Australian Government

Takeovers Panel

Reasons for Decision
Keybridge Capital Limited 08R, 09R and 10R
[2020] ATP 9

Catchwords:

Affirming initial Panel decisions – declaration – orders – prescribed occurrences – disclosure – efficient, competitive and informed market – funding arrangements – insider participation – frustrating action – placement – association – withdrawal rights

Corporations Act 2001 (Cth), sections 12, 602, 606, 611, 624, 630, 650F, 650G, 652C, 657A, 657D

Australian Securities and Investments Commission Act 2001 (Cth), section 201A

Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 16

Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311, Flinders Diamonds v Tiger (2004) 49 ACSR 199, ASIC v Yandal Gold (1999) 32 ACSR 317

Guidance Note 2: Reviewing Decisions, Guidance Note 12: Frustrating Actions, Guidance Note 14: Funding Arrangements

CASAC: Anomalies in the Takeovers Provisions of the Corporations Law

Keybridge Capital Limited 07 [2020] ATP 11, Keybridge Capital Limited 04, 05 & 06 [2020] ATP 6, Donaco International Limited [2019] ATP 11, Tribune Resources Limited 02R [2018] ATP 22, Molopo Energy Limited 03R, 04R & 05R [2017] ATP 12, Merlin Diamonds Limited [2016] ATP 18, IFS Construction Services Limited [2012] ATP 15, Bentley Capital Limited 01R [2011] ATP 13, Just Group Limited [2008] ATP 22, GoldLink IncomePlus Limited 03 [2008] ATP 21, Summit Resources Limited [2007] ATP 9, Orion Telecommunications Limited [2006] ATP 23, National Can Industries Limited 01R [2003] ATP 40, AMP Shopping Centre Trust 02 [2003] ATP 24

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

INTRODUCTION

1. The review Panel, Michael Borsky QC, Christian Johnston and Denise McComish (sitting President), affirmed the initial Panel's decisions to make a declaration of unacceptable circumstances and orders in *Keybridge Capital Limited 04, 05 & 06*.[1]

2. In these reasons, the following definitions apply.

17 April 2020 general meeting	has the meaning given in paragraph 22
ADIT	Aurora as responsible entity for the Aurora Dividend Income Trust
AFARF	Aurora as responsible entity for the Aurora Fortitude Absolute Return Fund
ASG	Australian Style Group Pty Limited

[1] [2020] ATP 6. All references to the initial Panel are to the Panel in *Keybridge Capital Limited 04, 05 & 06*

ASIC	Australian Securities and Investments Commission
Aurora	Aurora Funds Management Limited in its capacity as responsible entity for ADIT, HHY Fund and AFARF
Bentley	Bentley Capital Limited
CASAC	has the meaning given in paragraph 53
Catalano Entities	Antony Catalano, Catalano Super Investments Pty Ltd ATF Catalano Superannuation Fund and Antstef Pty Ltd ATF Antstef Trust
HHY	Aurora as responsible entity for HHY Fund
Keybridge	Keybridge Capital Limited
Keybridge 07	has the meaning given in paragraph 23
Placement	has the meaning given in paragraph 11
prescribed occurrences	the matters referred to in section 652C[2]
Processed Shares	has the meaning given in paragraph 28(a)
Scarborough	Scarborough Equities Pty Ltd
WAM Active	WAM Active Limited

FACTS

3. The facts are set out in detail in *Keybridge Capital Limited 04, 05 & 06*. Below is a summary.

4. On 13 December 2019, WAM Active announced an off-market takeover bid for all the shares in Keybridge at 6.5 cents per Keybridge share and lodged its bidder's statement with ASIC.

5. On 8 January 2020, ADIT announced an intention to make an off-market takeover bid for all the shares in Keybridge at 6.6 cents per Keybridge share.

6. On 17 January 2020, Keybridge lodged its target's statement in respect of WAM Active's bid with ASIC. The target's statement was announced on 20 January 2020.

7. On 24 January 2020, WAM Active extended the offer period for its bid to 7.00pm (Sydney time) on 17 February 2020.

8. On 7 February 2020, ADIT lodged its bidder's statement with ASIC. ADIT's bidder's statement disclosed the following sources of consideration:

[2] Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms defined in Chapter 6 have the meaning given in that chapter (as modified by ASIC)

"ADIT's internal cash reserves are currently insufficient for ADIT to fund the total cash consideration under the Bid and the expected Bid costs. ADITs portfolio is comprised of highly liquid investments, which ADIT can liquidate at short notice."

"Should ADIT's cash reserves, as a result of normal business activities over the Bid Period, be insufficient to fully fund the total cash consideration and costs of the Bid, ADIT will draw on the Bid Funding Agreements and, if necessary, will seek to liquidate other liquid investments or raise capital from ADIT unitholders in order to fund the balance of the Bid consideration and associated costs."

9. ADIT's bidder's statement also disclosed:

"(a) ADIT holds approximately $900,000 in cash available for payment of Bid Consideration;

(b) ADIT holds liquid investments listed on the ASX, which together with its available cash exceeds $4.4 million and which investments may be liquidated at short notice to fund Bid Consideration where required;

(c) if ADIT's directors form the opinion that it is desirable or necessary to do so, ADIT may seek to raise capital from its unitholders;

*(d) ADIT has entered into funding agreements with HHY Fund (**HHY**) and Aurora Fortitude Absolute Return Fund (**AFARF**) which, if called upon, will enable the cash requirements of the Bid to be satisfied (**Bid Funding Agreements**). The arrangements entered into with these entities include the following:*

(i) Up to $3 million is available to be called from HHY and up to $775,000 from AFARF;

…

(iv) As the responsible entity of HHY and AFARF, Aurora is in a position to confirm that HHY and AFARF have the cash resources available to meet calls under the Bid Funding Agreements, and that they are fully solvent and able to meet the obligations under those Bid Funding Agreements; …"[3]

10. On 10 February 2020, WAM Active further extended the offer period for its bid to 7.00pm (Sydney time) on 3 March 2020.

11. On 12 February 2020, Keybridge announced that it had agreed to place 22,000,000 shares to sophisticated investors at an issue price of 6.9 cents per Keybridge share (**Placement**). The Placement subsequently took place on 17 February 2020. The

[3] The Bid Funding Agreements with HHY and AFARF were subject to *"events of defaults"* and *"Prior to ADIT seeking to draw down any funding under the Bid Funding Agreements, it must have first expended an aggregate of $3 million of its own funds in cash payments under the Bid or in ancillary expenses in pursuing the Bid. ADIT's satisfaction of this condition is in part dependent on it being able to realise its investments in liquid investments listed on the ASX so as to fund that required expenditure…"*

Placement triggered a condition to WAM Active's bid that related to Keybridge issuing securities. The terms of WAM Active's bid provided that where an event occurs that triggers a condition, the condition "*affected by that event becomes two separate Conditions on identical terms except that: (i) one of them relates solely to that event; and (ii) the other specifically excludes that event.*"

12. On 18 February 2020, Keybridge received a notice from WAM Active requesting that Keybridge call a meeting under section 249D to consider the removal of Keybridge's Managing Director, Mr Nicholas Bolton, as a director of the company.

13. On 19 February 2020, Keybridge lodged a supplementary target's statement with ASIC in respect of WAM Active's bid. The supplementary target's statement disclosed (among other things) that Keybridge's Managing Director, Mr Nicholas Bolton, "*has a 54.5% purely economic interest in the Responsible Entity and manager of ADIT, Aurora Funds Management Limited*".

14. On 24 February 2020, WAM Active announced an increase in its offer price from 6.5 cents to 6.9 cents per Keybridge share and that it had elected to waive the majority of the defeating conditions to its bid, with the effect that WAM Active's bid was only subject to a 'No Prescribed Occurrences' condition as set out in section 10.7(c) of WAM Active's bidder's statement.

15. On 25 February 2020, WAM Active announced a notice of status of defeating conditions, which stated that:

"For the purposes of section 630(3) of the Corporations Act 2001 (Cth), WAM Active gives notice that:

(a) the Offer remains subject to the condition in section 10.7(c) (No Prescribed Occurrences) but has been freed of all other conditions set out in section 10.7 of the Bidder's Statement…"

16. On 2 March 2020, WAM Active announced that:

"Pursuant to section 650F of the Corporations Act 2001 (Cth), [WAM Active] gives notice that:

(a) The Offer is free of the Condition set out in section 10.7(c) (No Prescribed Occurrences) of the Bidder's Statement; and

…

Accordingly, the Offer is now unconditional."

17. WAM Active's announcement also stated (among other things) that it:

(a) had extended its offer to close at 7.00pm (Sydney time) on 3 April 2020 and

(b) expected to pay its bid consideration to "*those Keybridge shareholders who have already accepted the Offer on or around Friday, 6 March 2020*".

18. On 4 March 2020, Keybridge informed WAM Active (through the proceedings and among other things) that Keybridge was concerned that WAM Active may not have

been able to declare its bid free of conditions and expressed the view that WAM Active should not process applications received under its bid. Aurora made a similar point to WAM Active (through the proceedings) on 5 March 2020.

19. On or about 6 March 2020, WAM Active commenced processing acceptances received under its bid.

20. On 10 March 2020, Bentley's (and its related entity, Scarborough's) broker incorrectly sent CHESS takeover messages to accept ADIT's bid instead of WAM Active's bid.[4]

21. On 11 March 2020, the Acting President of the Panel made an interim order that WAM Active, "*must not take any steps, or allow any steps to be taken, to process any acceptances received under, or any transfers in relation to, WAM Active's bid for Keybridge*".

22. On 13 March 2020, Keybridge convened a meeting to be held on 17 April 2020 (**17 April 2020 general meeting**) for the purpose of considering resolutions concerning the removal of Mr Bolton as a director of the company (see paragraph 12) and the re-election of Mr William Johnson, a director of Keybridge at the time, and the other director of Keybridge at the time, Mr Jeremy Kriewaldt (as Keybridge suffered a 'second strike' at its previous annual general meeting).

