Combination Transaction
 - (d) completion of the Combination Transaction occurred on or about 7 March 2018
 - (e) following completion of the Combination Transaction, the loan from Orient to Orient US was extinguished
 - (f) following completion of the Combination Transaction, Molopo stated that it had gained (via Orient's 30% interest in Drawbridge Holdings) a diversified oil and gas exploration portfolio with indirect interests in several oil and gas projects in Texas, U.S.A. and
 - (g) on 25 April 2018, Kerogen provided an extension to 1 April 2019 in respect of the drilling deadline for the first commitment well, subject to a number of conditions including that the application for a drilling permit must be filed on or before 1 August 2018.

⁷ The contribution agreement states that it was executed on 21 February 2018 but was effective as of 13 February 2018

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22. Following completion of the Combination Transaction, Molopo reported that it had approximately \$16.904 million of cash available to it as at 31 March 2018.
23. On 11 May 2018, ASX notified Molopo that ASX considered the Orient transaction announced on 22 August 2017 (as modified by the announcement on 8 May 2018) to be a significant change to the nature or scale of Molopo's activities and ASX had exercised its discretion under Listing Rule 11.1.2 to require that transaction to be approved by Molopo shareholders and under Listing Rule 11.1.3 to require Molopo to satisfy the requirements in Chapters 1 and 2 of the Listing Rules as if it were applying for admission to the official list. Further, ASX advised that it considered that Molopo had committed serious breaches of the ASX Listing Rules and may also have breached ss1041H and 1309⁸ for making misleading disclosures to ASX.
24. On 18 May 2018, following Aurora's Declaration Application to the Panel, Molopo advised its shareholders that it intended to seek shareholder approval and satisfy the ASX readmission requirements, as described above.
25. On 28 May 2018, Molopo released its third supplementary target's statement outlining its recent announcements and stated that its directors continue to unanimously recommend that shareholders reject Aurora's Bid.
26. On 31 May 2018, at Molopo's Annual General Meeting, the Former Directors were replaced on the board by four new directors (with each of Gibraltar, Keybridge, Aurora and Mr Andrew Metcalfe nominating one of the new directors) (**the Directors Replacement**).

APPLICATION

Declaration and orders sought

27. By application dated 11 May 2018 (the **Declaration Application**), Aurora sought a declaration of unacceptable circumstances. Aurora submitted that (among other things):
 - (a) the transactions and events described in the 8 May Announcement constituted frustrating actions and should have been subject to shareholder approval
 - (b) there were disclosure deficiencies in Molopo's target's statement and supplementary target's statements
 - (c) Molopo failed to comply with its continuous disclosure obligations and
 - (d) the conduct of Molopo's directors in relation to, and the nature of, the transactions, and other circumstances, gave rise to serious concerns regarding the transactions.

⁸ 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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28. Aurora submitted that the cumulative effect of the transactions and events has been, and continued, to inhibit the acquisition of control over voting shares in Molopo taking place in an efficient, competitive and informed market.
29. Aurora also submitted that it appeared that Molopo had misled the Panel in the *Molopo Energy Limited 09* proceedings regarding the urgency and use of the US\$4.5 million shareholder loan to Orient.
30. Aurora further submitted, in relation to the Orient / Drawbridge Transactions, that certain circumstances “*point to the transaction being a sham*” including the uncommercial structure of the transaction, the speed at which and the secrecy with which it had been consummated, the lack of oil and gas experience of the Former Directors and the disregard for the ASX Listing Rules.
31. Aurora sought an order that all of the transactions that are capable of being unwound be unwound. If that order was not made (or complied with) and Aurora withdrew its bid due to the frustrating actions, it sought an order for costs associated with its bid.

Variation of final orders sought

32. By further application dated 24 May 2018 (the **Variation Application**), Aurora sought a variation of the final orders made in *Molopo Energy Limited 03R, 04R & 05R*⁹ to allow Aurora to be able to vote Aurora’s shares in Molopo that are currently vested in ASIC for sale:
 - (a) on the resolutions for the election of directors at the Annual General Meeting (excluding the two resolutions for the election of persons nominated by Aurora and Keybridge, respectively)
 - (b) on any other resolutions arising at the meeting, including any motion for an adjournment, where such a vote would not give rise to a control event and
 - (c) on any resolution approving the Orient / Drawbridge Transactions for the purposes of Listing Rule 11.1.
33. Aurora submitted that the sole purpose of the variation was to facilitate the maintenance of the status quo while the divestment order remained unsatisfied and the decision in *Molopo Energy Limited 03R, 04R & 05R* was subject to judicial review. It submitted that if the resolutions to approve the Orient / Drawbridge Transactions are passed and result in a material destruction of value, investors of Aurora’s funds would suffer serious prejudice for reasons that have no relevance to the principles behind s602 that the divestment order sought to address.
34. Aurora also submitted that there was inadequate disclosure regarding the ultimate controllers of Molopo’s second largest shareholder, ION, and for ION to “*continue to exploit the Divestment Order in a manner to take and keep control of Molopo and to then ratify its wrongdoing would be totally unconscionable*”.

⁹ [2017] ATP 12

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Interim orders sought

35. On 18 May 2018, Aurora sought an interim order to restrict Molopo's spending pending the outcome of proceedings. We made an interim order (see Annexure A) restricting Molopo from making any payment or incurring any expenditure or liability of more than \$175,000 or \$175,000 in aggregate without the consent of one or more of the sitting Panel members.
36. We made the interim order to maintain the status quo pending determination of the matter. We considered the \$175,000 threshold allowed Molopo to meet any day-to-day expenses but indicated that it would consider requests for specific payments above that amount as and when they arose or if necessary, any variation to the interim order. On 22 May 2018, at Molopo's request, we consented to specified categories of expenditure subject to certain limitations.
37. On 30 May 2018, we varied our interim order (see Annexure B) to add two further interim orders relating to the Annual General Meeting (see paragraph 64 below).
38. On 27 June 2018, we lifted the interim orders by way of further variation of interim orders (see Annexure C). Molopo requested that the interim orders be lifted following the Directors Replacement. No parties objected to that request.

DISCUSSION

39. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.
40. Following the Directors Replacement and after it was communicated that we were minded to make a declaration of unacceptable circumstances, Molopo changed legal advisers and changed the general direction of its submissions to being generally supportive of Aurora's application.

Decision to conduct proceedings

41. ASIC and Keybridge made preliminary submissions submitting that the Panel should conduct proceedings on the Declaration Application.
42. ASIC submitted that the matters disclosed in the 8 May Announcement raised a number of concerns with respect to the conduct of Molopo and its directors. While ASIC's enquiries into these matters were said to be on-going, ASIC considered that some of the concerns raised impacted Aurora's Bid and potentially gave rise to unacceptable circumstances.
43. Keybridge noted that it had commenced proceedings in the Supreme Court of Western Australia against Molopo for statutory oppression and breach of the Listing Rules in September 2017. As part of those proceedings, Keybridge commissioned an independent expert report in relation to the Orient Project's leases. The expert valued Orient's interests in the Orient Project at between US\$0 and US\$395,000. Keybridge submitted that this supported Aurora's proposition that the Orient / Drawbridge Transactions were non-commercial. It is also submitted that the issues raised in the ASX letter dated 11 May 2018 support the submissions made in the Declaration Application that unacceptable circumstances had occurred.

