



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Molopo Energy Limited 12R  
[2018] ATP 19**

**Catchwords:**

*Orders – variation of orders – disclosure – failure to disclose – supplementary target’s statement – frustrating action – poison pill – efficient, competitive and informed market – equal opportunity – continuous disclosure – directors’ duties – compensation – costs*

*Corporations Act 2001 (Cth), sections 602, 644, 647, 657A, 657D(2), 657EA(4), 1041H, 1309*

*Guidance Note 2 – Reviewing Decisions, Guidance Note 4 – Remedies, Guidance Note 12 – Frustrating Action*

*Procedural Rules r3.3.1*

*Molopo Energy Limited 10 & 11 [2018] ATP 12, Molopo Energy Limited 09 [2017] ATP 22, Molopo Energy Limited 08 [2017] ATP 20, Merlin Diamonds Limited [2016] ATP 18, World Oil Resources Limited [2013] ATP 1, Cemex Australia Pty Ltd v Takeovers Panel [2009] FCAFC 78; (2009) 177 FCR 98 at [60], Orion Telecommunications Ltd [2006] ATP 23, Anzoil NL [2002] ATP 19*

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	YES	N/A	YES	NO

**INTRODUCTION**

1. The Panel, Tracey Horton, Michelle Jablko (sitting President) and John Sheahan QC, varied the final orders made by the initial Panel<sup>1</sup> in relation to the affairs of Molopo Energy Limited by including orders requiring certain persons who were directors of Molopo during the period in which the unacceptable circumstances occurred<sup>2</sup> to compensate Molopo and one of its shareholders for costs they incurred during the initial Panel proceedings.<sup>3</sup> The Panel agreed with the orders made by the initial Panel but considered the additional orders appropriate to protect the rights and interests of Molopo and its shareholders which were affected by the unacceptable circumstances.

2. In these reasons, the following definitions apply.

- Aurora** Aurora Funds Management Ltd, including 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
- Combination** The transactions entered into pursuant to a contribution

<sup>1</sup> All references to the initial Panel are to the Panel in *Molopo Energy Limited 10 & 11 [2018] ATP 12*

<sup>2</sup> There is no suggestion that the current directors of Molopo (who were elected at Molopo’s AGM on 31 May 2018) are responsible for these circumstances

<sup>3</sup> The application sought a review of the final orders made by the initial Panel and did not seek a review of the initial Panel’s decision to make a declaration of unacceptable circumstances

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<b>Transaction</b>	agreement between Orient and Drawbridge 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, in consideration for receipt of a 30% non-voting interest in Drawbridge
<b>Declaration</b>	declaration of unacceptable circumstances in relation to the affairs of Molopo Energy Limited made by the initial Panel on 8 June 2018 (Annexure A)
<b>Drawbridge</b>	Drawbridge Energy Holdings Ltd, a British Virgin Islands entity
<b>Former Directors</b>	Messrs Baljit Johal, Matthew Cudmore and Richard Matthews
<b>Initial Proceedings</b>	the proceedings in <i>Molopo Energy Limited 10 &amp; 11</i> [2018] ATP 12
<b>Keybridge</b>	Keybridge Capital Limited
<b>Molopo</b>	Molopo Energy Limited
<b>Orient</b>	Orient FRC Ltd
<b>Orient Project</b>	Orient's up to 50% working interest to explore for oil and gas in a mature oil province in South Florida, U.S.A.
<b>Orient US</b>	Orient FRC (US) LLC
<b>Original Orders</b>	the orders made by the initial Panel on 18 July 2018 set out in Annexure B
<b>Relevant Transactions</b>	The transactions and events described in Molopo's 8 May 2018 announcement, summarised at paragraph [21] of the initial Panel's reasons

## FACTS

3. The facts are as set out in the Declaration and the initial Panel's reasons.<sup>4</sup> We adopt those<sup>5</sup> as our findings of fact. Briefly:
- (a) 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.
  - (b) On 12 September 2017, Aurora announced an off-market takeover bid for Molopo offering consideration valued at \$0.135 per share.<sup>6</sup> One of the defeating conditions of Aurora's Bid was that Molopo not incur or commit to

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<sup>4</sup> [2018] ATP 12 at [3]-[26], [68], [72] - [74], [76]

<sup>5</sup> As supplemented below

<sup>6</sup> Aurora had previously announced on 27 July 2017 an off-market takeover bid for Molopo offering consideration valued at \$0.18 per share which was subsequently withdrawn upon Molopo's announcement of its acquisition of an interest in Orient and its participation in the Orient Project.