23. On 16 March 2020, Bentley and Scarborough made an application to the Panel seeking final orders to the effect that their acceptances into ADIT's bid be reversed and any contracts between those entities and ADIT arising as a result of the acceptances be cancelled (**Keybridge 07**).[5] On 29 May 2020 (after the date of our decisions in relation to the declaration and orders), the Panel consented to this application being withdrawn (and it is not the subject of any of the review applications in these proceedings).

24. On 24 March 2020, ADIT announced that it had freed its bid of all defeating conditions on 13 March 2020, with the effect that the offer price under its bid increased to 7 cents per Keybridge share. On 27 March 2020, ADIT confirmed the consideration it was offering under its bid.

25. On 30 March 2020, ADIT lodged its second supplementary bidder's statement with ASIC. The supplementary bidder's statement included accountant's certificates opining on whether there had been material changes in the financial position of each of HHY and AFARF since the date that each fund published its financial statements.

26. On 6 April 2020, ADIT's bid for Keybridge closed in accordance with its terms.

27. On 7 April 2020, the initial Panel (in response to two applications made by WAM Active and one made by Keybridge, which the initial Panel decided to hear together)

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[4] Bentley and Scarborough had previously emailed and posted acceptance forms accepting WAM Active's bid in relation to their respective shareholdings, which had not been processed

[5] *Keybridge Capital Limited 07* [2020] ATP 11. The Acting President had previously made an order that ADIT not take any steps (or allow any steps to be taken) to process any acceptances or transfers received from Bentley or Scarborough in relation to ADIT's bid on the request of WAM Active

made a declaration of unacceptable circumstances. The initial Panel considered, among other things, that:

(a) The Placement bifurcated the condition to WAM Active's bid that related to Keybridge issuing securities into two separate conditions as a result of the provision in the bidder's statement referred to in paragraph 11.

(b) What WAM Active referred to as its 'No Prescribed Occurrences' condition contained the following conditions that were not prescribed occurrences under section 652C(1):

(i) the conditions referred to in paragraph (a) above and

(ii) a condition similar to the condition in section 652C(1)(a) but with the additional words "*or any of the Controlled Entities of KBC*".

(c) As WAM Active's bid was subject to conditions that were not prescribed occurrences, when it purported to free its bid from the remaining bid conditions on 2 March 2020, it was unable to do so as it needed to give a notice to Keybridge freeing its bid from those conditions not less than 7 days before the end of the offer period (i.e. 3 March 2020) in order to validly do so (see section 650F(1)).

(d) While WAM Active purported to extend its bid to 3 April 2020 (also on 2 March 2020) it was unable to do so as its bid remained subject to defeating conditions (see section 650C) and it acquired a substantial interest in Keybridge where its bid had closed subject to defeating conditions.

(e) The disclosure in ADIT's bidder's statement as to the proposed funding of ADIT's bid was materially deficient because, among other things, it did not establish that the entities that agreed to provide funding had the necessary financial resources. Neither of the accountant's certificates referred to in paragraph 25 included an opinion on the relevant fund's ability to meet its obligations under its funding agreement with ADIT. The certificates were not sufficient to remedy the information deficiencies in ADIT's bidder's statement.

(f) In light of Mr Bolton's economic interest in Aurora, Keybridge did not have sufficient procedures in place to mitigate any actual or potential conflict of interest (arising from at least the time ADIT announced its intention to make an off-market takeover bid). In the context of competing bids from WAM Active and ADIT, it was important for Keybridge shareholders to receive advice and information that was not tainted in its independence. Therefore, the effect of the lack of sufficient procedures was that the market for control of Keybridge shares was not efficient, competitive and informed.

28. On 9 April 2020, the initial Panel made orders, including (in effect) that:

(a) WAM Active not exercise any voting rights that attach to any shares WAM Active acquired through processing acceptances (**Processed Shares**) above what it could have otherwise acquired under its 'creep' capacity if it had done so at the time of making its bid.

(b) WAM Active comply with a request from any person whose Keybridge shares were acquired by WAM Active (through processing acceptances) for that transaction to be reversed. This order would cease to apply if a Court made orders or a declaration that was inconsistent with that order.

(c) All unprocessed acceptances into WAM Active's bid be cancelled.

(d) Any person that has accepted into the ADIT's bid had the right for a period of time to withdraw that acceptance

APPLICATION

Aurora's application (Keybridge Capital Limited 08R) and Aurora's and Bentley's request for interim orders

29. On 9 April 2020, Aurora sought a review of the initial Panel's decision to make a declaration of unacceptable circumstances and orders, submitting (among other things) that:

(a) It disagreed with the initial Panel's conclusions in relation to information deficiencies in ADIT's bidder's statement. To the extent that there were deficiencies *"it was addressed in the Supplementary Bidder's Statement that was released on 30 March 2020, which included copies of the Accountant's Certificates"*.

(b) *"To the extent that there were any issues connected with Mr Bolton's role at Keybridge Capital Limited (Keybridge), which is denied, Aurora understands that any such issues were remedied by Keybridge's Supplementary Target Statement released on 19 February 2020, being a period in excess of two (2) weeks prior to the despatch of the ADIT Bidder's Statement."*

(c) It was *"ready, willing and able to process"* and *"pay for the Bentley/Scarborough acceptances"* once the Panel's interim orders in relation to Keybridge 07 ceased to apply.

(d) It was of the view that *"given the ADIT [bid] has already closed, it is not in the public interest to make Orders against ADIT and that no prejudice was caused to any Keybridge shareholders who accepted into the ADIT bid"*.

30. Aurora requested a stay of the initial Panel's final orders "*as they relate to ADIT"*. Bentley made a submission seeking interim orders requiring Keybridge in relation to the 17 April 2020 general meeting to:

(a) *"appoint an independent Chairman to Chair the general meeting"*

(b) *"put the voting on the resolutions considered at the general meeting to a Poll"*

(c) unless "*the placees to the Placement elects not to exercise their voting rights on the Poll, adjourn the meeting after the Poll voting and prior to the determination of the Poll voting results"* and

(d) preserve "*all Proxy Forms, online proxy voting reports, admission, Poll voting and related general meeting documentation until the decision of the Review Panel*".[6]

31. WAM Active submitted (among other things) that it supported Bentley's request for interim orders. It also submitted that Aurora was "*improperly seeking to use the Panel process in requesting the stay to influence the vote at*" the 17 April 2020 general meeting.

32. Keybridge submitted that it supported Aurora's request for a stay of the orders as they relate to ADIT because if such a stay was not granted the review proceedings would have no utility. Keybridge also submitted that there should be a voting freeze on the shares that Bentley and Scarborough accepted into the ADIT bid.

33. Keybridge also undertook to "*preserve all proxy forms, online proxy voting reports, admission, poll voting and related general meeting documentation (as requested by Bentley) until the determination of the Review Panel*".

34. On 14 April 2020, the Acting President made an interim order (**Annexure A**) staying the initial Panel's orders as they applied to ADIT, except for the order that allowed a shareholder who accepted into the ADIT bid to notify ADIT of its intention to exercise a withdrawal right and give voting directions for any meeting of Keybridge. The Acting President considered that the interim orders maintained the status quo pending determination of the review application by the sitting review Panel. It was likely that the review Panel would be appointed before the 17 April 2020 general meeting and the Acting President considered that the interim orders could be revisited by the sitting review Panel on request, including in relation to the ability of persons who accepted into ADIT's bid to direct that their shares be voted at the meeting.

Keybridge and WAM Active's applications for review of the initial Panel's orders (Keybridge Capital Limited 09R and 10R) and Keybridge's request for an interim order

35. On 15 April 2020, Keybridge sought a review of the initial Panel's decision to make orders. On the same day, WAM Active sought a review of the initial Panel's decision to make orders.

36. Keybridge submitted in its application (among other things) that:

(a) The orders in relation to the share transfers processed by WAM Active were made in circumstances where WAM Active's bid had closed subject to conditions and were inconsistent with the initial Panel's declaration. Those transfers were void and it was open to the initial Panel "*to vest those shares in ASIC, order that those shares be cancelled or come up with some alternative mechanism*

[6] Bentley later submitted that this submission was an application for review of the initial Panel's decision to make a declaration and orders. The Acting President considered that the submission was not on its face an application. In addition, to the extent that the submission could be said to be an application for a review of the initial Panel's declaration, it submitted that the initial Panel failed to "*decide that unacceptable circumstances arose in relation to the Placement and the association between Mr Catalano, the Catalano Entities, Mr Bolton and ASG*". The Acting President considered that if it was an application for review of the declaration, it would have required his consent under section 657EA(2) which was not sought or granted in time

(e.g. capital return or buyback) in order for them to cease to provide WAM Active with a benefit associated with their ownership as the orders have in fact done".

(b) *"In the alternative, WAM Active's creep limit voting entitlement should not be allowed to exceed 20% of Keybridge's issued capital. Immediately prior to the Processed Shares being transferred to WAM Active, WAM Active's relevant interest (excluding the Processed Shares and the unprocessed shares) was less than 19% of Keybridge's share capital and hence WAM Active would not have been able to have relied on the section 611 item 9 creep…. The logic behind allowing WAM Active to have any voting right in excess of 20% is flawed"*.

37. WAM Active submitted in its application (among other things) that:

(a) It considered that Aurora deliberately closed the ADIT offer to prevent the Panel from making substantive orders in relation to the ADIT bid and requested that the initial orders be amended to, in effect, cancel all the acceptances into the ADIT bid.

(b) An order considered by the initial Panel but not made, preventing Mr Bolton's involvement in Keybridge's consideration of any new bid made by WAM Active for Keybridge while ADIT's bid or any other bid in relation to Keybridge made by Aurora or an entity related to or controlled by Aurora was on foot,[7] *"be reinstated"*.