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44. We decided to conduct proceedings on the Declaration Application. The circumstances raised a number of serious concerns. We focused on the effect of the circumstances on Aurora's bid.
45. We also decided to conduct proceedings on the Variation Application and directed that it be considered together¹⁰ with the Declaration Application given the related factual circumstances, in particular the request to allow Aurora's vested shares to be voted on any resolution approving the Orient / Drawbridge Transactions.

Request for withholding information

46. In our brief issued prior to the Directors Replacement, we requested from Molopo copies of board minutes, documents evidencing the Orient / Drawbridge Transactions and other materials. In response Molopo requested a direction from the Panel to provide copies of the requested material to the Panel and ASIC only¹¹ and to withhold the material from other parties. It submitted, as reasons for why the information should be withheld, that some documents were subject to confidentiality restrictions, that some shareholders who were parties to the proceeding should not be given access to documents that are generally not available to all shareholders, that the information could be used to gain advantage in the current court proceedings or to commence further litigation and certain information was commercially sensitive.
47. The sitting President convened a conference for the purpose of receiving the material from the proper officer of Molopo, who was summonsed to attend the conference and produce unredacted material. The conference was held on 28 May 2018 by teleconference. A legal representative of Molopo attended in person to produce the material to the Panel. One of the Former Directors (Mr Johal) attended the conference by teleconference and confirmed that all of the documents requested in the summons were provided. Two documents were redacted for legal professional privilege. All the material was given to ASIC, with Molopo's consent.
48. We asked 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 the material produced only to the Panel. We received submissions from Aurora, Keybridge and Mr Roger Corbett AO that they did not agree to waive any such rights, noting in effect that transparency was required here because the material related specifically to transactions which had been kept secret from the market and were entered without shareholder approval. Aurora also submitted its concern that the Panel may have been misled in *Molopo Energy Limited 09* (see paragraphs 89 to 94) in circumstances where confidential material was similarly held back by Molopo.¹²
49. We did not consider it necessary for us to rely on the confidential material to make a declaration of unacceptable circumstances and, except as set forth in the declaration (which was provided to parties and the Former Directors in draft form

¹⁰ Regulation 16(1)(a) of the *Australian Securities and Investments Commission Regulations 2001* (Cth)

¹¹ And further requested that such documents be provided in redacted form, omitting legal advice

¹² See [2017] ATP 22 at [18]-[24]

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for submissions before it was made), relied on publicly disclosed material up to the date of the declaration.

50. However, following the Directors Replacement, we asked Molopo whether it was willing to consent to the disclosure of the confidential material (in an unredacted form) provided under summons in this proceeding and the *Molopo Energy Limited 09* proceeding to other parties for the purposes of considering any proposed orders. Molopo consented and provided the unredacted documents.

Annual General Meeting

51. In our brief in connection with the Variation Application, we indicated to the parties that we were minded not to take any action in relation to the Annual General Meeting to allow the shares currently vested in ASIC to be voted and asked parties for submissions.
52. ASIC submitted that nothing in Aurora's current application undermined the basis on which the findings of unacceptable circumstances were made in *Molopo Energy Limited 03R, 04R & 05R* or the reasons for the divestment order. ASIC also submitted that it would be "*unusual and unnecessary*" for the Panel to reach a conclusion on the Molopo board's decisions to date as reason to intervene to support a particular change to the composition of Molopo's board, particularly at the stage of the Panel's enquiries.
53. Keybridge refrained from making any submission on the variation of orders request but submitted (among other things) that ASIC should exercise its rights to vote the shares in its capacity as a trustee based on what it considers to be in the best interests of all Molopo shareholders. In rebuttal, ASIC submitted that it was not its practice when holding shares on trust for divestment, or its role as an independent statutory regulator, to make voting decisions or exercise any other rights attached to those shares.
54. We considered that an order allowing the vested shares to be voted (whether by ASIC or at the direction of Aurora) at the Annual General Meeting was not appropriate at the time taking into consideration:
 - (a) the date and time of the Annual General Meeting (which at the time of our brief was only four business days away)
 - (b) the fact that consideration of the Declaration Application was on-going and, if the incumbent board was reelected, there were interim measures in place to restrict Molopo's spending and
 - (c) the nature of the variation to orders being sought (given that the shares were vested in ASIC for sale).
55. We also sought submissions on whether, if ION had failed to fully and adequately respond to tracing notices, we should consider an interim order preventing ION from voting at the Annual General Meeting until it had done so.
56. ASIC submitted that such an interim order may be appropriate if ION had so failed to respond and those failures suggest unacceptable circumstances exist. It also noted that any deficiencies in ION's responses would also likely mean that ION's

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substantial holder disclosures were also deficient and would be contrary to the policy objectives in s602.

57. In addition to querying the ultimate ownership of ION, Aurora and Keybridge presented information to show that the holding company of ION had been deregistered and that ION itself was in the process of being struck off the register.
58. ION submitted that it had responded fully and adequately to ASIC's tracing notice and ASIC had raised no further issues in relation to the notice since August 2017. It provided a copy of a declaration of trust evidencing the ultimate owner of ION. It submitted that it was not previously aware of the corporate irregularities in the holding structure and was taking steps to correct them, but that ION was still a registered company and should be allowed to vote at the Annual General Meeting.
59. We sought comments on a proposed interim order that ION must not exercise any of its voting rights unless it had complied with ss671B and 672B and directed Molopo to disregard any votes exercised in contravention of ION's voting restriction.
60. ION opposed the proposed interim order and requested that, if the Panel considered that the information ION had provided was inadequate, the Annual General Meeting be adjourned to allow ION time to address the issues.
61. ASIC submitted that the proposed interim order may raise uncertainty as to whether there had been any breach and whether it was material and queried Molopo's ability to determine compliance. Molopo similarly raised concerns with its proposed obligation particularly given the imminence of the meeting.
62. Keybridge also noted the practical issues in the implementation of the proposed interim order and submitted that the Panel should order that certain procedures be followed at the meeting to enable us to determine what transpired.
63. Given the practical concerns raised and the short time available to deal with the concerns and gather further information, we decided not to make the proposed interim order relating to ION. Instead, we put in place some safeguards at the meeting to ensure that we could follow up on what occurred.
64. We varied our interim order (see Annexure B) to add two further interim orders that required:
 - (a) all resolutions (other than any procedural resolutions) to be considered at the Annual General Meeting to be conducted by poll and
 - (b) Molopo to keep, and provide to the Panel, a record of any votes cast on those resolutions in respect of the ordinary shares in Molopo held by ION and Gibralt.¹³
65. ION voted in favour of the resolutions to re-elect the Former Directors and against the resolutions to elect the current directors. Gibralt voted against the resolutions

¹³ The shares of Gibralt were tagged in response to submissions that an offer had been made a short time before the meeting to acquire Gibralt's shares

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to re-elect the Former Directors and in favour of the resolutions to elect the current directors.

