



Australian Government

Takeovers Panel

Reasons for Decision

Molopo Energy Limited 03R, 04R & 05R

[2017] ATP 12

Catchwords:

Review – declaration – orders – association – otherwise unacceptable – shared goal – collaborative conduct – structural links – common knowledge – contemporaneous buying – board spill – common director – relevant agreement – propose to enter into relevant agreement – propose to act in concert – divestment of shares – unfair prejudice

Corporations Act 2001 (Cth), sections 9, 12, 249D, 602, 606, 657A, 657C(3), 657D, 657EA(4), 671B

Australian Securities and Investments Commission Regulations 2001 (Cth), regulations 16(1)(a), 16(2)(a)

Corporations Regulations 2001 (Cth), regulation 6.10.01

Kyriackou v Law Institute of Victoria Limited [2014] VSCA 322, Sullivan v Civil Aviation Safety Authority [2014] FCAFC 93, Tinkerbelle Enterprises Pty Limited as Trustee for The Leanne Catelan Trust v Takeovers Panel [2012] FCA 1272, CEMEX Australia Pty Ltd v Takeovers Panel [2009] FCAFC 78, CEMEX Australia Pty Ltd v Takeovers Panel [2008] FCA 1572, Endresz v Whitehouse (1997) 24 ACSR 208, Gjergja v Cooper [1987] VR 167, Elders IXL Ltd v NCSC [1987] VR 1, Adsteam Building Industries Pty Ltd & Anor v The Queensland Cement and Lime Co Ltd & Ors (1984) 14 ACLR 456, Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336

Guidance Note 2 – Reviewing Decisions

Molopo Energy Limited 01 & 02 [2017] ATP 10, Sovereign Gold Company Limited [2016] ATP 12, Ainsworth Game Technology Limited 01 & 02 [2016] ATP 9, Mungana Goldmines Limited 01R [2015] ATP 7, Gondwana Resources Limited 02R [2014] ATP 18, Touch Holdings Limited [2013] ATP 3, World Oil Resources Limited [2013] ATP 1, CMI Limited 01R [2011] ATP 5, CMI Limited [2011] ATP 4, Viento Group Limited [2011] ATP 1, Goldlink IncomePlus Limited 04R [2009] ATP 3, Mount Gibson Iron Limited [2008] ATP 4, Orion Telecommunications Ltd [2006] ATP 23, Anaconda Nickel Limited 16 & 17 [2003] ATP 15, Winepros Limited [2002] ATP 18, Anzoil NL 01 [2002] ATP 19

R da Silva Rosa, M Kingsbury and D Yermack, “Evaluating Creeping Acquisition” [2015] 37 Sydney Law Review 37

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

INTRODUCTION

1. The Panel, Peter Day, Ian Jackman SC (sitting President) and Tony Osmond, set aside the declaration made on 30 May 2017 in relation to the affairs of Molopo Energy Limited¹ and made a declaration of unacceptable circumstances in substitution. The Panel considered that two substantial shareholders of Molopo, Keybridge and Aurora, were associated and contravened section 606² and the substantial holder notice provisions. Further or in the alternative, the Panel also agreed with the initial Panel that the involvement of Mr Nicholas Bolton, or Mr

¹ *Molopo Energy Limited 01 & 02 [2017] ATP 10*. All references to the initial Panel are to the Panel in *Molopo Energy Limited 01 & 02*

² Unless otherwise indicated, all statutory references are to the *Corporations Act 2001 (Cth)*, and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

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Bolton together with Mr John Patton, in Keybridge and Aurora gave rise to unacceptable circumstances in relation to the affairs of Molopo. The Panel made orders including a divestment order.

2. In these reasons, the following definitions apply.

AFARF	Aurora Fortitude Absolute Return Fund, an unlisted investment management fund
AGIT	Aurora Global Income Trust, an ASX listed registered unit trust (ASX: AIB)
ASG	Australian Style Group Pty Ltd
ASH	Australian Style Holdings Pty Ltd
Aurora	Aurora Funds Management Limited, including as responsible entity of AFARF, AGIT, Buy-Write and HHY
Aurora Trust	Aurora Investments Unit Trust
Bentley	Bentley Capital Limited (ASX: BEL)
Buy-Write	Aurora Property Buy-Write Income Trust, an ASX listed investment trust (ASX: AUP)
HHY	HHY Fund, an ASX listed investment trust (ASX: HHY)
Keybridge	Keybridge Capital Limited (ASX: KBC)
Molopo	Molopo Energy Limited (ASX: MPO)
Mr Bolton	Mr Nicholas Bolton
NAC	NAOS Absolute Opportunities Company Limited (ASX: NAC)
Scarborough	Scarborough Equities Pty Ltd
Seventh Orion	Seventh Orion Pty Ltd

FACTS

3. Molopo is an ASX listed entity. It currently has no operating activity and holds cash on hand of approximately \$66 million.
4. Keybridge is an ASX listed entity. It has a relevant interest in 19.95% of Molopo.
5. ASG holds 21.16% of Keybridge. ASG is wholly owned by ASH whose shareholders are Mr Bolton (1%) and Mr Bolton's sister (99%). Mr John Bolton, Mr Bolton's father, is the sole director of ASG and ASH. Prior to being disqualified by ASIC from managing a corporation for a period of three years from 17 November 2015,³ Mr Bolton was a co-director of ASG with his father and the sole director of ASH.
6. Mr Bolton also holds 2.2% of Keybridge in his personal capacity.