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any capital expenditure or liability for one or more related items of greater than \$2 million (unless previously announced or consented to by Aurora).

- (c) 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.
  - (d) On 8 May 2018, Molopo made an ASX announcement disclosing (among other things) various transactions which had completed without shareholder approval, including:
    - (i) the Combination Transaction which had completed on 7 March 2018 and
    - (ii) the provision of total funding to Orient US of US\$21million and that this loan had been extinguished following completion of the Combination Transaction.<sup>7</sup>
  - (e) Following completion of the Combination Transaction, Molopo reported that it had approximately \$16.904 million of cash and cash equivalents as at 31 March 2018.
  - (f) On 11 May 2018, Aurora applied for a declaration of unacceptable circumstances and orders.
4. The initial Panel decided to make the Declaration on 8 June 2018 and the Original Orders on 18 July 2018. The Original Orders required Molopo to pay to Aurora costs incurred by Aurora in relation to Aurora’s Bid and the Initial Proceedings.

## APPLICATION

### Review sought

- 5. By application dated 19 July 2018 and made on 20 July 2018, Molopo sought a review of the Original Orders.
- 6. Molopo submitted that the Original Orders do not achieve either of the outcomes in s657D(2)(a) or (b)<sup>8</sup>. Molopo submitted that the most appropriate orders to remedy the unacceptable circumstances are:
  - (a) orders to cancel each of the various transactions, including the Combination Transaction, that contributed to the unacceptable circumstances and
  - (b) compensation orders against the Former Directors, former advisers and any other party or parties receiving Molopo funds from the transactions which were not legally approved by Molopo shareholders,

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<sup>7</sup> Further details of the transactions announced are summarised at paragraph [21] of the initial Panel’s reasons

<sup>8</sup> 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)

thereby putting Molopo shareholders back in the position they would have been had the Former Directors not undertaken the transactions.

## DISCUSSION

### Decision to conduct proceedings

7. Keybridge made preliminary submissions submitting that *“Shareholders share with Molopo the adverse effect of the unacceptable dissipation by the Former Directors of Molopo of Molopo’s principal assets. They also suffer the loss of an opportunity to sell their shares at a time when the unacceptable behaviour of the Former Directors included acting in a way which both:*
  - (a) *triggered defeating conditions of a current takeover bid in a way which the bidder was most unlikely not to rely on; and*
  - (b) *continued the suspension of Molopo shares from trading on ASX which deprived Molopo shareholders of an active market in those shares.”*
8. We decided to conduct proceedings on the issue of whether compensation orders should be made against the Former Directors.
9. We did not consider it appropriate to make orders to unwind the transactions for the same reasons as the initial Panel (see paragraphs [111] and [112] of the initial Panel’s reasons).
10. We also did not consider it appropriate to make orders against any former advisers of Molopo as there was insufficient evidence presented to support such an order (see paragraph 16 below).

### Materials considered

11. In deciding this matter, we have been provided with, and have considered, the following:
  - (a) all material before the initial Panel
  - (b) the initial Panel’s reasons for decision and
  - (c) all submissions and material provided to us in the review.
12. We will address specifically only what is necessary to explain our findings on material questions of fact, the material on which they are based, and our reasons.
13. We provided draft preliminary findings to the parties, ASIC and the Former Directors and asked for submissions in advance of making any orders. We did not receive any submissions on our findings from Messrs Johal or Cudmore. Mr Matthews provided some comments which are discussed below (where relevant), although submitted that *“given that he no longer has access to the company’s books and records, and given the parallel proceedings brought by Molopo against the Former Directors in the Supreme Court of Victoria, [Mr Matthews] is otherwise not in a position to provide any more fulsome response to the Preliminary Findings.”*

### Responsibility of the Former Directors

14. Upon reviewing the material before the initial Panel, it was apparent that no other individuals (apart from Mr Ronnen Rosengart and Mr Samuel Belzberg to the

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extent discussed at paragraphs 18 and 19 below) were directly responsible for the actions taken, or purportedly taken, by or on behalf of Molopo in respect of the circumstances described in paragraphs [9] to [30] of the Declaration.