Disclosure

66. We are very troubled by the serious disclosure failures of Molopo over an extended period of time and during a takeover period when greater care is required in a target's communications with shareholders.¹⁴
67. Molopo provided no explanation for the delay in the disclosure of each of the transactions and events described in the 8 May Announcement and only issued supplementary target's statement disclosure in relation to those transactions and events on the day submissions on our brief were due.
68. More troubling still, is that at a board meeting of the Former Directors on 4 April 2018, Molopo's legal advisers emphasised that Molopo should be seeking to remedy the situation, referring to Molopo's failure to disclose the transactions and seek ASX guidance as to the application of Chapter 11 of the Listing Rules, as soon as possible. Yet, Molopo took over another month to make any announcement.
69. Section 644(1) requires that if a target becomes aware of a misleading or deceptive statement in, or an omission from, the target's statement or a new circumstance has arisen that is material from the point of view of a shareholder, the target must prepare a supplementary target's statement that remedies this defect. A supplementary target's statement must, as soon as practicable, be sent to the bidder and ASX and lodged with ASIC pursuant to subsections 647(2) and (3).¹⁵
70. In *Patrick Corporation Limited 04*, the Panel had concerns that a target had not satisfied the requirement in section 647(2) in circumstances where the target proposed to release a supplementary target's statement 27 days after the bidder had announced a revised offer and 22 days after the target's board had made a rejection recommendation.¹⁶
71. Given the impact, among other things, that the transactions and events described in the 8 May Announcement would have on the value of Molopo shares, we consider that some or all of those transactions and events were new circumstances that were material from the point of view of a Molopo shareholder. Accordingly, each new circumstance should have been disclosed in a supplementary target's statement as soon as practicable after it occurred. This clearly did not happen. In our view, there has been a blatant disregard of Molopo's disclosure obligations by the Former Directors.

¹⁴ See *Nexus Energy Limited* [2006] ATP 17 where the Panel considered at [31] that "once a company is subject to a takeover bid, it is required to take even greater care in ensuring that all of its communications to shareholders or the market are not misleading in any way". This was adopted and endorsed in *Foster's Group Limited* [2011] ATP 15 at [27]. The Panel there also said at [34]: "Further, once a takeover bid has been announced, the target company should be on a heightened state of alert regarding all of its public announcements." See GN 18 – Takeover Documents at [41]-[42]

¹⁵ As modified

¹⁶ [2006] ATP 16 at [36]

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72. As a result of failing to disclose these new circumstances, the target's statement dated 28 November 2017, first supplementary target's statement dated 19 January 2018 and second supplementary target's statement dated 19 March 2018 contain, or until the third supplementary target's statement was released contained, omissions and misleading and deceptive information. Not only did the new circumstances mean that previously disclosed information was no longer accurate but, at the time of release of each of the first and second supplementary target's statements, Molopo was aware of some or all of the new circumstances and yet chose not to disclose that information.
73. The same was true in respect of other ASX announcements made by Molopo during the period as noted by ASX in its letter to Molopo dated 11 May 2018:
- "In all of the interactions ... between 30 January 2018 (the date of the Orient Redemption and the Assumption of Full Funding Responsibility for the Orient Project) and 8 May 2018 (the date of the Drawbridge Announcements), MPO omitted to advise ASX of the Orient Redemption or the Assumption of Full Funding Responsibility for the Orient Project, even though they were directly relevant to the matters being discussed in those interactions.*
- Similarly, in all of the interactions ... between 21 February 2018 (the date Orient entered into the Contribution Agreement) and 8 May 2018 (the date of the Drawbridge Announcements), MPO omitted to advise ASX of the fact that its now wholly owned subsidiary Orient had entered into the Contribution Agreement."*
74. For example, in response to a query from ASX, Molopo advised on 23 April 2018 that "To date, Dr Feiler has not contributed a shareholder loan" but failed to mention that ESGM (said to be Dr Feiler's special purpose vehicle) ceased to be a shareholder of Orient almost three months earlier as a result of the redemption by Orient of ESGM's Orient shares.
75. Keybridge also submitted that there were occasions in addition to the transactions and events described in the 8 May Announcement when Molopo should have issued a supplementary target's statement, for example, alterations to Molopo's 22 August announcement caused by the receipt of the Morning Star report dated 18 September 2017 (see paragraph 20) and by the requirements for funding announced on 11 December 2017.
76. We also consider that the third supplementary target's statement contains insufficient or misleading information regarding (among other things):
- (a) each new circumstance and the effect of each circumstance on Molopo shareholders' continuing shareholdings in Molopo
 - (b) Drawbridge Holdings and its assets
 - (c) the controlling shareholder(s) of Drawbridge Holdings
 - (d) the Molopo directors' recommendations with respect to Aurora's Bid, noting that certain factual circumstances previously relied upon have changed materially and/or no longer apply (for example, the basis for the net tangible asset backing per Molopo share of \$0.183 upon which the Former Directors

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relied to opine that Aurora's bid is inadequate and does not reflect fair value) and

- (e) the effect or consequences if the shareholder approval referred to in paragraph 24 is not obtained.

77. The serious disclosure failures mean that the acquisition of control, or potential control, of Molopo has not taken place in an efficient, competitive and informed market and Molopo shareholders have not been given enough information to enable them to assess the merits of Aurora's Bid.

Frustrating Action

78. In exercising our power to declare circumstances to be unacceptable, we must have regard to the purposes of Chapter 6 set out in s602. One of those purposes is that, as far as practicable, a company's shareholders have a reasonable and equal opportunity to participate in any benefits accruing to shareholders through any proposal under which a person would acquire a substantial interest in the company.¹⁷ When considering that purpose in relation to the acquisition or proposed acquisition of a substantial interest, we must take into account the actions of directors including actions that caused or contributed to the acquisition or proposed acquisition not proceeding.¹⁸
79. The actions disclosed in the 8 May Announcement triggered several conditions of Aurora's Bid. By virtue of Molopo taking those actions, Aurora's Bid may be withdrawn or lapse.
80. When assessing whether a frustrating action gives rise to unacceptable circumstances, the Panel typically considers a number of balancing factors, including the length of time the bid has been open and its likelihood of success.¹⁹ In *Molopo Energy Limited 09* doubts were raised regarding Aurora's Bid in the context of a potential frustrating action, including having regard to the terms of Aurora's Bid. Whether those same doubts continue to exist is uncertain in light of the significant change to the nature of Molopo's activities and what impact that has on the merits or otherwise of Aurora's Bid as compared to continuing to hold Molopo shares. In our view, any residual concerns of this nature are outweighed by the actions of the Former Directors (among other things).
81. By failing to disclose promptly and properly the actions announced on 8 May 2018, in addition to not seeking shareholder approval or making the actions conditional on shareholder approval, Molopo has not offered shareholders a choice between those actions and Aurora's Bid (or any potential competing bids). Accordingly, Molopo shareholders have not had a reasonable and equal opportunity to participate in any benefits accruing under Aurora's Bid.
82. Further, the Former Directors by their action, including such action which may cause or contribute to Aurora's Bid not proceeding, have not given all shareholders

¹⁷ Section 602(c)

¹⁸ Section 657A(3)

¹⁹ See GN 12 – Frustrating Action at [12]

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of Molopo reasonable and equal opportunity to participate in any benefits accruing under Aurora's Bid.