³ An appeal against ASIC's disqualification is pending before the Administrative Appeals Tribunal

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7. Mr Bolton was managing director of Keybridge from 22 February 2013 until his disqualification. Another director of Keybridge (nominated by ASG), Mr Antony Sormann, assumed the day-to-day executive leadership of Keybridge after Mr Bolton's resignation.
8. Aurora is an unlisted funds manager. It has a relevant interest in 17.92% of Molopo, as responsible entity for AGIT and AFARF.
9. Aurora was wholly owned by Keybridge until 30 June 2016. Effective on 1 July 2016, Keybridge sold Aurora (for up to \$1.8m) to Seventh Orion as trustee for the Aurora Trust.
10. At the time of the acquisition, Seventh Orion was owned 100% by Mr John Patton and he was the sole director of the company.
11. As a result of the transaction, Mr Patton was appointed managing director and Mr Jim Hallam was appointed as a non-executive director of Aurora. The other director on the Aurora board was Ms Betty Poon, Aurora's chief financial officer.
12. Units in the Aurora Trust are held by: Mr Bolton (49.9%), Mr Patton (26.1%)⁴, Ms Poon (8.5%), Mr Victor Siciliano (8.5%)⁵ and Mr Stephen Rowley (7%)⁶.
13. At the time of the acquisition, Aurora had a relevant interest in approximately 1.88% of Molopo.
14. On 1 July 2016, Keybridge filed a substantial holder notice advising that its relevant interest in Molopo had reduced to 18.48% as a result of the sale of Aurora.⁷
15. On 10 August 2016, Mr Patton was appointed as a non-executive director of Keybridge, nominated by ASG.
16. On 20 September 2016, Keybridge filed a substantial holder notice stating that it had acquired 1,682,763 Molopo shares and had voting power of 19.15% in Molopo.
17. On 7 October 2016, Mr Siciliano, Aurora's portfolio manager, commenced buying shares in Molopo.⁸ By 31 October 2016, Aurora's total interest had increased to approximately 3.5% of Molopo's issued capital.
18. On 13 October 2016, upon the resignation of Mr Sormann as executive director of Keybridge, Mr Patton was appointed Chairperson of the Keybridge board and engaged in a part time executive role.

⁴ Indirectly through a company owned by Mr Patton and his wife that acts as the trustee for (i) a discretionary family trust and (ii) a superannuation fund

⁵ As trustee for the VS Family Trust

⁶ Indirectly through an investment vehicle SNDR Investments Pty Ltd as trustee for the Rowley Investment Trust

⁷ Keybridge disclosed voting power in Molopo of 18.48% (netting the disposal and recent purchases of 1,704,222 shares)

⁸ Aurora had previously acquired 418,385 Molopo shares on or about 20 July 2016 as a result of the unwinding of an equity derivative

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19. On 14 October 2016, Mr Bolton entered into a consultancy agreement with Keybridge to provide Keybridge with advice and assistance in relation to its investments, including in Molopo.⁹
20. On 17 October 2016, Mr Rowley became a 50% shareholder in Seventh Orion (through SNDR Investments Pty Ltd) and was appointed as a director at the invitation of Mr Patton. Mr Rowley deposed that Mr Patton indicated that he had received legal advice that the introduction of another director may be beneficial, although not essential.
21. On 26 October 2016, Keybridge held a strategy meeting at which both Mr Bolton and Mr Patton were in attendance and where Keybridge's strategy in relation to acquisitions and disposals of Molopo shares and representation on the Molopo board was discussed.
22. In early November 2016, at Mr Patton's request, Mr Siciliano prepared and sent an investment paper to Aurora's board members proposing that Aurora "*move to a 19.99% as a balance of power stake, seek board representation*".
23. On 1 December 2016, Aurora lodged a notice of initial substantial holder disclosing that it had voting power of 9.75% in Molopo.
24. Aurora continued to acquire shares in Molopo through to 21 March 2017, resulting in its then relevant interest in 17.92% of Molopo's issued capital.
25. On 12 December 2016, Molopo submitted a report of misconduct to ASIC concerning a potential association between Keybridge and Aurora.
26. On 12 March 2017, Keybridge requisitioned a meeting of Molopo shareholders under section 249D to consider resolutions for the removal of all the directors of Molopo and the appointment of three new directors nominated by Keybridge (namely, Messrs Anthony Hartnell, William Johnson and David Sanders).
27. On 22 March 2017, Mr Patton on behalf of Aurora wrote to the then Chairperson of Molopo indicating that Aurora would seek to nominate one or more persons for election to the Molopo board. Aurora ultimately nominated one director.
28. On 20 June 2017, at the annual general meeting where the resolutions to change the board were considered, none of the resolutions seeking the removal of the existing directors or the appointment of Keybridge and Aurora nominees were passed.¹⁰
29. Other facts are set out in *Molopo Energy Limited 01 & 02* and are not repeated here.
30. Relevant relationships between the parties as at the date of the review applications of Keybridge and Molopo are shown in the diagram set out in **Annexure A**.