15. Both Messrs Johal and Cudmore were appointed to the board of Molopo on 24 October 2017. Mr Johal was appointed as Finance Director and later became Managing Director and Chairman on 10 November 2017. Mr Matthews was appointed to the board as Finance Director on 6 December 2017. On 11 December 2017, the day Molopo announced a US\$4.5 million loan to Orient,<sup>9</sup> Mr Matthews replaced Mr Metcalfe as Company Secretary of Molopo.
16. During the tenure of the Former Directors, Mr Rosengart was a non-executive director of Molopo until his resignation on 16 January 2018 and Mr Belzberg was a non-executive director until his death on 30 March 2018. Other than Mr Metcalfe until 11 December 2017, Molopo had no employees during the tenure of the Former Directors. There is no information to suggest the delegation of any relevant power by the Former Directors to another person during the relevant period. Mr Matthews pointed to Molopo's engagement in February 2018 of an advisor providing company secretarial advice and to the role played by Molopo's legal advisors. We were not provided with any material suggesting this involved any delegation that would be reasonable and appropriate or should absolve the Former Directors from responsibility for their actions as directors of Molopo.
17. The transactions the subject of the Declaration all occurred while the Former Directors were directors of Molopo. Notably, there were no formal resolutions approving any of the Relevant Transactions prior to each of them occurring.
18. While Molopo submitted in the Initial Proceedings that Mr Johal had discussions, during December and January 2018, with Mr Rosengart regarding the Orient Project, there was no material to evidence that Mr Rosengart was involved in approving any of the Relevant Transactions that occurred prior to his resignation.
19. Apart from Mr Belzberg's approval (via email) of a US\$5.5 million loan from Molopo Canada to Orient, his involvement in relation to the other Relevant Transactions is equivocal. In particular, it appears that he was informed by Mr Johal of certain transactions after they were completed, was given limited information about the transactions and on at least two occasions specifically asked Mr Johal not to make any further financial commitments without speaking to him first. In these circumstances, we consider that it would be unfairly prejudicial to make orders against his estate.
20. Molopo's submissions indicate that Mr Johal was heavily involved in negotiating the Relevant Transactions. For example, several agreements underpinning the Relevant Transactions were signed by Mr Johal on behalf of Orient and Molopo before they were presented to the full Molopo board.
21. According to the minutes of a Molopo board meeting held on 4 April 2018, Mr Johal discussed the Combination Transaction with each director at the time he

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<sup>9</sup> See paragraphs [9] and [10] of the Declaration

was in possession of the disclosure materials relating to the Combination Transaction. Mr Johal sent an email to Messrs Cudmore, Matthews and Belzberg on 5 March 2018 providing some information about the Combination Transaction. The email did not mention Drawbridge or provide adequate details of the structure of the transaction, and in particular made no mention of the voting rights of Orient. Messrs Matthews and Cudmore appear to have been satisfied with the information presented to them in approving the Combination Transaction. In response to Mr Johal's email, in contrast to Mr Belzberg, neither of them asked any questions or sought any further information.