38. Keybridge sought an interim order that *"WAM Active must not exercise any voting rights in respect of any Keybridge shares in which WAM Active has a relevant interest which it acquired through its void takeover bid at the forthcoming Keybridge shareholders meeting (with such shares amounting to 16,057,929 in total), or in the alternative that WAM Active must only exercise voting rights to the extent to which such Processed Shares does not increase its relevant interest above 20% of the total issued Keybridge share capital"*. Given the timing of the 17 April 2020 general meeting, the Acting President considered this request for an interim order on an urgent basis. He decided not to make any interim orders, noting that the matter can be revisited by the review Panel once appointed because (among other things):

(a) the interim order sought was of a nature that it was preferable that it be considered by the review Panel in its consideration of the review and

(b) it is open for Keybridge to seek a remedy in the court in relation to whether WAM Active is entitled to vote shares that may be void at law.

39. We were appointed as the sitting review Panel to consider Keybridge's review application and considered its request for an urgent interim order on 16 April 2020. We were not persuaded in the time available to make the interim order sought by Keybridge, noting the Acting President's comment in paragraph 38(b).

[7] See paragraphs 119(d) and 123 of the initial Panel's reasons

Bentley's further request for interim orders

40. On 15 April 2020, Bentley sought the following interim orders in relation to Aurora's application:

    (a) *"Bentley and Scarborough's online proxy voting directions (voting FOR Resolutions 1 and 3 and AGAINST Resolution 2, with the Proxyholder being the Chair of the General Meeting) (refer Annexure D) be actioned by ADIT appointing a corporate representative in accordance with its rights under the terms of the ADIT Bid to attend the general meeting of Keybridge on 17 April 2020 and vote in accordance with those voting directions"*

    (b) *"Keybridge accepts the appointment of the ADIT corporate representative and agrees to accept the vote of the ADIT Corporate Representative as outlined above"* and

    (c) *"Keybridge accepts that members attending the meeting in person, by proxy, attorney or corporate representative by telephone/electronic means be counted for the purposes of the quorum under the constitution of Keybridge"*.

41. Bentley's request arose because it was concerned that:

    (a) ADIT would not comply with the initial Panel's order (which was not stayed) requiring it to comply with Bentley and Scarborough's voting directions and

    (b) Keybridge might conclude in accordance with its constitution that it did not have a quorum at the 17 April 2020 general meeting because shareholders could not attend in person as a result of government restrictions to minimise the spread of the COVID-19 virus.

42. In relation to the proposed orders in paragraphs 40(a) and (b), we considered that the initial Panel's orders and Acting President's interim orders are sufficiently clear and any non-compliance with those orders could be dealt with by a court. In addition, Aurora indicated in an email that it would comply with the relevant orders.

43. We considered that the proposed order in paragraph 40(c) was not needed to maintain the status quo. Any procedural issue in relation to the 17 April 2020 general meeting would be a new circumstance.[8]

Results of the 17 April 2020 general meeting

44. On 17 April 2020, Keybridge announced that Mr Catalano had been appointed as a director of Keybridge and that the Keybridge board had, *"unanimously resolved to offer Geoff Wilson directorship on behalf of the WAM group of shareholders, subject only to Mr Wilson providing a written consent to act to the Company (within 14 days of this announcement)"*.[9]

45. At the 17 April 2020 general meeting:

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[8] We considered it was not necessary to come to a view as to whether such a new application would be within the Panel's jurisdiction, see generally *IFS Construction Services Limited* [2012] ATP 15

[9] As at the date of these reasons, Mr Wilson has not been appointed to the Keybridge board

(a) The resolution seeking the re-election of Mr Johnson as a director of Keybridge was not passed.

(b) The resolution seeking the re-election of Mr Kriewaldt as a director of Keybridge was passed.

(c) The resolution seeking the removal of Mr Bolton as a director of Keybridge was not passed.

(d) The Chairman of the meeting did not count 16,057,929 of WAM Active's votes, which is the amount of all of the Processed Shares (i.e. including those that were not the subject of the initial Panel's voting restriction). ADIT voted in accordance with Bentley and Scarborough's voting directions.

DISCUSSION

46. The powers of a review Panel are set out in section 657EA. Our role is to conduct a de novo review.[10] Subsection (4) provides that a review Panel has the same powers to make a declaration or orders as the initial Panel and may vary or set aside the decision reviewed or substitute a new decision. It may also affirm the initial Panel's decision.[11]

47. We decided to conduct proceedings and directed that all three review applications be considered together pursuant to regulation 16(1)(a) of the *Australian Securities and Investments Commission Regulations 2001* (Cth).[12]

48. We received all the material before the initial Panel and its reasons and obtained further submissions and material during the review proceedings. We have considered all the material but address only specifically that part of the material we consider necessary to explain our reasoning. Given that we have affirmed the decisions of the initial Panel, we adopt essentially the same headings as the initial Panel.

WAM Active's bid – Prescribed occurrences

49. As noted in paragraphs 55 and 56 of the initial Panel's reasons:

(a) two of the defeating conditions in section 10.7 of WAM Active's bidder's statement were:

*"(c) **No Prescribed Occurrences***

None of the following happens during the period commencing on the Announcement Date and ending on the expiry of the Offer Period (each being a separate condition):

(i) the shares of KBC or any of the Controlled Entities of KBC are converted into a larger or smaller number of shares;

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[10] *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [181]
[11] Guidance Note 2: *Reviewing Decisions* at [26] and *National Can Industries Limited 01R* [2003] ATP 40 at [21]
[12] We also directed that notices of appearance lodged in respect of *Keybridge Capital Limited 08R* were taken to be notices of appearance in *Keybridge Capital Limited 09R* and *10R*

…

(iv) KBC or a subsidiary of KBC makes an issue of or grants an option to subscribe for any of its securities or agrees to make such an issue or grant such an option;"

…

(b) Section 10.8(c) of WAM Active's bidder's statement provided that:

"Where an event occurs that would mean at the time the event occurs the Condition to which this Offer or the contract resulting from your acceptance is then subject would not be fulfilled, each paragraph of the Condition in Section 10.7 affected by that event becomes two separate Conditions on identical terms except that:

(i) one of them relates solely to that event; and

(ii) the other specifically excludes that event.

WAM Active may declare the Offer free under Section 10.7 from any paragraph of the Condition without declaring it free from the other paragraphs and may do so at different times."

50. The initial Panel found that the following conditions did not fall within the prescribed occurrences referred to in section 652C:

(a) The conditions created as a result of the Placement triggering the condition set out in section 10.7(c)(iv) of WAM Active's bidder's statement - *"As a result of section 10.8(c) of WAM Active's bidder's statement, the condition then bifurcated into two: one related specifically to the Placement and one related generally to Keybridge issuing securities (but specifically excluding the Placement)"*[13] and

(b) The condition in section 10.7(c)(i) of WAM Active's bidder's statement, which is similar to the condition in section 652C(1)(a) but with the addition of the words "*or any of the Controlled Entities of KBC*".[14]

51. The initial Panel concluded that:

(a) *"…in accordance with section 650F(1), WAM Active needed to give a notice to Keybridge freeing its bid from those conditions not less than 7 days before the end of the offer period in order to do so validly… This did not occur. At the time WAM Active purported to free its bid from the 'No Prescribed Occurrences' condition (on 2 March 2020) the offer period was scheduled to end at 7.00pm (Sydney time) on 3 March 2020"*[15]

(b) *"WAM Active was also unable to extend its bid on 2 March 2020 as its bid remained subject to defeating conditions. Under section 650C, a bidder making a bid that is subject to a defeating condition may extend the offer period after the bidder has given a*

[13] Paragraph 58 of the initial Panel's reasons
[14] Paragraph 61 of the initial Panel's reasons
[15] Paragraphs 66 and 67 of the initial Panel's reasons

notice of defeating conditions under subsection 630(3) only if one of a list of certain events happens after the giving of the notice. WAM Active gave that notice on 25 February 2020…and none of those events had occurred at the time of WAM Active's purported extension on 2 March 2020"[16] and

(c) *"The consequence of WAM Active not effectively freeing its bid of all its defeating conditions and being unable to extend its bid at the time it purported to do so is that WAM Active's bid closed at 7.00pm (Sydney time) on 3 March 2020 subject to defeating conditions. All takeover contracts and acceptances in relation to WAM Active's bid then became void and no transfers should have been registered"*.[17]

52. Section 650F(1) provides that a bidder can only free a condition by giving notice to the target declaring the offers to be free from a condition within either of the following time periods:

(a) In relation to prescribed occurrences *"that a bidder may withdraw unaccepted offers if an event or circumstance referred to in subsection 652C(1) or (2) occurs in relation to the target"* the notice must be given *"not later than 3 business days after the end of the offer period"*.

(b) In relation to all other conditions the notice must be given, *"not less than 7 days before the end of the offer period"*.

53. The initial Panel in paragraph 63 of its reasons referred to ASIC's submissions about the genesis of sections 652C and 650F in the Companies and Securities Advisory Committee (**CASAC**) report "*Anomalies in the Takeovers Provisions of the Corporations Law"* and the reasons referred to in that report why it did not include a more expansive list of prescribed occurrences.

54. WAM Active submitted that:

"A purposive interpretation in respect of sections 652C and 650F is not one that finds a condition ceases to relate to the matters in s652C once triggered. The genesis of sections 652C and 650F can be found in the Report by the Companies and Securities Advisory Committee (CASAC) in March 1994 titled "Anomalies in the Takeovers Provisions of the Corporations Law". In the Report, it was noted at page 47 that "The prescribed occurrences all concern specific matters relating to the capital structure, financial standing and solvency of the target company." Clearly the subject matter of a condition does not change once it has been triggered. WAM Active submits that the better interpretation of these provisions and the purpose of Chapter 6 is that unacceptable circumstances may arise if a prescribed occurrence condition that has been triggered is not waived on or before the s630 notice date."

55. Section 650F(1) provides a bidder with a significant concession in relation to a prescribed occurrences condition - under the legislation it can wait until 3 business days after its bid has ended to decide whether to waive the condition. We consider that a bidder can only rely on this concession in relation to conditions that at the very least closely match the prescribed occurrences listed in section 652C. We disagree

[16] Paragraph 68 of the initial Panel's reasons. The initial Panel stated that WAM Active did not purport to rely on section 624(2)
[17] Paragraph 70 of the initial Panel's reasons (footnote omitted) and section 650G

with WAM Active's submission above to the extent that it suggests that a bidder can wait until 3 business days after a bid has closed to waive a condition that it does not closely match, but is of a similar subject matter, as a prescribed occurrence.