83. As submitted by Keybridge, referring to the decision between the competing visions of Aurora and Molopo's board, "[t]he failure to disclose has precluded shareholders from making that decision until it is almost impossible to envisage that Aurora would declare the bid free of defeating conditions, hence depriving shareholders of that choice to decide." We agree.

Conduct of Molopo's directors and nature of transactions

84. A number of concerns and questions remain regarding the conduct of Molopo and its former directors in relation to the Orient / Drawbridge Transactions. Based on materials provided in the Panel proceedings, these concerns and questions include:
- (a) the reasons why Molopo's board repeatedly chose not to disclose material transactions and events to Molopo shareholders
 - (b) the circumstances surrounding the Molopo board's approval of the original acquisition by Molopo of 50% of Orient from Dr Feiler in July 2017
 - (c) the beneficial ownership of the other 50% shareholder of Orient at various times prior to, and at the time of, the redemption by Orient of that 50% shareholding
 - (d) the Molopo board's approval of each loan transaction and the intended purpose and actual use of the loan funds
 - (e) the limited due diligence undertaken on the Orient / Drawbridge Transactions, including counterparty due diligence
 - (f) Molopo's limited access to information in Drawbridge Holdings prior to, and after, the Combination Transaction²⁰
 - (g) the decision of the Former Directors not to obtain any independent valuations regarding any of the transactions and events described in the 8 May Announcement²¹ and, in relation to the Combination Transaction, not to seek third party valuation assistance for due diligence, instead relying on the Former Directors' own analysis
 - (h) the reasons why the other 50% shareholder of Orient did not match Molopo's US\$4.5 million loan to Orient and why this outstanding contribution was not factored into the redemption price and
 - (i) the reasons why Molopo considered it appropriate to make a total payment of US\$14 million for Orient in circumstances where the total consideration payable by Orient for its co-investment in the Orient Project with Kerogen

²⁰ Notwithstanding the requirement in Listing Rule 5.45 that an entity must not, and must ensure that its child entities do not, enter into a mining or petroleum tenement joint venture agreement unless the agreement provides that the operator of the joint venture will give the entity all the information the entity requires to comply with the Listing Rules

²¹ In respect of the Orient Transactions, Molopo submitted that the Former Directors had the benefit of existing reports referring to reports dated 11 June 2015, 1 June 2017 and 18 September 2017 (see paragraph 20 regarding the two later reports)

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had only been US\$2 million (payable in two installments due on 1 July 2017 and 1 September 2017).

85. These concerns, among others, have been raised by Aurora and Keybridge to question the genuineness of the Orient / Drawbridge Transactions.
86. Aurora and Keybridge also raised concerns with the terms of the Combination Transaction. In particular, the decision of the Former Directors to accept, in exchange for Molopo's contribution to Drawbridge Holdings, Class A shares in Drawbridge Holdings that have no voting rights and a contractual right to appoint only one director to the board of Drawbridge Holdings, with the appointment being subject to prior written approval of the majority in interest of the Class B shareholders. Aurora and Keybridge submitted that the limited right to appoint a director was tantamount to a 'poison pill' arrangement.
87. Our focus has been on those matters directly impacting Aurora's bid. We understand that ASIC is making enquiries regarding the conduct of Molopo and its directors more generally. We propose to make a referral to ASIC to consider potential breaches of directors duties by the Former Directors, as well as other matters, including the genuineness of the transactions.
88. The material available appears to provide some support for Aurora and Keybridge's concerns.²² However we did not need to decide if the transactions here were uncommercial or non-genuine. In our view, by entering into such material transactions and then failing to disclose those transactions for some period of time, shareholders have been denied any choice. Even if the transactions are put to shareholders and shareholders vote them down, it may not be possible to unwind those transactions (whether or not the arrangements include any 'poison pill'). On the other hand, unless the transactions are unwound, it seems most likely that Aurora's Bid will be withdrawn or lapse.

Molopo Energy Limited 09

89. In *Molopo Energy Limited 09*,²³ as noted above, the sitting Panel received materials from Molopo under summons and in a redacted form. The redacted materials were also received by ASIC with Molopo's consent. The sitting Panel informed parties that Molopo had made confidential submissions that, to the extent they considered them relevant to Aurora's application, were to the effect that:²⁴
 - (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*
 - (b) *Molopo would make announcements as are required to update the market at the appropriate time*

²² Also noting that following the Directors Replacement those concerns were shared by Molopo

²³ See *Molopo Energy Limited 09* [2017] ATP 22

²⁴ At [23]

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- (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.*
90. In response to our brief on the Declaration Application, Molopo submitted that, in fact, no funds had been spent on spudding the first commitment well (which was required to occur by no later than 1 May 2018 under the terms of the EDA). Molopo further submitted that the US\$4.5 million was applied as follows:
- (a) on 7 December 2017 and 13 December 2017, US\$190,000 and US\$310,000 respectively was paid to representatives of ESGM for the reimbursement of lease renewal and land management payments made by or on behalf of ESGM (that, as at those dates, Molopo had yet to contribute to)
- (b) on 28 December 2017, US\$2 million was deposited with Drawbridge Energy Operations & Management LLC, who were providing operating services at that time, with such funds utilised for the renewal of existing leases and the acquisition of new leases
- (c) on 9 February 2018, US\$1.955 million was utilised as part of the redemption payment of US\$7 million for the acquisition of the shares in Orient held by ESGM (see paragraph 22) and
- (d) US\$45,000 was utilised for miscellaneous and ancillary expenses (including land management payments).
91. Molopo's 11 December 2017 announcement stated that "*the US\$4.5 million in upfront funds ... will be used by Orient to pay certain costs of the Orient Project*". It also referred to the substantial work involved in meeting the first commitment well deadline and the necessity for Orient to engage an operating partner as soon as possible in order for Orient to comply with its commitments. It stated that Orient was in the process of engaging a reputable operating partner to undertake (among other things) drilling works in relation to the Orient Project.
92. It is clear that Molopo has not kept the market updated as represented to the Panel in *Molopo Energy Limited 09*. It also appears to us that it would have come as a surprise to the Panel in *Molopo Energy Limited 09* and Molopo shareholders based on the 11 December 2017 announcement that none of the US\$4.5 million (nor any other funds) have been used on spudding the first commitment well. It was certainly never contemplated that almost half those funds would be used to redeem the other 50% shareholder in Orient, who was otherwise expected to provide 50% of the funding required for the Orient Project.²⁵
93. In addition, we have some concerns regarding Molopo's requests for withholding information from parties and the redaction of information in documents received under subpoena in this proceeding (before the Directors Replacement) and *Molopo Energy Limited 09*.