**Significantly deficient disclosure of highly material information**

22. We agree with the initial Panel's findings that there had been a "*blatant disregard of Molopo's disclosure obligations by the Former Directors*".<sup>10</sup> The initial Panel found that Molopo had failed to provide supplementary target's statement disclosure in compliance with s644 following each new circumstance described in the 8 May 2018 announcement and this resulted in the target's statement and the first and second supplementary target's statement containing omissions and misleading and deceptive information. The initial Panel also found that the third supplementary target's statement contained insufficient or misleading information. We agree with the initial Panel that, by failing to make proper and prompt disclosure, in addition to not seeking shareholder approval for or making the Relevant Transactions conditional on shareholder approval, the Former Directors had caused or contributed to Aurora's Bid not proceeding.
23. The initial Panel included these findings in its draft decision and declaration. The Former Directors were given the opportunity to make submissions on the draft decision and declaration and become parties to the proceedings. The initial Panel received no submissions in response.
24. Not only did the Former Directors fail to disclose the Relevant Transactions, they also represented to the market that no material transactions had occurred during this period. On 21 February 2018, the same day Orient entered into the Combination Transaction, in response to an ASX price query Molopo announced that "*there is no information that should be given to ASX about its financial condition in accordance with [Listing Rule 3.1] that has not already been released to the market*".<sup>11</sup>
25. The material before us also suggested that the Former Directors acted contrary to legal advice in relation to their disclosure obligations. Mr Matthews rejected that and submitted that he at all times acted in accordance with legal advice provided to him, but did not provide material to support his submission. We accept that the Former Directors did act inconsistently with legal advice in relation to Molopo's disclosure obligations. However we would reach the same ultimate conclusion whether or not we made that finding.

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<sup>10</sup> See paragraph [71] of the initial Panel's reasons

<sup>11</sup> At page 2

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26. The matters that should have been disclosed were of great significance to Molopo and its shareholders, and the Former Directors should have realised that. This is made clear by the fact that ASX considered the transactions resulted in a significant change to the nature or scale of Molopo's activities requiring, by application of ASX Listing Rule 11.1, the transactions to be approved by shareholders and 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 considered that Molopo had committed serious breaches of the Listing Rules, including by failing to notify ASX of transactions before they were completed and delaying the notification of transactions. ASX stated that Molopo may also have breached sections 1041H and 1309 by making misleading disclosures to ASX.

#### Awareness of the unacceptable circumstances

27. It appears to us that the Former Directors were aware of, or had they acted reasonably should have been aware of, the unacceptable circumstances. Matters that suggest awareness, or should have alerted the Former Directors to their obligations, include:
- (a) Molopo itself brought an application to the Panel in *Molopo 08*<sup>12</sup> indicating its awareness of the issue of frustrating action, which was squarely the subject of *Molopo 09*<sup>13</sup> and the Initial Proceedings. Messrs Johal and Cudmore were appointed directors of Molopo the day after the *Molopo 08* Panel application was made.
  - (b) In *Molopo 09* the Panel decided that a then proposed payment of US\$4.5 million in relation to Orient was not an unacceptable frustrating action. Molopo represented to the Panel in relation to the payment that it “*would make announcements as are required to update the market at the appropriate time*”.<sup>14</sup> The Panel considered this, among other factors, relevant to its decision. During the proceedings, Messrs Johal and Cudmore were both directors and Mr Matthews was appointed a director shortly before the Panel's decision.
  - (c) Molopo's target's statement dated 28 November 2018 states: “*Molopo has no obligation to disseminate any updates or revisions to any statements to reflect any change in expectations in relation to those statements or any change in events, conditions or circumstances on which any of those statements are based unless it is required to do so under Division 4 of Part 6.5 of the Corporations Act to update or correct this Target's Statement (i.e. for certain matters that are material from the point of view of a Shareholder) or under its continuous disclosure obligations under the Corporations Act and the ASX Listing Rules.*”<sup>15</sup> Messrs Johal and Cudmore were both directors at the time. The Former Directors were the only directors at the time of release of each of the first, second and third supplementary target's statements.