56. We agree with the initial Panel that the Placement triggered the condition in section 10.7(c)(iv) of WAM Active's bidder's statement and as a result of section 10.8(c) of WAM Active's bidder's statement, the condition then bifurcated into two. We think that the better view is that those conditions are not prescribed occurrences as defined in section 652C.

57. WAM Active submitted that in relation to the condition in section 10.7(c)(i) of its bidder's statement (*the shares of KBC or any of the Controlled Entities of KBC are converted into a larger or smaller number of shares*), that a purposive interpretation *"demands the undefined term "controlled entities" be ignored"*. We disagree. Consistent with our view expressed in paragraph 55 we consider that this condition is not a prescribed occurrence because the words *"controlled entities"* were included.

58. Accordingly, we agree with paragraphs 55 to 70 of the initial Panel's reasons. The initial Panel discusses in paragraphs 71 and 72 of its reasons that WAM Active started processing acceptances after being put on notice of some of the above issues by Keybridge and Aurora. This is discussed further below on the question of orders.[18]

Frustrating action

59. The initial Panel stated, in paragraphs 77 and 78, of its reasons that:

> *"78. The Placement triggered a condition to WAM Active's bid. However, WAM Active subsequently purported to waive the triggered condition and also subsequently raised the consideration under its offer. These actions are inconsistent with WAM Active's bid being frustrated."*
>
> *"79. Paragraph 10 of Guidance Note 12: Frustrating Action states that: "…the Panel may declare circumstances to be unacceptable if the actions of the target directors cause an acquisition or proposed acquisition not to proceed or contribute to it not proceeding". In the circumstances of this matter, WAM Active accepted that the Placement would not lead to the defeat of its bid when it purported to waive the condition relating to it. We consider this waiver, along with our conclusion that WAM Active's bid has closed, to be a changed circumstance that means it is not necessary for us to declare whether the Placement gave rise to unacceptable circumstances. We recognise that the purported waiver was not effective (also due to the actions of WAM Active). However, the ineffectiveness of the waiver does not*

[18] Paragraphs 73 and 74 of the initial Panel's reasons discuss another potential technical irregularity with WAM Active's bid that the initial Panel decided not to consider further. This issue was the subject of Court proceedings instituted by WAM Active seeking *"in effect, a declaration that alleged non-compliance by it with section 630(5) was not a defect affecting its bid or, alternatively, orders effectively rectifying the alleged defect"*. These proceedings were discontinued. While the initial Panel considered the issue and the effect of the Court proceedings on how it should proceed, it was not raised by Keybridge in its initial application to the Panel and was not raised by the parties in these proceedings. Accordingly we decided not to consider the potential technical irregularity further

change the position that WAM Active clearly intended to waive the condition and accepted that its bid should continue despite the Placement."

60. In relation to whether the Placement was a frustrating action giving rise to unacceptable circumstances, WAM Active submitted that *"the proper time for assessing whether unacceptable circumstances exist in relation to the Placement by reason of a breach of the frustrating action policy is the time when the frustrating action occurred. An unacceptable action should not be permitted simply because a bid subsequently fails for a different reason (or otherwise succeeds)"*. We agree that it is relevant to consider whether an action is a frustrating action at the time the action occurred. However it does not follow that subsequent events are not relevant to the question of whether the action is unacceptable, or whether it is in the public interest to make a declaration on that basis.

61. Guidance Note 12: Frustrating Action states that (at [10]) *"the Panel may declare circumstances to be unacceptable if the actions of the target directors cause an acquisition or proposed acquisition not to proceed or contribute to it not proceeding"*.[19] It is implicit in this guidance that events that take place after any alleged frustrating action are relevant: at the time the action is taken, there is necessarily a bid that is proceeding (or about to proceed), and the policy requires that a bid not proceed (a future event). Accordingly, the events that take place in between are relevant considerations. The Placement could be said to have been the start of a series of events that resulted in the failure of the WAM Active bid. However most of these events were of WAM Active's own making.

62. WAM Active submitted that as a result of the Placement, it *"was not able to extend the s630 notice date beyond 25 February without triggering s650E withdrawal rights. WAM Active considered offering withdrawal rights would have jeopardised its bid, increasing the frustrating effect of the Placement"*. This may be relevant to the question of whether the Placement was a frustrating action at the time the Placement was made, on the basis that it may have contributed to the bid not proceeding. We consider however, applying our commercial judgment, that the Placement was not an unacceptable frustrating action when considered in light of all the surrounding circumstances, including the following facts:

    (a) at the time of the Placement, WAM Active's bid had been open for approximately six weeks, had already been extended once, was subject to a 50.1% minimum acceptance condition (which had not been met at the time of the Placement) and subject to a condition that there be no superior alternative proposal (which would appear to have been triggered by ADIT's bid)[20]

    (b) WAM Active subsequently increased the consideration offered under its bid to 6.9 cents

    (c) WAM Active subsequently attempted to declare its bid unconditional. While we have found that WAM Active did not declare its bid unconditional

[19] Derived from section 657A(3)
[20] Guidance Note 12: *Frustrating Action* at [12]

successfully, it was capable of, and intended to, do so notwithstanding the Placement

(d) if WAM Active had successfully declared its bid unconditional, it is likely to have obtained a controlling stake in Keybridge and

(e) WAM Active subsequently announced a new unconditional bid on 28 April 2020.

63. We also consider, in light of the above, that in any event it would not be in the public interest to make a declaration on this issue.

ADIT's bidder's statement

64. The initial Panel considered that:

(a) *"the disclosure in ADIT's bidder's statement dated 7 February 2020 is materially deficient. It does not establish that the entities that have agreed to provide funding have the necessary financial resources. The disclosure also contains relatively limited information on ADIT's financial capacity"*[21] *and*

(b) *"the supplementary bidder's statement dated 30 March 2020 does not rectify the materially deficient disclosure because the disclosure (as supplemented) does not establish that HHY and AFARF have the necessary financial resources to meet their funding commitments"*.[22]

65. As noted in paragraph 24 above, ADIT in effect increased its bid consideration to 7 cents on 24 March 2020. The initial Panel also considered that *"ADIT's bidder's statement (as supplemented) did not provide any further disclosure of how its increase in bid consideration from 6.6 cents to 7.0 cents would be funded"*.[23]

66. ADIT's bidder's statement disclosed the following in relation to funding:

(a) ASG and Mr Bolton had indicated that *"they do not intend to accept the Bid. However, there is no obligation, agreement, arrangement or understanding with these parties as to how they respond to the Bid"*. Accordingly, the amount of funding ADIT required for its bid was reduced from $10.264 million to $7.9 million.

(b) ADIT held approximately $900,000 in cash available for the bid consideration. ADIT held "*liquid investments listed on the ASX, which together with its available cash exceeds $4.4 million and which investments may be liquidated at short notice to fund Bid Consideration where required*".

(c) ADIT had entered into funding agreements with HHY and AFARF for up to $3 million from HHY and up to $775,000 from AFARF. It was a requirement that, prior to ADIT seeking to draw down any funding under the agreements, it must have first expended an aggregate of $3 million of its own funds in cash payments under the bid or in ancillary expenses in pursuing the bid.

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[21] Paragraph 91 of the initial Panel's reasons
[22] Paragraph 92 of the initial Panel's reasons
[23] Paragraph 93 of the initial Panel's reasons

(d) *"As the responsible entity of HHY and AFARF, Aurora is in a position to confirm that HHY and AFARF have the cash resources available to meet calls under the Bid Funding Agreements, and that they are fully solvent and able to meet the obligations under those Bid Funding Agreements."*

67. ADIT's second supplementary bidder's statement dated 30 March 2020:

(a) attached accountant's certificates in relation to HHY and AFARF that opined on whether there have been material changes in the financial position of each fund since the date that fund's financial statements (in relation to the 30 June 2019 financial year) were published. Each certificate lists the unaudited net tangible assets of the relevant fund "*at 29 February 2019*" and

(b) disclosed that in light of "*the recent volatility in the local and global equity markets, due largely to COVID19 pandemic, Aurora hereby advises that the funding agreement with AFARF has been increased from $775,000 to $1.5 million. In the event further market volatility is experienced, Aurora may make further adjustments to the Bid Funding Agreements as appropriate*".

68. Aurora submitted (among other things) that:

"…it fully complied with the provisions set out in s.636(1)(f) and s.602(a) & (b)(iii) of the Corporations Act as well as the requirements set out in Regulatory Guide 9. Aurora was upfront and transparent in its disclosures at all relevant times, providing tangible information for Keybridge investors to consider. At no time did Aurora make speculative statements or provide speculative comments in relation to the funding of the ADIT Bid."

"Section 5.3 of the ADIT Bidder's Statement clearly sets out the Funding Sources for the ADIT Bid, disclosing the material terms, including the references to the Funding Agreements with HHY and AFARF. Given that Aurora is the responsible entity for ADIT, HHY and AFARF, there was a common board amongst the borrower (ADIT) and the lenders (HHY and AFARF). Therefore, Aurora contends that the Board of Aurora was best placed to understand the funding dynamics of the ADIT Bid, which was additionally supported by its subsequent independent accounting certificates."

69. Bentley submitted (among other things) that ADIT's bidder's statement failed to disclose:

(a) "*the material ($623,821) increase in the maximum cash consideration payable under the ADIT Bid as a consequence of the increase in their bid price from 6.6 to 7 cents on 27 March 2020*"

(b) "*the holding of sufficient cash funds to fund the bid*" and failed to provide "*updates during the bid period in relation to material changes to the $900,000 cash funds it held (presumably as at 7 February 2020, as disclosed in the bidder's statement), to fund the bid*"

(c) "*any reasonable basis of accessing sufficient cash funds to fund the bid*"

(d) particulars of ADIT's portfolio of "*liquid investments listed on the ASX*" and failed to provide any reasonable basis that ADIT's portfolio comprised "*highly liquid investments, which ADIT can liquidate at short notice*"

(e) *"any reasonable basis upon which it was to secure $3 million cash from its own resources to fund the bid (prior to being able to draw down cash from HHY and or AFARF under the Bid Funding Agreements)"* and

(f) *"any reasonable basis upon which HHY and AFARF held or had access to cash funds ($3 million in the case of HHY and $0.775/1.5 million in the case of AFARF), to satisfy ADIT's entitlement to draw down such cash under the Bid Funding Agreements (within the 2 to 10 business days' time frames contemplated therein), to enable ADIT to fund the bid"* (footnote omitted).