²⁵ See paragraph 12

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94. We propose to make a referral to ASIC to investigate whether one or more of the Former Directors breached section 199(1) or 200(1)(a) of the *Australian Securities and Investment Commission Act 2001* (Cth) in relation to this proceeding and/or *Molopo Energy Limited 09*, including whether any written submissions given to the Panel (and ASIC) gave information or evidence that “*is false or misleading in a material particular*”.

Extension of time

95. Prior to making our decision on the Declaration Application, we decided to extend time under s657C for the making of the application. Among other matters, we considered the following factors important to our decision to extend time:
- (a) the actions taken by Molopo which are the subject matter of the Declaration Application only came to light during the two month period preceding the application
 - (b) the application made credible allegations of serious unacceptable circumstances and
 - (c) it is in the public interest that the time for making the application should be extended.²⁶

DECISION

Declaration

96. It appears to us that the circumstances are unacceptable:
- (a) having regard to the effect that we are satisfied they have had or are having on:
 - (i) the control, or potential control, of Molopo or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Molopo
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in s602
 - (c) in the further alternative, because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6.
97. We gave the Former Directors the opportunity to make submissions on our draft decision and declaration and become parties to the proceedings. We received no submissions in response.
98. In having regard to the purpose set out in paragraph 602(c), we have taken into account the action of the Former Directors, including any such action which may cause or contribute to Aurora’s bid not proceeding.
99. Accordingly, we made the declaration set out in Annexure D and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

²⁶ *Austral Coal Limited 03* [2005] ATP 14 at [18] to [21], *The President’s Club Limited 02* [2016] ATP 1 at [106] to [160]

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Orders

100. Following the declaration, we made the final orders set out in Annexure E. Under s657D the Panel is empowered to make ‘any order’²⁷ if 4 tests are met:
- (a) it has made a declaration under s657A. This was done on 8 June 2018.
 - (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 12 June 2018 and 2 July 2018. Each party (other than Mr Corbett) made submissions and rebuttals on the 12 June 2018 supplementary brief on orders. Each party (other than Mr Corbett and ION) made submissions, and Molopo and Aurora made rebuttals, on the 2 July 2018 further supplementary brief on orders.
 - (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. The orders do this by compensating Aurora for some of the costs it incurred on its bid while the market was completely uninformed about transactions that Molopo had undertaken.
101. We were initially minded to order that, following an investigation into the matters described in the declaration of unacceptable circumstances, Molopo must issue a supplementary target’s statement providing more detailed disclosure regarding the transactions, the value of Molopo’s assets, Molopo’s intentions with respect to the transactions and the Molopo directors’ recommendations with respect to the Aurora’s Bid in light of the changed circumstances. We expected that the disclosure be made prior to the date that Aurora was required to give notice as to the status of the defeating conditions²⁸ under its bid so that Aurora could make a decision as to whether it would proceed with its bid.
102. Molopo submitted that the proposed disclosure order was not feasible or appropriate in circumstances where the current directors would most likely not be in possession of the requisite information to comply with the proposed order in a way that was accurate and meaningful. Molopo suggested that it would need a further three weeks to comply with the proposed order. This date would be after the date Aurora’s Bid was set to close.
103. Aurora submitted that while the information sought by the proposed disclosure order was appropriate, as a remedy, it was “*simply inadequate for the purpose of maintaining its takeover bid*”. In rebuttals, Aurora submitted in effect that, if an unwind order was not made, Aurora would withdraw its bid. In its view, “*the horse has already bolted*” and no amount of detail in a supplementary target’s statement would change that.

²⁷ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

²⁸ As required by s630(1)

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104. After confirming Aurora's position, we decided not to make the proposed disclosure order. We assume that Aurora will advise the market of its position promptly after our decision on orders was made and the period of review in respect of orders had passed. If that does not occur, ASIC or another party can apply for a variation of orders to require supplementary target's statement disclosure.
105. ASIC submitted that in addition to supplementary target's statement disclosure, we should make orders requiring Molopo to commission an independent technical specialist's report compliant with VALMIN Code 2015 and an independent expert's report compliant with ASIC RG 111 Content of expert reports and ASIC RG 112 Independence of experts opining on whether Aurora's Bid is fair and reasonable. ASIC submitted such reports would ensure Molopo's shareholders are provided with "*independent information about each of Drawbridge Holdings' assets and the effect of each new circumstance on Molopo shareholders' continuing shareholdings in Molopo (including via the value of Molopo's shares, relevant given its primary asset class is no longer cash)*".
106. We do not disagree that technical specialist and independent expert reports would provide information that Molopo shareholders require to make an informed assessment of Aurora's Bid. However, in the extraordinary circumstances before us, and in light of Aurora's submissions that it would withdraw its bid if the transactions are not unwound, we do not consider ordering any expert reports appropriate given the time and cost involved in doing so.
107. Similarly, in other circumstances, an order requiring a general meeting for the purposes of seeking shareholder approval for the transactions may have been appropriate. However, in circumstances where it appears that the current Molopo directors would likely recommend voting against resolutions approving the transactions and the transactions have long been completed and are not easily reversed if voted down, we do not consider such an order appropriate to protect rights and interests or to allow the bid to proceed as it would have.
108. Following the Directors Replacement, Molopo submitted that it was conducting an investigation into the Orient Transactions and the Combination Transaction. Molopo submitted that these transactions should be "*cancelled, reversed or declared voidable*" because "*on the current information there appears to be little likelihood of those transactions delivering any return to Molopo shareholders*". Aurora and Keybridge also submitted that an order cancelling the transactions was most appropriate to remedy the unacceptable circumstances.
109. We considered making orders that: (a) each transaction is voidable (to the extent the law of Australia is relevant) at the election of the relevant Molopo party and (b) require each non-Molopo party to take all actions necessary to reverse the effects of each transaction which a Molopo party elects to rescind and reimburse Molopo for any monies paid by a Molopo party in connection with the transaction. We note that it would be necessary before making such orders, to give such non-Molopo parties an opportunity to make submissions, which would require some time given the parties and jurisdictions involved.