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<sup>12</sup> *Molopo Energy Limited 08* [2017] ATP 20

<sup>13</sup> *Molopo Energy Limited 09* [2017] ATP 22

<sup>14</sup> At [23]

<sup>15</sup> At pages 1-2

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- (d) At a board meeting held on 4 April 2018, Molopo’s legal advisers emphasised to the Former Directors that Molopo was currently in breach of the ASX continuous disclosure regime and the situation should be remedied as soon as possible.
  - (e) Between 1 February and 20 March 2018, ASX sent Molopo one email and two letters raising separate disclosure concerns and one letter regarding the application of Listing Rule 11.1. Molopo only responded to one of the disclosure queries during this period (that response was materially defective – see paragraph 24) and on 23 March 2018 requested the first of several extensions to the deadlines to respond. Molopo’s legal advisers became involved on 5 April 2018. After significant communications, a response to ASX’s disclosure queries was released by Molopo on 23 April 2018 and a response to the Listing Rule 11.1 letter was received by ASX on 10 May 2018.
28. The failure to disclose the Relevant Transactions at all was exacerbated by the provision of disclosure by Molopo prior to the 8 May 2018 announcement where the Former Directors, knowing that one or more of the Relevant Transactions had occurred, chose not to disclose that information thereby rendering the provided disclosure misleading (and on one occasion even actively represented to the market that no significant transactions had occurred). This was highlighted in the initial Panel’s reasons at [72] in relation to Molopo’s target’s statement disclosure and at [73]-[74] in relation to Molopo’s ASX disclosure and in its correspondence with ASX.

#### Conclusion

29. In light of the matters outlined above, it is apparent that:
- (a) the Former Directors blatantly disregarded Molopo's disclosure obligations on numerous occasions, at times over extended periods, and were directly responsible for the actions taken, or purportedly taken, by or on behalf of Molopo giving rise to the unacceptable circumstances
  - (b) the matters that should have been disclosed were of great significance to Molopo and its shareholders, and the Former Directors should have realised that, and
  - (c) the Former Directors were aware of the unacceptable circumstances, or would have been, had they acted reasonably.

## DECISION

### Orders

30. We asked for submissions on whether the Former Directors should be required to compensate Molopo for the amounts it was required to pay Aurora pursuant to the Original Orders. We also asked for submissions on whether the Former Directors should be required to compensate the parties to the Initial Proceedings, namely Molopo, Keybridge and Mr Roger Corbett AO, and ASIC for costs incurred in those proceedings.



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31. Keybridge and Molopo supported the proposed compensation orders in their favour. Molopo submitted that *“Molopo and its shareholders would not, on the Panel’s own strong findings, not [sic] be in the position it is currently in had it not been for the actions and decisions of the Former Directors in breach of amongst other things the ASX Listing Rules and Corporations Law.”*
32. Mr Matthews submitted that such orders involve questions of law outside the Panel’s jurisdiction, namely breaches of directors’ duties. Mr Matthews submitted that *“making orders against the Former Directors would conflate the conduct of Molopo and its directors. Molopo and its directors are separate legal entities and, absent any adverse finding by a court on the appropriate course of action, the directors are entitled to the protection of the corporate veil in that respect.”* Messrs Johal and Cudmore submitted that the proposed order *“would require the Panel to be satisfied that the actions of the former directors justify piercing the corporate veil”* and *“there was insufficient evidence upon which the Panel could be satisfied that it is appropriate to pierce the corporate veil.”*
33. The Panel does not often make orders against directors personally, although it has done so in rare cases.<sup>16</sup> The Panel does not make such orders to punish,<sup>17</sup> but rather because it thinks such orders are appropriate to satisfy one of the paragraphs in s657D(2). In this case, we are satisfied that the new orders are appropriate, and necessary, to protect the rights and interests of persons affected by the unacceptable circumstances, namely Molopo and its shareholders. Our orders are not based on a breach of directors’ duties or intended to provide compensation for any such breach. Our orders create new rights,<sup>18</sup> in this case, against the Former Directors. We do not consider this to be based on “piercing the corporate veil”. Rather, this is a rare case in which the material before us provides a strong basis for concluding that:
- (a) orders against Molopo alone will be ineffective to protect the rights or interests of the persons most directly and materially affected by the unacceptable circumstances, and may only cause them further prejudice
  - (b) actions or omissions by the Former Directors were the direct cause of the unacceptable circumstances and
  - (c) no alternative orders would appropriately or effectively protect the rights or interests of the persons affected<sup>19</sup>.
34. We varied the Original Orders by adding three additional orders set out in Annexure C. The Original Orders required Molopo to pay to Aurora costs