70. Bentley also submitted that *"ADIT, HHY and AFARF's investment portfolios had illiquid assets that could not have been realised or a timely basis"*, noting that as *"ADIT was required to realise non-liquid assets to fund the bid and in turn, was also relying on HHY and AFARF being required to do the same to meet their funding obligations to ADIT, ADIT failed to demonstrate and disclose that these funds' assets were realisable on a timely basis for a sufficient amount"*.

71. Bentley submitted that ADIT did not have funding in place, or a reasonable basis to expect that it would have funding in place, to pay for all acceptances if its bid had become unconditional and provided a lot of financial information to support this proposition. Below is only a portion of the detailed submissions and material that Bentley provided.

72. In relation to ADIT's ability to secure $3 million cash from its own resources (which it was required to do under its funding arrangements with HHY and AFARF), Bentley submitted, among other things, that:

(a) ADIT's unit price declined approximately 18% from November 2019 to March 2020.

(b) ADIT's financial position during the bid appeared to comprise:

(i) cash of $900,000 less outgoings since on or about 7 February 2020

(ii) a material stake in RNY Fund (ASX:RNY), which was suspended from trading and *"recently (on 31 March 2020) lodged their 31 December 2019 year end audited accounts containing a Disclaimer of Opinion by the Auditors (as to the going concern assumption in light of RNY's current liabilities exceeding its current assets by $1.6 million)"*

(iii) interests in *"unidentified assets of undisclosed value, presumably invested with a portion of the funds ($3.5 million less $900,000 cash?) received from"* a capital distribution in relation to one of ADIT's investments and

(iv) a small stake in another entity, which *"has declined significantly in value to approximately $10k"*.

73. In relation to HHY, Bentley submitted (among other things) that HHY's NTA position as at 31 March 2020, represented a 33% decline from the previous month and that *"HHY's daily NTA position would have been well known to Aurora…, which means that ADIT and HHY were both aware through the course of March 2020 that HHY's NTA value were unable to support its $3 million Bid Funding Agreement with ADIT"*.

74. In relation to AFARF, Bentley submitted (among other things) that over 95% of AFARF's listed securities investment portfolio was in the Aurora Property Buy-Write Income Trust (ASX: AUP). On 2 April 2020, the Aurora Property Buy-Write Income Trust announced that its securities were suspended from trading on ASX pending the completion of ASX investigations on the impact of COVID-19 on the RNY Fund. The Aurora Property Buy-Write Income Trust owns 67.15% of the RNY Fund.

75. Aurora did not make any specific submissions in response to Bentley's submissions above. Instead Aurora made submissions querying why Bentley would be making a submission in the first place, including:

"At a high level, Aurora continues to be confused why Bentley, being a declared seller (at 6.9 cents or higher), would fight to withdraw from a takeover offer at 7.0 cents, in circumstances where there is no longer a (lower) competing bid. To devote 17 pages to its submissions is puzzling. Aurora has previously questioned whether some form of collateral benefits are behind this behaviour, with [sic] incidentally have not satisfactorily been denied by WAM Active or Bentley, however notes that the Panel has not elected to make such inferences."

76. It is not clear to us that the question of whether WAM Active and Bentley are associated is within the scope of the review applications. In any event we do not consider there is sufficient material for us to draw any conclusions on that question.

77. We considered Aurora's submissions in the initial proceedings on this issue, including the following that were noted by the initial Panel in paragraph 84 of its reasons:

(a) HHY has substantial holdings in 3 ASX-listed securities and that "*Aurora is of the view that these investments could be liquidated in an orderly manner at or around their respective market prices*" and

(b) AFARF has substantial holdings in two ASX-listed funds and that "*Aurora is of the view that these investments could be liquidated in an orderly manner at or around their respective market prices*".

78. In the initial proceedings, Aurora submitted that it had received interest by third parties in acquiring some of the investments in HHY and that in relation to AFARF:

"… this is an open fund that is able to accept new applications. Aurora notes that AFARF could either sell positions, raise debt against its current investment positions or raise additional funds. Additionally, AFARF's key holdings include Aurora Property Buy-Write Income Trust which currently trades at a material discount to its underlying Net Asset Value, and thus, represents an attractive investment opportunity at current market prices."

79. We consider that Aurora's submissions do not adequately deal with the concerns raised by Bentley, which in combination put the funding of ADIT's bid in doubt. In considering the material provided by the parties and applying our commercial judgement, we are concerned that Aurora may not have had adequate funding in place, or a reasonable basis to expect that it would have funding in place, to pay for all acceptances if its bid became unconditional (even if it is assumed that ASG and Mr Bolton would not accept the bid). Our concerns also relate to the funding of ADIT's bid during the course of the bid period, given the effect of COVID-19 on the

market and accordingly the value of the underlying investments of ADIT, HHY and AFARF. However on balance we consider that we do not need to decide either question.

80. Keybridge submitted (among other things) that we should take into account the fact that *"at the time of the Second Supplementary Bidder's Statement (30 March 2020), it was clear that WAM Active was not going to accept into the ADIT bid"*. We do not agree. From our commercial experience, it is not uncommon in contested bids for a bidder, once its bid has closed, to accept into a rival bid that offers more consideration.

81. We agree with the initial Panel (at paragraph 89 of its reasons) that ADIT *"did not provide sufficient disclosure of how it would manage the risks involved in the realisation of ADIT's, HHY's and AFARF's underlying investments, given that if ADIT's bid were successful a substantial proportion of these investments would need to be sold (and in a timely basis to ensure that ADIT would be able to meet its payment obligations)"*[24] and its conclusion (at paragraph 91 of its reasons) that the disclosure in ADIT's bidder's statement dated 7 February 2020 was materially deficient.[25]

82. We also agree with the initial Panel's conclusions that:

    (a) *"the supplementary bidder's statement dated 30 March 2020 does not rectify the materially deficient disclosure because the disclosure (as supplemented) does not establish that HHY and AFARF have the necessary financial resources to meet their funding commitments"* (see paragraph 92 of the initial Panel's reasons)

    (b) *"ADIT's bidder's statement (as supplemented) did not provide any further disclosure of how its increase in bid consideration from 6.6 cents to 7.0 cents would be funded"* (see paragraph 93 of the initial Panel's reasons) and

    (c) accountant's certificates as provided in *GoldLink IncomePlus Limited 03*[26] would have been appropriate in the case as *"one of the main disclosure deficiencies is that Keybridge shareholders had no information as to whether the funders could satisfy their cash commitments under their funding agreements"* (see paragraph 94 of the initial Panel's reasons).

83. Aurora submitted that it failed to see how:

    (a) *"the Panel could presently be minded to affirm the initial Panel's declaration, as to do so would appear to be inconsistent with the Corporations Act, namely s. 657D(2)(a)"* and

    (b) *"the rights or interests of any person, who has accepted into the ADIT bid, have been adversely affected. All accepting Keybridge shareholders, with the exception of Bentley and Scarborough, have been processed and paid by ADIT in accordance with the terms of its Bidder's Statement. It is therefore difficult to see how any purported faulty ADIT*

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[24] Quoting *Guidance Note 14: Funding Arrangements* at [16]
[25] Aurora submitted that the initial Panel did not explain *"on what basis it considers the disclosures to be materially deficient"*. We do not agree, see paragraph 89 and 90 of its reasons. In addition, given our consideration of Bentley's submissions, we do not hesitate to come to the same conclusion
[26] [2008] ATP 21 at [15]

disclosures, which Aurora specifically denies, could be linked or could cause the rights and interests of those shareholders who have accepted the ADIT bid, and been paid, to be adversely affected. As such, in the current circumstances, Aurora questions the legal basis on which the Panel could rely in order to make an Order affording withdrawal rights to those Keybridge shareholders who have accepted into ADIT's bid".

84. We do not agree. Section 657D(2)(a) relates to the Panel's power to make orders. We consider that it is conceivable that orders, including potentially the orders made by the initial Panel, would be appropriate in these circumstances. Even in the event that orders would not be appropriate to remedy any unacceptable circumstances, it may still be in the public interest to make a declaration.[27]

Keybridge's management of conflicts

85. As discussed in paragraph 97 of the initial Panel's reasons, Mr Bolton:

    (a) has a "*54.5% purely economic interest*" in Aurora (the responsible entity of ADIT) and

    (b) as "*Keybridge's Managing Director, participated in Keybridge's response to WAM Active's bid. For instance, Mr Bolton signed Keybridge's target's statement in response to WAM Active's bid (after being authorised to sign pursuant to a resolution passed at a director's meeting), signed the managing director's letter in the target's statement, recommended shareholders reject the bid, and was the contact listed in the target's statement for any shareholders with queries in relation to the bid*".

86. Keybridge submitted that Mr Bolton's involvement in its consideration of the WAM Active bid was not unacceptable and "*any such involvement is not relevant consideration for*" us. It submitted that:

    "*The Keybridge Target's Statement in relation to the WAM Active bid was issued at a time where there was minimal take up of the WAM Active offer. The WAM Active offer at that time was highly conditional. The WAM Active offer was also inferior to that of the ADIT offer. Mr Bolton's position as stated in the Keybridge Target's Statement for each of the WAM Active offer and the ADIT offer did not raise any unusual statements or views. In any event, his position had no effect on the success of either the ADIT offer or the WAM Active offer.*"

    "*More generally, the complete failure of the WAM Active bid means that any possible unacceptability was theoretical and did not cause WAM Active any prejudice.*"

87. We invited Mr Bolton, as a non-party, to make submissions in response to the initial Panel's reasons. He submitted on this issue, among other things:

    Whether I was able to personally make a recommendation in relation to the WAM Active Bid was the subject of consultation with my independent Chairman and also with the Company's

[27] We consider it is appropriate in some circumstances for the Panel to make a declaration of unacceptable circumstances to communicate to the market that there is an issue and decide, following consideration of submissions, that there are no orders that are appropriate to remedy those unacceptable circumstances, see *Summit Resources Limited* [2007] ATP 9

legal advisors after I had raised the possibility of conflict. The matter was properly considered with factors such as my immaterial economic interest in the ADIT bid taken into account. I was advised that there was no conflict in providing a recommendation and it was on this basis that I proceeded to offer my recommendation.