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110. We considered detailed submissions on this issue. While the Panel has previously made orders cancelling the sale of shares²⁹ and on one occasion considered the cancellation of a transaction,³⁰ a number of difficult issues arise here in connection with cancelling the transactions.
111. The acquisition of 50% of the shares in Orient, announced on 22 August 2017 (see paragraph 6), cannot be taken to frustrate Aurora’s revised bid which was announced later. The subsequent transactions were all governed by foreign law, involved mostly foreign entities and the transactions relating to the operations of the Orient Project may have been reasonably foreseeable.³¹ It was not clear to us that, at the time the transactions were entered into, the counterparties were necessarily aware of irregularities that in our view would justify orders unwinding the transactions. If we were minded to make such orders, we would also need to consider what transactions Aurora would have been aware of when it announced its intention to increase its bid consideration subject to certain conditions (see paragraph 14).
112. Even assuming that orders of this nature may assist Molopo to seek to reverse the transactions in other forums, we do not consider such orders likely to be effective in ensuring that the bid proceeds unless the transactions are actually unwound. Given the complexity of the transactions and the time that will be involved in seeking to unwind the transactions, we are not satisfied that any order we can make in this regard would be sufficiently effective in protecting the rights and interests of persons affected by the unacceptable circumstances or ensure that the bid would proceed as if those circumstances had not occurred.
113. In addition to the compensation order in favour of Aurora, we made a costs order in favour of Aurora. We consider that prior to the Directors Replacement, Molopo “presented a case that was not arguable” and delayed proceedings.³²

Variation of orders in Molopo Energy Limited 03R, 04R & 05R

114. In considering orders, we indicated to parties that we were currently not minded to vary the orders made in *Molopo Energy Limited 03R, 04R & 05R* in respect of Aurora’s shares vested in ASIC as sought by the Variation Application.

²⁹ *Skywest Limited 03* [2004] ATP 17, *Touch Holdings Limited* [2013] ATP 3 and *Ambassador Oil & Gas Limited 01* [2014] ATP 14

³⁰ *Pinnacle VRB Ltd 08* [2001] ATP 17

³¹ Which the Panel in *Molopo Energy Limited 09* considered was the case in relation to the proposed payment to fund certain costs in Orient, see [2017] ATP 22 at [26].

³² GN 4 – Remedies General, at [28] to [29]

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115. In response, Aurora submitted that given the change in the composition of the board following the Annual General Meeting, it no longer sought a variation at this stage. Accordingly, no further action was required.

Christian Johnston

President of the sitting Panel

Decision dated 8 June 2018 (Declaration), 18 July 2018 (orders)

Reasons given to parties 24 July 2018

Reasons published 30 July 2018

Advisers

Party	Advisers
Keybridge	Bennett + Co
Molopo	DLA Piper Australia (to 4 June 2018) Kemp Strang (after 5 June 2018)
ION	HWL Ebsworth Lawyers



Australian Government

Takeovers Panel

Annexure A

**CORPORATIONS ACT
SECTION 657E
INTERIM ORDER**

MOLOPO ENERGY LIMITED 10

Aurora Funds Management Ltd in its capacity as responsible entity of the Aurora Fortitude Absolute Return Fund made an application to the Panel dated 11 May 2018 in relation to the affairs of Molopo Energy Limited (**Molopo**) and requested an interim order in relation to the matter on 18 May 2018.

The Panel ORDERS:

1. That neither Molopo nor any subsidiary of Molopo make any payment or otherwise incur or commit to pay or incur any expenditure or liability for an amount in any single transaction of more than \$175,000, or an amount in aggregate in any series of transactions of more than \$175,000, without the prior consent of one or more of the sitting Panel members communicated to Molopo in writing.
2. This interim order has effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of this interim order.

Bruce Dyer
Counsel
with authority of Christian Johnston
President of the sitting Panel
Dated 18 May 2018



Australian Government

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Annexure B

CORPORATIONS ACT

SECTION 657E

VARIATION OF INTERIM ORDERS

MOLOPO ENERGY LIMITED 10 & 11

Aurora Funds Management Ltd in its capacity as responsible entity of the Aurora Fortitude Absolute Return Fund made an application to the Panel dated 24 May 2018 in relation to the affairs of Molopo Energy Limited (**Molopo**) and requested an interim order in relation to the matter on 28 May 2018.

The interim orders made on 18 May 2018 are varied by inserting a new Interim Order 2 so that the interim orders as varied read:

The Panel ORDERS:

1. That neither Molopo nor any subsidiary of Molopo make any payment or otherwise incur or commit to pay or incur any expenditure or liability for an amount in any single transaction of more than \$175,000, or an amount in aggregate in any series of transactions of more than \$175,000, without the prior consent of one or more of the sitting Panel members communicated to Molopo in writing.
2. In relation to the annual general meeting of Molopo to be held on Thursday, 31 May 2018 at 10:00 am (Melbourne time) or any adjournment of the meeting, that:
 - (a) voting on all resolutions to be considered at the meeting (other than any procedural resolutions) is conducted by poll and
 - (b) Molopo keeps a record of any votes cast on the resolutions referred to in Interim Order 2(a) in respect of the ordinary shares in Molopo held by:
 - (i) ION Limited and
 - (ii) Gibralt Capital Corporationand provides to the Panel by 5:00pm (Melbourne time) on the day of the meeting:
 - (iii) certified copies of such voting records (being any voting card, proxy form or other document evidencing votes cast on the poll) and
 - (iv) the poll report for each resolution.

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**Reasons – Molopo Energy Limited 10 & 11
[2018] ATP 12**

3. These interim orders have effect until the earliest of:
- (a) further order of the Panel
 - (b) the determination of the proceedings and
 - (c) 2 months from the date from which the relevant interim order was first made.

**Allan Bulman
Director
with authority of Christian Johnston
President of the sitting Panel
Dated 30 May 2018**



Australian Government

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Annexure C

**CORPORATIONS ACT
SECTION 657E
SECOND VARIATION OF INTERIM ORDERS**

MOLOPO ENERGY LIMITED 10 & 11

The interim orders made on 18 May 2018 in this matter, as varied on 30 May 2018, are further varied by amending paragraph 3 to read:

“These interim orders have effect until 6:00pm (Melbourne time) on Wednesday, 27 June 2018.”

Allan Bulman
Director
with authority of Christian Johnston
President of the sitting Panel
Dated 27 June 2018



Australian Government

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Annexure D

CORPORATIONS ACT

SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

MOLOPO ENERGY LIMITED 10 & 11¹

CIRCUMSTANCES

1. Molopo Energy Limited (**Molopo**) is an ASX listed entity. Its shares have been suspended since 27 July 2017 as a result of failing to satisfy ASX's requirement for a sufficient level of operations.
2. On 27 July 2017, Aurora Funds Management Limited as responsible entity of the Aurora Fortitude Absolute Return Fund (**Aurora**) announced an off-market takeover bid for Molopo offering consideration valued at \$0.18 per share payable in cash (capped at \$5 million in total) or unquoted units in the Aurora Fortitude Absolute Return Fund.
3. On 22 August 2017, Molopo announced that it had acquired 50% of the shares in Orient FRC Ltd (**Orient**) for US\$7 million from Dr Gil Feiler pursuant to a share sale agreement executed on 25 July 2017. The announcement stated that Orient would participate in an exploration and development project, pursuant to an exploration and development agreement (**EDA**) with Kerogen Florida Energy Company LP (**Kerogen**), for up to a 50% working interest to explore for oil and gas in a mature oil province in South Florida, U.S.A. (the **Orient Project**). None of the current directors of Molopo, being those elected on 31 May 2018 (the **Current Directors**), or Messrs Baljit Johal, Matthew Cudmore and Richard Matthews (the **Former Directors**) were on the board of directors of Molopo at the time the Orient transaction was executed or announced.
4. On 12 September 2017, Aurora withdrew its previously announced proposed bid on the basis that Molopo's acquisition of shares in Orient triggered a proposed defeating condition of the bid and announced a revised bid offering reduced consideration valued at \$0.135 per share to reflect the estimated value dilutive impact of the Orient transaction and the operating losses incurred during the half year ended 30 June 2017.