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<sup>16</sup> See, for example: *Merlin Diamonds Limited* [2016] ATP 18 at [154]-[155] (costs order against director of several companies holding shares who acted in concert with other shareholders), *Orion Telecommunications Ltd* [2006] ATP 23 (orders limiting voting, creeping and acquisitions by a director of several associated companies as well as against the companies themselves)

<sup>17</sup> *World Oil Resources Limited* [2013] ATP 1 at [235], *Anzoil NL* [2002] ATP 19 at [69]

<sup>18</sup> See *Cemex Australia Pty Ltd v Takeovers Panel* [2009] FCAFC 78; (2009) 177 FCR 98 at [60].

<sup>19</sup> See paragraph 9 above.

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incurred by Aurora in relation to Aurora's Bid and the Initial Proceedings. Our additional orders require the Former Directors to:

- (a) reimburse Molopo for the amounts it paid to Aurora pursuant to the Original Orders
  - (b) pay to Molopo costs it incurred in the Initial Proceedings and
  - (c) pay to Keybridge (a shareholder of Molopo) costs it incurred in the Initial Proceedings.
35. We agree with the initial Panel's orders enabling Aurora to recover the costs of its bid and the Initial Proceedings and make no change to those orders. However, we do not consider that other Molopo shareholders should (indirectly) bear the burden of these costs given that their interests have also been adversely affected to a very significant extent by seriously deficient disclosure in relation to transactions of great significance.
36. We made the Former Directors jointly and severally liable as we were not satisfied it was appropriate to differentiate between them. While Mr Johal was actively involved in the Relevant Transactions, each Former Director was responsible<sup>20</sup> for ensuring that Molopo complied with its disclosure obligations under the Corporations Act and the ASX Listing Rules.
37. Under s657EA(4) and s657D the Panel is empowered to make 'any order'<sup>21</sup> if 4 tests are met:
- (a) it has made a declaration under s657A. The initial Panel did so on 8 June 2018.
  - (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We do not consider our orders unfairly prejudice any person. While we acknowledge that the orders do prejudice the Former Directors, we do not consider that prejudice to be unfair having regard to the nature of the unacceptable circumstances and the role of the Former Directors in contributing to those circumstances. Mr Matthews submitted that he had not been given enough time to properly respond to the Preliminary Findings. We consider that Mr Matthews had a fair opportunity to be heard in the circumstances. Mr Matthews:
    - (i) received (as a director of Molopo) documents relating to the Initial Proceedings between 11 May 2018 and 25 May 2018
    - (ii) was sent a draft of the Declaration on 6 June 2018 and invited to make submissions or become a party to the Initial Proceedings (which would have given him access to all of the material before the initial Panel)

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<sup>20</sup> We note also that each director would be liable for misleading or deceptive statements, omissions and failure to address new circumstances in a target's statement (subject to defences) even if that director did not commit, and was not involved in, the contravention: Sections 670B(1), item 7, 670C and 670D

<sup>21</sup> Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

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- (iii) was sent the initial Panel’s reasons on 24 July 2018
  - (iv) was sent Molopo’s review application and the Panel’s brief on 2 August 2018
  - (v) first contacted the Panel about making submissions (apart from sending an email on 6 June 2018 to advise that he was no longer a director of Molopo) on 5 August 2018
  - (vi) made submissions (and received several extensions of time to make them), the last round of which were due on 20 September 2018.
- (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 2 August 2018, 3 September 2018 and 24 September 2018.
- (d) it considers the orders appropriate under one or more of the paragraphs in s657D(2). For reasons above, we are satisfied that our orders are appropriate under s657D(2)(a) to protect rights or interests of persons who have been, are being or will be or are likely to be affected by the unacceptable circumstances. In the alternative, we are satisfied that new order 3, to the extent it relates to amounts paid pursuant to order 2, and new orders 4 and 5, are appropriate under s657D(2)(d) and s657EA(4) for similar reasons to those outlined in paragraph [113] of the initial Panel’s reasons.