The initial Panel's reasons at Paragraph 101 incorrectly assume that Keybridge did not consider the issue of conflict. This is specifically incorrect. They were considered, a position formed and the subsequent advice followed. The procedures implemented, on a considered basis, did not seek to prevent my offering of a recommendation.

I note that the issue of perceived conflict is subjective and there is not necessarily a definitive answer on something as complicated as a third party's perception. If the issue of perceived conflict was independently assessed and an unbiased view formed on the issue, it should not give rise to unacceptable circumstances just because there might be an alternate view.

…

Further, I worked with the ASIC to reach a form of words that addressed the potential conflict in Keybridge's Supplementary Target's Statement. As far as I was aware, this sufficiently addressed any concern and this disclosure was made prior to the opening of the ADIT Bid.

88. In response to Mr Bolton's last submission above, ASIC and Bentley submitted in effect that disclosure of a potential conflict is not in itself sufficient to manage that conflict. We agree in this instance, given the nature of the conflict described by the initial Panel in paragraphs 100 and 101 of its reasons. We also consider that the matters referred to by Keybridge above did not absolve it from properly managing this conflict.

89. It is clear to us that the initial Panel did not in the words of Mr Bolton "*incorrectly assume that Keybridge did not consider the issue of conflict*". However, it concluded (in paragraph 103 of its reasons) that "*Keybridge appears to have done little to address actual or potential conflicts, as Keybridge permitted Mr Bolton to participate in Keybridge's consideration of WAM Active's bid after the announcement of ADIT's bid*". We agree with this statement and generally with the analysis of the initial Panel in paragraphs 95 to 103 of its reasons.[28]

Alleged associations

90. Paragraphs 104 to 110 of the initial Panel's reasons discuss WAM Active's submission that the following persons were associated:

    (a) Mr Catalano and Mr Bolton and Aurora

    (b) "*Mr Catalano, KBC and Aurora (and their respective associates)*"

    (c) Mr Bolton and "*Aurora, ADIT and the entities funding ADIT's bid*" and

    (d) Mr Bolton and "*his associated entity, ASG [Australian Style Group]*".

[28] While we ultimately decided not to make any orders on this issue (see paragraphs 121 to 124 below) we sought submissions on the issue in our supplementary brief on orders (see also paragraph 84 above)

91. The initial Panel considered (at paragraph 109 of its reasons) that the findings of association were not open to it on the evidence.

92. WAM Active and Bentley submitted that Mr Catalano's appointment to the board of Keybridge (see paragraph 44 above) was a further indicator of association. Keybridge submitted that Mr Catalano's appointment does not demonstrate an association between him and ASG, noting that Mr Wilson of WAM Active was also offered a board position.

93. Bentley submitted that the initial Panel in its reasons did not refer *"to Bentley's extensive and detailed submissions supporting the associations between these parties"*. We have considered this along with the other material provided by the parties in relation to this matter. Applying our commercial judgement, we agree with the conclusions of the initial Panel.

Keybridge's target's statement

94. We agree with the initial Panel (for the reasons stated in paragraph 113 of its reasons) that it is not necessary for us in the circumstances to conclude whether the alleged disclosure deficiencies in Keybridge's target's statement give rise to unacceptable circumstances. We consider that it is not in the public interest to extend the declaration in relation to this issue as there are no ongoing unacceptable circumstances arising as a result of these disclosure deficiencies that need to be remedied.

DECISION

95. For the reasons above, we affirm the initial Panel's decision to make a declaration of unacceptable circumstances and consider that it is not against the public interest to do so. We have had regard to the matters in section 657A(3).

Orders

96. We sought submissions from the parties in relation to the initial Panel's orders when we asked for submissions in relation to the initial Panel's reasons and a second time in a supplementary brief on orders. After consideration of those submissions we have decided to affirm the initial Panel's orders.

97. The initial Panel stated (in paragraph 118(d) of its reasons) that it considered its orders were appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons, or ensure that a takeover or proposed takeover proceeds as it would have if the circumstances had not occurred.[29] The initial Panel stated that its orders did this by (in effect):

    (a) *"cancelling any acceptances into WAM Active's bid that have not been processed and requiring WAM Active to comply with any request from any shareholder whose acceptance was processed to reverse the transaction (subject to any Court order or declaration inconsistent with that order)"*

[29] See s657D(2)

(b) *"for a period of six months, preventing WAM Active from exercising any votes attaching to Keybridge shares above what it could have otherwise acquired under its 'creep' capacity. This assists with preserving the status quo as far as possible for a period to allow the parties to seek a Court declaration as to the status of the shares processed by WAM Active if desired. This is consistent with a submission by ASIC that "as an interim measure however... some form of voting freeze order may be appropriate""* and

(c) *"granting each shareholder that accepted into ADIT's bid a withdrawal right so that shareholders can reconsider their acceptance in the knowledge of ADIT's disclosure deficiencies and requiring ADIT to act on any voting instructions received from that shareholder prior to any withdrawal request being actioned. This protects the rights or interests of the persons primarily affected by the unacceptable circumstances relating to ADIT's disclosure (i.e. those Keybridge shareholders who accepted into the bid in a market that was not efficient, competitive and informed)"*.

WAM Active's bid

98. Keybridge submitted that we should make an order vesting the Processed Shares with ASIC because (among other things):

(a) Such an order is consistent with previous Panel decisions.[30]

(b) *"The bid process must be adhered to rigorously to ensure that the takeover threshold is passed only in appropriate circumstances which are not unacceptable. This is important from a market integrity perspective to ensure that rigorous compliance with the takeovers provisions occurs"*.

(c) *"It is highly relevant that the Panel was prepared to issue Interim Orders preventing completion of the purchase by WAM Active of the unprocessed shares. The effect of an ASIC vesting order in relation to the Processed Shares is to put WAM Active back in an equivalent position to the position it is in regarding the unprocessed shares"*.

99. The initial Panel considered (at paragraph 127 of its reasons) that making a vesting order *"was potentially unfairly prejudicial given the challenging economic climate existing at the time of our orders and Keybridge's continuing suspension"*.

100. The Catalano Entities submitted that to the extent that we were minded, *"despite ASIC's submissions, to order that the Processed Shares should be vested in ASIC for sale, then the Catalano Entities are prepared to provide an enforceable undertaking to the Panel under section 201A of the ASIC Act 2001 (Cth) to the following effect"*:

(a) "The Catalano Entities will irrevocably and unconditionally undertake to offer to purchase the Processed Shares from ASIC at a price of 6.9 cents per share for the period of 3 months commencing on the date that the Processed Shares are vested with ASIC."

[30] Citing *Donaco International Limited* [2019] ATP 11, *Tribune Resources Limited 02R* [2018] ATP 22 and *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12

(b) *"If required, the Catalano Entities will provide to the Panel confidential evidence of readily available funds required for the Catalano Entities to acquire the Processed Shares from ASIC at a price of 6.9 cents per share."*[31]

101. Keybridge submitted that the undertaking offered by the Catalano Entities ensured that ASIC could sell the vested shares, WAM Active did not suffer any financial loss, and that third parties could participate in the sell down consistent with a competitive market. There is some force to this submission. The Catalano Entities' undertaking suggests that the battle for control of Keybridge is far from over. However we consider this is not the only relevant issue to take into account.

102. ASIC submitted, among other things, that:

(a) *"The prohibition in s606 regulates the acquisition of voting power by prohibiting acquisitions that, by their nature, are likely to offend the principles in s602. Accordingly, numerous precedents suggest the Panel will be inclined to make a divestment order where a party's conduct has resulted in an acquisition in breach of s606, noting that the Panel's power to make such an order depends on the order being remedial rather than punitive".*

(b) Where *"an acquisition constitutes a clear breach of the 20% prohibition, a vesting order will often be the most practical means of addressing the unacceptable circumstances".*

(c) *"The present circumstances appear to be one where WAM has attempted, but failed to, meet one of the exemptions in s611. Accordingly, in determining what orders are appropriate to protect the rights of shareholders, it may be necessary to give consideration to the extent to which the circumstances offend the principles of Ch6".*

(d) *"Parts 6.3–6.9 of the Act set out detailed rules governing the conduct and terms of takeover bids that, if followed, provide bidders the benefit of the exemption in item 1 of s611. Hence, in the context of a non-compliant bid, although any deviation that results in a bid no longer receiving the benefit of the exemption s611 may result in a breach of s606, it may be appropriate to look at the nature of the acquisition when determining what orders are appropriate. In this respect, ASIC notes that (among other matters) as a result of WAM's attempted bid:*

(i) *when the acquisitions took place, WAM had announced an intention to acquire all shares in Keybridge at the price paid for the Processed Shares as part of its bid; and*

(ii) *the Processed Shares were acquired from individuals who had the benefit of considering a bidder's statement and a regulated bid process, notwithstanding the defects identified.*"

103. While we recognise that the common remedy for contraventions of section 606 usually involve vesting shares in ASIC for sale, there have been a number of

[31] The Catalano Entities also submitted that for the avoidance of doubt, the proposed undertaking was not intended to prevent or restrict ASIC from seeking to dispose or disposing the vested Processed Shares to any third party

instances when that has not been the case.[32] There have been instances where the Panel has allowed for a contravention of section 606 to be cured by way of an item 7 resolution prior to divestment.[33] There have also been cases where the Panel has made a voting freeze order instead of,[34] or in combination with,[35] a vesting order.