¹ The Panel is still considering the application in *Molopo Energy Limited 11* seeking a variation of the final orders made in *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12 to allow Aurora to be able to vote Aurora's shares in Molopo that are currently vested in the Commonwealth of Australia. The decision in *Molopo Energy Limited 03R, 04R & 05R* is currently subject to a Federal Court application dated 8 September 2017 for judicial review made under section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and section 39B of the *Judiciary Act 1903* (Cth) by Aurora Funds Management Limited as responsible entity for Aurora Global Income Trust and Aurora Fortitude Absolute Return Fund

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5. Aurora lodged its bidder's statement on 26 October 2017. One of the defeating conditions of Aurora's bid is that Molopo does not incur or commit to any capital expenditure or liability for one or more related items of greater than \$2 million (unless previously announced or consented to by Aurora). Aurora's bid is currently scheduled to close on 20 June 2018 (unless withdrawn or further extended).
6. On 8 November 2017, WAM Capital Limited (**WAM**) announced a proposed competing off-market takeover bid for Molopo at \$0.135 per share cash and subject to similar conditions as the Aurora bid.
7. On 24 November 2017, Aurora made an application to the Panel submitting that a payment proposed by Molopo would trigger the 'no material capital commitment or liability' defeating condition and, if made, would frustrate Aurora's takeover bid. The Panel considered that Aurora was sufficiently put on notice by Molopo's 22 August 2017 announcement that some such payment was likely.² Factors relevant to the Panel's decision included submissions by Molopo to the effect that "*Molopo would make announcements as are required to update the market at the appropriate time*" and "*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*".³
8. On 28 November 2017, Molopo released its target's statement in which Molopo's directors unanimously recommended that shareholders reject Aurora's bid. Molopo's directors at the time did not include any Current Directors or Former Directors, except Messrs Johal and Cudmore.
9. On 11 December 2017, Molopo announced that it had advanced Orient US\$4.5 million by way of shareholder loan. Molopo's directors at the time did not include any Current Directors but included all the Former Directors.
10. The 11 December 2017 announcement stated that the payment part satisfied the expected requirement that Orient hold funds of at least US\$20 million, being the estimated contract value for the drilling program, to demonstrate to the proposed operating partner that Orient had the financial capacity to comply with its obligations and progress the Orient Project. The announcement referred to the requirement under the terms of the EDA for Orient to spud the first commitment well by no later than 1 May 2018.
11. To date, no funds have been spent on spudding the first commitment well. The US\$4.5 million was applied⁴ as follows:
 - (a) on 7 December 2017 and 13 December 2017, US\$190,000 and US\$310,000 respectively was paid to representatives of ESGM Investments Limited (said to be Dr Feiler's special purpose vehicle) (**ESGM**) for the reimbursement of lease renewal and land management payments made by or on behalf of ESGM (that, as at those dates, Molopo had yet to contribute to)

² See *Molopo Energy Limited 09* [2017] ATP 22

³ At [23]

⁴ As submitted by Molopo

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- (b) on 28 December 2017, US\$2 million was deposited with Drawbridge Energy Operations & Management LLC, who were providing operating services at that time, with such funds utilised for the renewal of existing leases and the acquisition of new leases
 - (c) on 9 February 2018, US\$1.955 million was utilised as part of the redemption payment of US\$7 million for the acquisition of the shares in Orient held by ESGM (see paragraph 21) and
 - (d) US\$45,000 was utilised for miscellaneous and ancillary expenses (including land management payments).
12. On 4 January 2018, WAM withdrew its proposed bid on the basis that the additional expenditure commitments announced by Molopo on 11 December 2017 triggered the ‘no material transactions’ condition of its proposed bid.
 13. On 12 January 2018, Aurora announced an intention to increase its bid consideration to \$0.153 per share if Aurora’s relevant interest exceeded 30% (by number), all of the defeating conditions were fulfilled or waived,⁵ Molopo did not spend any further funds on the Orient Project and Molopo did not breach the ‘no material capital commitment or liability’ condition.
 14. On 19 January 2018, Molopo issued its first supplementary target’s statement noting that a condition to Aurora’s conditional increase could not be satisfied because Molopo would be required to fund further amounts in relation to the Orient Project as previously announced, including in its 11 December 2017 announcement. Molopo’s directors at the time did not include any Current Directors but included all the Former Directors.
 15. On 1 February 2018, Molopo released its activities and cashflow statement for the quarter ending 31 December 2017 showing cash and cash equivalents at the end of the quarter of \$48.021 million and estimating total cash outflows for the next quarter of \$1.9 million.
 16. On 21 February 2018, Molopo responded to an ASX query letter in which it indicated that the US\$4.5 million loaned to Orient would be used when required to comply with its obligations under the EDA and confirmed that Molopo was in compliance with its continuous disclosure requirements in ASX Listing Rule 3.1.
 17. On 19 March 2018, Molopo issued its second supplementary target’s statement in which Molopo’s directors reiterated reasons previously relied upon for rejecting Aurora’s bid. Molopo’s directors at the time did not include any Current Directors but included all the Former Directors.
 18. On 23 April 2018, Molopo responded to a further ASX query letter with questions relating to the Orient Project. It disclosed that Drawbridge Energy Operations & Management LLC had been appointed as “operator” under the EDA and that Dr Feiler had not to date executed any shareholder loan agreement with Orient.