**Michelle Jablko**

**President of the sitting Panel**

**Orders dated 26 September 2018**

**Reasons given to parties 15 October 2018**

**Reasons published 18 October 2018**

#### Advisers

Party	Advisers
Molopo	DLA Piper Australia (to 4 June 2018) Kemp Strang (after 5 June 2018)
Messrs Johal and Cudmore	SBA Law
Mr Matthews	Aptum Legal



**Australian Government**

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**Annexure A**

**CORPORATIONS ACT**

**SECTION 657A**

**DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

**MOLOPO ENERGY LIMITED 10 & 11<sup>1</sup>**

**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.

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<sup>1</sup> 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.<sup>2</sup> 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*".<sup>3</sup>
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 applied<sup>4</sup> 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)

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<sup>2</sup> See *Molopo Energy Limited 09* [2017] ATP 22

<sup>3</sup> At [23]

<sup>4</sup> As submitted by Molopo

## Takeovers Panel

### Reasons – Molopo Energy Limited 12R [2018] ATP 19

- (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 3(d)) 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,<sup>5</sup> 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.

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<sup>5</sup> 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)

## Takeovers Panel

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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.

## Takeovers Panel

### Reasons – Molopo Energy Limited 12R [2018] ATP 19

22. The Former Directors of Molopo did not obtain any independent valuations regarding any of the actions announced on 8 May 2018<sup>6</sup> 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 1309<sup>7</sup> 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 3(d).
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

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<sup>6</sup> 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 19 regarding the two later reports)

<sup>7</sup> 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)



## Takeovers Panel

### Reasons – Molopo Energy Limited 12R [2018] ATP 19

- (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
  - (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).

**Takeovers Panel**

**Reasons - Molopo Energy Limited 12R  
[2018] ATP 19**

**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**

**Takeovers Panel**

**Annexure B**

**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:

<b>Aurora</b>	Aurora Funds Management Ltd, including as responsible entity for the Aurora Fortitude Absolute Return Fund
<b>Molopo</b>	Molopo Energy Limited
<b>Takeover Bid</b>	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**

**Annexure C**  
**CORPORATIONS ACT**  
**SECTIONS 657EA AND 657D**  
**ORDERS**

**MOLOPO ENERGY LIMITED 12R**

The Panel in *Molopo Energy Limited 10 & 11* made a declaration of unacceptable circumstances on 8 June 2018 and final orders on 18 July 2018.

The final orders made on 18 July 2018 are varied by inserting new Orders 3, 4 and 5, and renumbering and amending original Order 3, so that new Orders 3 to 6 read as follows:

**THE PANEL ORDERS**

3. Within 2 months of this order, the Former Directors must pay to Molopo \$70,581.66, representing the total amount paid by Molopo to Aurora pursuant to Orders 1 and 2 made on 18 July 2018. Liability is joint and several.
4. Within 2 months of this order, the Former Directors must pay to Molopo \$91,944.60 representing the costs actually, properly and reasonably incurred by Molopo in the course of the *Molopo Energy Limited 10 & 11* proceedings. Liability is joint and several.
5. Within 2 months of this order, the Former Directors must pay to Keybridge \$46,235 representing the costs actually, properly and reasonably incurred by Keybridge in the course of the *Molopo Energy Limited 10 & 11* proceedings. Liability is joint and several.
6. In these Orders the following terms apply.

<b>Aurora</b>	Aurora Funds Management Ltd, including as responsible entity for the Aurora Fortitude Absolute Return Fund
<b>Former Directors</b>	Messrs Baljit Johal, Matthew Cudmore and Richard Matthews
<b>Keybridge</b>	Keybridge Capital Limited
<b>Molopo</b>	Molopo Energy Limited
<b>Takeover Bid</b>	Aurora's off-market takeover bid for Molopo announced on 12 September 2017

**Bruce Dyer**  
**Counsel**  
**with authority of Michelle Jablko**  
**President of the sitting Panel**  
**Dated 26 September 2018**