104. We agree with the initial Panel (at paragraph 128 of its reasons) that it is appropriate in considering whether orders are unfairly prejudicial to a person to consider "*the degree of culpability of the persons whose interests are affected by the orders*".[36] The initial Panel (at paragraph 128 of its reasons) stated that:

"…WAM Active's errors leading up to its bid closing appear inadvertent. This is not the case in relation to WAM Active proceeding to process acceptances when it was not entitled to do so."

105. WAM Active submitted that:

"The Review Panel is asked to consider … the fact that WAM Active had less than 24 hours after submissions were made by Aurora to the Panel (identified in paragraph 73(b) of the reasons) to weigh up the potential unacceptable circumstances that might arise if it did not process acceptances (as it publicly stated it would do) versus the potential for unacceptable circumstances that might arise if KBC's and Aurora's ill-defined new allegations had merit (noting KBC appeared to be asserting at that time that WAM Active might be required to offer withdrawal rights). WAM Active acted in the manner it considered, at the time, would be less likely to result in unacceptable circumstances – it complied with its public statement and processed acceptances accordingly. Critically, at the time acceptances were processed, WAM Active considered its bid had been validly declared unconditional and extended. The Initial Panel failed to recognise that WAM Active acted in good faith and based on the information it had [at] the relevant time."

106. We asked the parties whether there was anything relevant in WAM Active's submission to the question of whether we should affirm, vary, revoke or make new orders in relation to WAM Active's bid. Keybridge submitted (among other things) that:

(a) WAM Active had 2 days to determine its course of action and not *"less than 24 hours"* and

(b) *"WAM Active did not behave in a measured and responsible way. Instead, WAM Active appears to have been driven by a desire to process acceptances forthwith regardless of the risk and to consequently accept the implications of doing so. WAM*

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[32] The Courts have not always made divestment orders in such circumstances, see the decision of the Full Court of the Supreme Court of South Australia in *Flinders Diamonds v Tiger* (2004) 49 ACSR 199 at [66] to [79]; see discussion of this decision in *Orion Telecommunications Limited* [2006] ATP 23 at [130] to [137]

[33] *Bentley Capital Limited 01R* [2011] ATP 13 at [197]

[34] *Merlin Diamonds Limited* [2016] ATP 18 at [144] to [150]. The Panel considered that vesting was not appropriate in that case because it was not satisfied on the material before it that the acquirer was aware that its associate had voting power in Merlin Diamonds Limited (see [146])

[35] *Orion Telecommunications Limited* [2006] ATP 23 at [142] to [149]

[36] *AMP Shopping Centre Trust 02* [2003] ATP 24, quoting *ASIC v Yandal Gold* (1999) 32 ACSR 317, at [120] to [121]

Active has competent advisers, which it presumably had regard to. WAM Active is itself a sophisticated investor, and knew what it was doing as a commercial risk assessment. It is misleading for WAM Active to say that it "acted in good faith"".

107. Aurora submitted, in response to the initial Panel's statement above, that:

"WAM Active is a seasoned market participant having made many takeover offers and had retained competent and experienced legal practitioners in relation to its bid, as is evidenced by the technical submissions provided by WAM Active during the various Keybridge Panel matters. As such, Aurora submits that WAM Active's errors were not inadvertent but rather were deliberate and calculated. Aurora contends that WAM Active decided not to free its bid from all of its bid conditions, as to do so would have undermined its Panel Application. As such, Aurora considers it to be inaccurate for the Panel to state that WAM Active's actions were 'inadvertent'."

108. While we prefer the submissions of Keybridge and Aurora on the question whether WAM Active only had a short period of time to decide whether to process acceptances, we consider that WAM Active's errors in formulating its conditions and not validly waiving them in accordance with section 650F were unlikely to have been deliberate. Accordingly we broadly agree with the initial Panel's characterisation of the facts as quoted in paragraph 104 above.

109. We have considered all the circumstances: including the degree of WAM Active's culpability, previous Panel and Court decisions that considered whether a vesting order was appropriate[37] and the factors raised by ASIC (as described in paragraph 102 above). We are of the view, applying our commercial judgement, that a combination of a voting freeze and reversal rights, rather than a vesting order, is a more appropriate solution in the circumstances having regard to the requirements in s657D(2).

110. The initial Panel only applied a six month voting freeze for those shares held by WAM Active above 24.15%[38] *"being 3% higher than WAM Active's voting power six months' prior to the date of our orders"*.[39] The initial Panel provided the following explanation for the way this order was determined (at paragraph 134 of its reasons):

"Our order was not based on a determination that WAM Active was entitled to acquire shares under creep at the time it acquired the processed shares. Rather, at a more conceptual level, instead of WAM Active launching a takeover bid on 13 December 2019, it could presumably have acquired shares under its creep capacity. In our commercial view, this hypothetical limit is an appropriate level at which to cap WAM Active's ability to vote shares in Keybridge as it reflects the voting power WAM Active could theoretically have acquired in Keybridge in other circumstances."

111. Keybridge submitted in effect that it held the same view it held in the initial Panel proceedings, that this 'creep limit' was incorrectly calculated and should be based on

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[37] Noting that the majority of matters where shares are vested in ASIC involve an acquisition without any of the protections of a bid or disclosure, see paragraph 103 above
[38] Of Keybridge's issued capital as at the date of the orders
[39] Paragraph 133 of the initial Panel's reasons

the actual shareholding position at the time the Processed Shares were processed rather than the theoretical level determined by the initial Panel. There are many ways in which a voting freeze order could take into account WAM Active's ability to creep.[40] In the light of the matters we have taken into account in determining that a vesting order was not appropriate in this case,[41] we consider (applying our commercial judgement) that the initial Panel's voting freeze order is the most appropriate in the circumstances.

112. The initial Panel's order giving a former holder of the Processed Shares the right to reverse the holder's transfer is not expressed to expire. The initial Panel considered cancelling the acceptances for the Processed Shares but stated that it was conscious of *"the prejudice such an order could cause shareholders who may not have ready access to those funds"*.[42] The initial Panel also stated (at paragraph 131 of its reasons, footnote omitted):

    "…We recognise that our orders leave WAM Active as the registered holder of the relevant shares. However, we have not validated that registration. We consider the question of whether the registration of those shares automatically became void or became voidable a question more appropriately adjudicated by a Court. Our order relating to shareholders' reversal right (see below) facilitates this by automatically ceasing if a Court makes orders or a declaration inconsistent with it."

113. Keybridge submitted that the initial Panel's statement "*We consider the question of whether the registration of those shares automatically became void or became voidable a question more appropriately adjudicated by a Court"* is inconsistent with section 650G that *"categorically states that a transfer of those shares is void"* and it considered that the 'voidable' concept was wrong.

114. We do not consider that anything material turns on the terminology that the initial Panel used. The initial Panel's comment related to the effect of registration of the Processed Shares, not the transfer of them. The initial Panel correctly noted (at paragraph 126 of its reasons) that:

    (a) A consequence of WAM Active's bid closing subject to defeating conditions was that all takeover contracts, and all acceptances that did not result in binding takeover contracts, were void and

    (b) Section 650G provides that: "*A transfer of securities based on an acceptance or contract that is void under this section must not be registered*".

115. We agree with the initial Panel that the legal status of the registration of the Processed Shares is more appropriately adjudicated by a Court.

116. WAM Active submitted that we should make orders to facilitate, in effect, the ability of the former holders of the Processed Shares to withdraw their acceptance and

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[40] ASIC in its submissions provided some alternatives
[41] See for example paragraphs 102 and 109 above
[42] Paragraph 130 of the initial Panel's reasons

accept into WAM Active's new offer (see paragraph 62(e)). Keybridge submitted that it rejected WAM Active's submission because (among other things):

"WAM Active's submission would deny shareholders a competitive auction for their shares by third parties. The Catalano Entities have kick-started this competitive auction. This competitive auction could be facilitated by providing that any increase in price received above 6.9 cents is to go to the Processed Shareholders rather than WAM Active. This would be fair from the perspective of Processed Shareholders. Given that WAM Active is protected from any downside effect as to price, then it should not obtain any benefit as to upside gain as to price."

117. It is conceivable that there could be a way to facilitate the ability of the former holders of Processed Shares to withdraw their acceptance and accept into either WAM Active's new offer and deal with Keybridge's objection by giving those shareholders the opportunity to accept the better offer in a competitive auction. We consider that it would not be inappropriate for Processed Shareholders to be given the opportunity to accept WAM Active's new bid. While ASIC seems best placed to facilitate this, it is possible that WAM Active (or ASIC) could seek further orders under the liberty to apply provision in Order 12 or a variation of the orders under section 657D(3), if necessary.

118. ASIC submitted that applying a time limit to the right of the former holders of Processed Shares to reverse their acceptances had some merit "*given there is otherwise indefinite uncertainty to WAM Active.*" We have decided not to limit the reversal right in that way, and note that the form of the relevant order recognises that it may not be in force indefinitely. This is because it applies "*Unless a Court makes orders or a declaration inconsistent with this Order*". As presently drafted, the reversal right protects the interests of those affected by the unacceptable circumstances and may give WAM Active some impetus to deal with the legal consequences of its actions.

119. Aurora submitted that:

"It is a fact that a number of parties who had accepted ADIT's bid, having previously accepted into the WAM Active bid, which was void at law, were unable to be processed by Aurora as WAM Active had already processed those acceptances – again, in contravention of the law. Aurora submits that those acceptances ought to be released so that ADIT can process them and make the appropriate payments to the respective Keybridge shareholders."