⁵ Aurora indicated at that time that its intention would be to waive the 50% minimum acceptance condition if Aurora were to have a relevant interest in more than 30% (by number)

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19. On 30 April 2018, Molopo announced a clarification to its 22 August 2017 announcement confirming that the resources reported in the report from Morning Star Consultants, LLC (**Morning Star**) dated 1 June 2017 referred to in that announcement “were reported for the benefit of [Kerogen] which classified the resources applicable to the Orient Project as ‘prospective resources’” and that Morning Star subsequently prepared a revised report for Molopo “on the basis that Molopo had completed the acquisition of its interest in the Orient Project (ie. to report on these resources as of 25 July 2017 when Molopo acquired an interest in Orient)”. The announcement stated that Morning Star issued a report to the directors of Molopo dated 18 September 2017 which upgraded the classification of the resource volumes applicable to the Orient Project from “prospective resources” to “contingent resources” as of 25 July 2017.
20. On 8 May 2018, Molopo made an ASX announcement disclosing the following actions (Molopo’s board at the time consisted of the Former Directors):
- (a) on 31 January 2018, Orient had redeemed all of the shares in Orient held by ESGM for a redemption amount of US\$7 million
 - (b) during the first quarter of 2018, Molopo (or its subsidiaries) provided total funding to Orient of US\$23.5 million, in addition to the US\$4.5 million provided in December 2017. Of this total amount, US\$7 million was used to fund the redemption of the shares in Orient held by ESGM and US\$21 million was used to fund an intercompany loan from Orient to its wholly owned subsidiary, Orient FRC (US) LLC (**Orient US**)
 - (c) on 21 February 2018, Orient entered into a contribution agreement with a BVI entity, Drawbridge Energy Holdings Ltd (**Drawbridge Holdings**), pursuant to which it agreed to (i) assign Orient’s interest in the Orient Project to Orient US at completion and (ii) transfer its 100% interest in Orient US to Drawbridge Holdings, in consideration for receipt of a 30% non-voting interest in Drawbridge Holdings (the **Combination Transaction**)
 - (d) completion of the Combination Transaction occurred on or about 7 March 2018
 - (e) following completion of the Combination Transaction, the loan from Orient to Orient US was extinguished
 - (f) following completion of the Combination Transaction, Molopo stated that it had gained (via Orient’s 30% interest in Drawbridge Holdings) a diversified oil and gas exploration portfolio with indirect interests in several oil and gas projects in Texas, U.S.A. and
 - (g) on 25 April 2018, Kerogen provided an extension to 1 April 2019 in respect of the drilling deadline for the first commitment well set out in the EDA, subject to a number of conditions including that the application for a drilling permit must be filed on or before 1 August 2018.
21. Following completion of the Combination Transaction, Molopo had approximately \$16.904 million of cash available to it as at 31 March 2018.

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22. The Former Directors of Molopo did not obtain any independent valuations regarding any of the actions announced on 8 May 2018⁶ and, in relation to the Combination Transaction, did not seek third party valuation assistance for due diligence, instead relying on their own analysis.
23. On 11 May 2018, ASX notified Molopo that ASX considered the Orient transaction announced on 22 August 2017 (as modified by the announcement on 8 May 2018) to be a significant change to the nature or scale of Molopo's activities and ASX has exercised its discretion under Listing Rule 11.1.2 to require that transaction to be approved by Molopo shareholders and under Listing Rule 11.1.3 to require Molopo to satisfy the requirements in Chapters 1 and 2 of the Listing Rules as if it were applying for admission to the official list. Further, ASX advised that it considered that Molopo had committed serious breaches of the ASX Listing Rules and may also have breached ss1041H and 1309⁷ for making misleading disclosures to ASX.
24. On 18 May 2018, following Aurora's application to the Panel, Molopo advised its shareholders that it intended to seek shareholder approval and satisfy the ASX readmission requirements, as described above.
25. On 28 May 2018, Molopo released its third supplementary target's statement outlining its recent announcements and events and stated that its directors continue to unanimously recommend that shareholders reject Aurora's bid. Molopo's board at the time consisted of the Former Directors.
26. In light of Molopo's announcement on 8 May 2018, Molopo has failed to provide supplementary target's statement disclosure in compliance with s644 following each of the new circumstances described in paragraph 21.
27. As a result, the target's statement dated 28 November 2017, first supplementary target's statement dated 19 January 2018 and second supplementary target's statement dated 19 March 2018 contain, or until the third supplementary target's statement was released contained, omissions and misleading and deceptive information.
28. The third supplementary target's statement also contains insufficient or misleading information regarding (among other things):
 - (a) each new circumstance and the effect of each circumstance on Molopo shareholders' continuing shareholdings in Molopo
 - (b) Drawbridge Holdings and its assets
 - (c) the controlling shareholder(s) of Drawbridge Holdings
 - (d) the Molopo directors' recommendations with respect to Aurora's bid, noting that certain factual circumstances previously relied upon have changed materially and/or no longer apply and

⁶ In respect of Orient, Molopo submitted that the Former Directors had the benefit of existing reports referring to reports dated 11 June 2015, 1 June 2017 and 18 September 2017 (see paragraph 20 regarding the two later reports)

⁷ 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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- (e) the effect or consequences if the shareholder approval described above is not obtained.
- 29. The actions announced by Molopo on 8 May 2018 triggered several conditions of Aurora's bid. By virtue of Molopo taking those actions, Aurora's bid may be withdrawn or lapse.
- 30. By failing to disclose promptly and properly the actions announced on 8 May 2018, in addition to not seeking shareholder approval or making the actions conditional on shareholder approval, Molopo has not offered shareholders a choice between those actions and Aurora's bid (or any potential competing bids).

EFFECT

- 31. It appears to the Panel that the acquisition of control, or potential control, of Molopo has not taken place in an efficient, competitive and informed market and Molopo shareholders have not been given enough information to enable them to assess the merits of Aurora's bid.
- 32. Molopo shareholders have not had a reasonable and equal opportunity to participate in any benefits accruing under Aurora's bid.
- 33. The Former Directors of Molopo by their action, including such action which may cause or contribute to Aurora's bid not proceeding, have not given all shareholders of Molopo reasonable and equal opportunity to participate in any benefits accruing under Aurora's bid.

CONCLUSION

- 34. It appears to the Panel that the circumstances are unacceptable circumstances:
 - (a) having regard to the effect that the Panel is satisfied they have had or are having on:
 - (i) the control, or potential control, of Molopo or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Molopo
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in s602
 - (c) in the further alternative, because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6.
- 35. In having regard to the purpose set out in paragraph 602(c), the Panel has taken into account the action of the Former Directors of Molopo, including any such action which may cause or contribute to Aurora's bid not proceeding.
- 36. 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).

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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 Christian Johnston
President of the sitting Panel
Dated 8 June 2018**



Australian Government

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Annexure E

**CORPORATIONS ACT
SECTION 657D
ORDERS**

MOLOPO ENERGY LIMITED 10 & 11

The Panel made a declaration of unacceptable circumstances on 8 June 2018.

THE PANEL ORDERS

1. Within 10 business days of this order, Molopo must pay to Aurora \$46,476.66 representing the out-of-pocket fees and expenses incurred by Aurora in relation to the Takeover Bid from 1 January 2018 up and until the date of this order. If the Takeover Bid is declared unconditional and Aurora obtains voting power of more than 50%, Aurora must repay all monies received under this Order 1.
2. Within 10 business days of this order, Molopo must pay to Aurora \$24,105.00 representing the costs actually, necessarily, properly and reasonably incurred by Aurora in the course of the proceedings.
3. In these orders the following terms apply:

Aurora	Aurora Funds Management Ltd, including as responsible entity for the Aurora Fortitude Absolute Return Fund
Molopo	Molopo Energy Limited
Takeover Bid	Aurora's off-market takeover bid for Molopo announced on 12 September 2017

Allan Bulman
Director
with authority of Christian Johnston
President of the sitting Panel
Dated 18 July 2018