120. Aurora did not provide us with any material to suggest how many persons accepted offers under both bids (other than Bentley and Scarborough). We asked whether there were any legal impediments to ADIT processing an acceptance of a Keybridge shareholder after that shareholder reverses its acceptance of the WAM Active bid in accordance with the initial Panel's orders. No party provided us with any material that indicated to us there was such a legal impediment. We note that Aurora has the ability to seek further orders if a specific situation arises.[43]

[43] under the liberty to apply provision in Order 12 or a variation of the orders under section 657D(3)

Mr Bolton

121. The initial Panel considered whether to make "*an order preventing Mr Bolton from attending any Keybridge board meetings or voting on Keybridge board resolutions, in connection with Keybridge's response to any new bid made by WAM Active for Keybridge, or provide a recommendation in relation to any such bid while either of the following are on foot*":

    (a) "*ADIT's bid for Keybridge*" or

    (b) "*any other bid in relation to Keybridge made by Aurora or an entity related to or controlled by Aurora was on foot*".[44]

122. The initial Panel concluded that (at paragraph 123 of its reasons):

    "*… the order relating to Mr Bolton's involvement was no longer appropriate as the unacceptable circumstances relating to him were no longer continuing (as there was no conflict or potential conflict in the absence of ADIT's bid). As no unacceptable circumstances were continuing, it is not clear what rights or interests of persons affected by the unacceptable circumstances would be protected by such an order*".

123. We agree with the initial Panel. WAM Active submitted that:

    "*WAM Active acknowledges that the Review Panel may consider it inappropriate to make orders regulating hypothetical circumstances. WAM Active requests however that in the event of a related party competing bid being made by an entity associated with one or more of the KBC directors, it have the ability to seek a variation of the orders that would restrict the conflicted director(s) involvement in KBC's response to both the related party bid and WAM Active's bid*".

124. While WAM Active might seek to avail itself of liberty to apply, we incline to the view that a scenario of the kind suggested by WAM Active above would likely be a new circumstance.

ADIT's bid

125. Aurora submitted that, in relation to the initial Panel's order giving accepting shareholders into ADIT's bid withdrawal rights:

    "*…the rights or interests of those Keybridge shareholders who accepted the ADIT bid have not been affected, as they willingly accepted into the ADIT bid and have been processed and paid. As such, Aurora considers that there is no utility in providing those shareholders with withdrawal rights, especially in circumstances where the ADIT bid closed over one (1) month ago (being 6 April 2020). To do so, would not be in the public interest as it would only confuse the market (especially given the time delays) – in Aurora's opinion.*"

126. We do not agree. In light of the disclosure deficiencies in ADIT's bidder's statement, withdrawal rights protect the rights and interests of accepting shareholders who have been affected by the unacceptable circumstances (s657D(2)). We also consider it

[44] See paragraph 119(d) of the initial Panel's reasons

is relevant, as noted in paragraph 101, the undertaking offered by the Catalano Entities suggests that the battle for control of Keybridge is far from over.

127. As noted in paragraphs 20 and 23 above, Bentley and Scarborough made the Keybridge 07 application to the Panel seeking final orders to the effect that their acceptances into ADIT's bid, caused by a mistake on the part of their broker, be reversed and any contracts between those entities and ADIT arising as a result of the acceptances be cancelled.

128. Aurora submitted that it was "*concerned that the Panel, being presently minded to affirm the initial Panel's declaration, is in effect 'shoe horning' a potential outcome in Keybridge 07 into Keybridge 08R, 09R & 10R. Aurora submits that the circumstances are different and therefore warrant a different analysis*".

129. We did not agree with this submission, noting that the matters before the initial Panel in Keybridge 07 were not before us. We stated to the parties that we did not consider that the matters raised in Keybridge 07 were relevant to the question of orders and asked them whether they agreed. Aurora submitted that:

"*Aurora is not entirely clear as to the meaning of this question, so may need to supplement its response in its rebuttals.*"

"*In the meantime, Aurora submits that Bentley Capital Limited (and Scarborough Equities Pty Ltd) ought to be excluded from any withdrawal rights, as a consequence of disclosure issues, which Aurora specifically denies, as Bentley did not rely on ADIT's disclosures when accepting into the ADIT bid. Further, if Bentley were to obtain a withdrawal right and then chose to exercise it, Aurora believes Bentley would be in breach of the Truth in Takeovers provisions – having previously stated on numerous occasions that it was a seller at 6.9 cents or better.*"

"*Aurora considers it to be illogical, and calls on the Panel to exercise its commercial judgement in this matter, for Bentley to seek to withdraw from the higher ADIT 7.0 cent cash bid in order to accept a lower WAM Active 6.9 cent cash bid, especially in circumstances where the previous WAM Active bid was not capable of being accepted, as it was void at the time of Bentley's acceptance.* "

"*Aurora notes that Bentley has still not provided a valid reason for seeking to withdraw its acceptance from the higher ADIT bid so that it can accept the lower WAM Active bid and should be prevented from seeking to hijack this Panel hearing to achieve its own personal agenda.*"

130. We consider the meaning of the question above was clear, particularly in light of Aurora's previous submission. In response to the rest of Aurora's submission, we do not consider it is appropriate to carve Bentley and Scarborough out of the initial Panel's order providing all shareholders who accepted into ADIT's bid a withdrawal right. It would be rarely necessary or appropriate to consider the personal circumstances of each shareholder when considering making such an order.

Costs

131. We asked the parties whether any or all of WAM Active, Bentley, Aurora and Keybridge made submissions which have wasted the time of the Panel, ASIC and other parties in these proceedings and that would justify a costs order against them.

132. Keybridge submitted a costs order should be made against Bentley. Bentley submitted that a costs order should made against ADIT. Aurora questioned the relevance and motivation behind Bentley and Mr Johnson's submissions. The Catalano Entities sought a costs order in their favour to be paid by either or both of WAM Active and Bentley. WAM Active submitted that a costs order against any party was not merited.

133. After considering these submissions, we consider a costs order is not justified here.

Postscript

134. On 2 June 2020, Keybridge announced that it had commenced proceedings against WAM Active in the Supreme Court of NSW *"for matters pertaining to the improper transfer by WAM Active of 16,057,929 Keybridge shares from 96 different shareholders (Processed Shares) into WAM Active's own name on 6 March 2020"*, seeking (among other things):

    (a) *"A declaration that WAM Active Limited has breached section 650G of the Corporations Act by processing (through its agent Boardroom Pty Ltd) the acceptances of the Processed Shares into the name of WAM Active Limited."*

    (b) *"A declaration that the transfer of the Processed Shares to WAM Active Limited is void."*

    (c) *"An order that the Processed Shares vest in ASIC."*

135. On 4 June 2020, WAM Active in an announcement stated, among other things, that Keybridge had *"already failed on two previous attempts to obtain orders of this kind, with the Takeovers Panel twice refusing to make the orders KBC is now requesting in its third attempt with the instituted proceedings in the Supreme Court of NSW"*.

136. Keybridge submitted, among other things, that WAM Active's announcement:

    (a) breached the confidentiality undertaking given by WAM Active in its notice of appearance, because *"Keybridge's position in the Panel proceedings has not been a matter of public record either in relation to the Initial Panel or in relation to the Review Panel"*

    (b) was inaccurate because Keybridge did not seek a vesting order in its initial Panel application and

    (c) was misleading in stating that *"the Takeovers Panel twice refusing to make the orders KBC is now requesting"… "The Panel has expressly recognised in its commercial judgement that WAM Active should have itself dealt with the void transfer issues by way of court proceedings (refer to paragraph 73 of the Reasons of the Initial Panel). The announcement fails to recognize that the Panel has expressly left this open to the court."*

137. WAM Active submitted, among other things, that "*the confidentiality undertaking does not prohibit WAM Active stating broadly what orders were sought by KBC. The undertaking terms clearly state, "This undertaking does not apply to statements that, without discussing merits, identify the parties or the subject matter of the proceeding or the broad nature of the unacceptable circumstances alleged or the orders sought"*".

138. Parties are reminded in the process letter they receive at the commencement of the matter that compliance includes complying with the spirit of the media canvassing undertaking, noting that "*it is incumbent on parties not to take too technical an interpretation of the prohibition*.[45]

139. While we have decided not to take any action in this case, we consider it important to correct the public record. We consider that WAM Active's announcement mischaracterised our decision and that of the initial Panel, which expressly stated that the issue of the legal status of the registration of the Processed Shares is more appropriately adjudicated by a Court.[46]

Denise McComish
President of the sitting Panel
Decision dated 7 May 2020 (Declaration), 20 May 2020 (Orders)
Reasons given to parties 22 June 2020
Reasons published 25 June 2020

[45] *Just Group Limited* [2008] ATP 22 at [32]
[46] See paragraph 113 and paragraph 131 of the initial Panel's reasons

Advisers

Party	Advisers
Catalano Entities	MinterEllison
Keybridge	Baker McKenzie
WAM Active	Mont Lawyers Pty Limited
William Johnson	Not applicable
Bentley	Not applicable
Aurora	Not applicable

Australian Government
Takeovers Panel

Annexure A

CORPORATIONS ACT
SECTION 657E
INTERIM ORDERS

KEYBRIDGE CAPITAL LIMITED 08R

A. On 7 April 2020, the Panel made a declaration of unacceptable circumstances in relation to the affairs of Keybridge Capital Limited under section 657A of the *Corporations Act 2001* (Cth) (**Act**) and on 9 April 2020, the Panel made orders under section 657D of the Act (**Orders**).

B. On 9 April 2020, the Panel received a review application from Aurora Funds Management Limited as responsible entity for Aurora Dividend Income Trust, HHY Fund and Aurora Fortitude Absolute Return Funds and a request to stay the Orders relating to ADIT pending the review.

C. Defined terms have the same meaning as in the Orders.

The Acting President ORDERS:

1. That the Orders (except orders 1 to 5 and 9 to 13) are stayed.

2. For the avoidance of doubt:

   (a) ADIT is not required to take any steps to facilitate a withdrawal of an ADIT Accepting Shareholder's acceptance and

   (b) Order 9 continues to apply and an ADIT Accepting Shareholder may notify ADIT of its intention to exercise a withdrawal right and give voting directions for the purposes of Order 9 (as if the withdrawal right was not stayed).

3. These interim orders have effect until the earliest of:

   (i) further order of the review Panel or the Acting President

   (ii) the determination of the review proceedings and

   (iii) 2 months from the date of these interim orders.

Tania Mattei
Counsel
with authority of Richard Hunt
Acting President
Dated 14 April 2020