⁹ The consultancy was effective from 13 October 2016

¹⁰ At the meeting, Keybridge and Aurora were not entitled to vote Molopo shares vested in ASIC as a result of a final order dated 14 June 2017 made by the initial Panel

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APPLICATIONS

31. The Panel received three applications for review following the initial Panel's decision.
32. By applications dated 1 June 2017, Keybridge and Molopo each sought a review of the initial Panel's decision to make a declaration of unacceptable circumstances in *Molopo Energy Limited 01 & 02*.
33. The initial Panel's preliminary view was that an association had been established between Keybridge and Aurora in relation to Molopo but, in the end, it was not persuaded that it should confirm that preliminary view.
34. The initial Panel did, however, declare the circumstances unacceptable as it considered that the involvement of Mr Bolton, or Mr Bolton together with Mr Patton, in Keybridge and Aurora gave rise to unacceptable circumstances in relation to the affairs of Molopo.
35. In its review application, Keybridge submitted (among other things) that the evidence presented to the initial Panel did not support the finding that Mr Bolton has the capacity to influence significantly the investment strategies of Keybridge and that the initial Panel had not identified any acquisition of control over voting shares or of a substantial interest in Molopo in relation to which Mr Bolton, either alone or together with Mr Patton, was involved.
36. In its review application, Molopo submitted that the initial Panel erred in failing to find association between Keybridge and Aurora and failed to take account adequately of the evidence presented regarding the involvement of Bentley and Mr Farooq Khan in the factual matrix relevant to the alleged association.
37. Molopo requested the consent of the President to make its application for review, if required, because the review application submitted that the declaration should have extended to other circumstances.¹¹ The President granted her consent.
38. By application dated 15 June 2017, Aurora sought a review of the initial Panel's decision on orders. The initial Panel's orders included a divestment order. Aurora submitted (among other things) that the divestment order was unprecedented in circumstances where the initial Panel had not found a breach of the Corporations Act. It further submitted that the orders did not cure the unacceptable circumstances. It also submitted that the divestment order was unfairly prejudicial to underlying Aurora unit holders (by devaluing their investment) and to Molopo shareholders (because of the overhang caused in the market).

¹¹ Referring to Guidance Note 2 – Reviewing Decisions and *Gondwana Resources Limited 02R* [2014] ATP 18 at [29]-[30]

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DISCUSSION

Scope of review

39. The powers of a review Panel are set out in section 657EA. 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 decision reviewed after conducting proceedings or decline to conduct proceedings and allow the initial Panel's decision to stand.¹²
40. Mr Bolton submitted that because the initial Panel did not make a finding of association, in the absence of new evidence, there was no basis for us to now determine that Mr Bolton is associated with ASG, ASH, Mr Patton, Keybridge, Aurora or Seventh Orion.
41. Our review is not limited by the findings of the initial Panel or confined to the grounds raised in the review applications. This is because our review is a *de novo* hearing of the matters before the initial Panel based on the material before us¹³ and on which we exercise our own discretion. It is open for us to re-consider all aspects of the initial applications.¹⁴ This includes a potential association between one or more of Messrs Khan, Simon Cato, Johnson, Bolton, Patton and Hallam and Ms Poon, and their controlled entities, including Bentley, Scarborough, ASG, Keybridge and Aurora (defined in the initial Panel's reasons as "Relevant Persons") as submitted in Molopo's application to the initial Panel.
42. We decided to conduct proceedings on each of the review applications and considered afresh the circumstances in *Molopo Energy Limited 01 & 02*. We directed¹⁵ that the applications be considered together.

Materials considered

43. In determining this matter, we have been provided with, and have considered, the following materials:
 - (a) all the material before the initial Panel
 - (b) the initial Panel's preliminary findings, decision emails, declaration of unacceptable circumstances, final orders and reasons for decision
 - (c) the review applications and
 - (d) the submissions and rebuttals of the parties in the review.
44. We have considered all the material, but address specifically only those we consider necessary to explain our reasoning.

¹² *Goldlink IncomePlus Limited 04R* [2009] ATP 3 at [8]-[15]. See also Guidance Note 2 – Reviewing Decisions at [26]

¹³ See, for example, *CEMEX Australia Pty Ltd v Takeovers Panel* [2008] FCA 1572 at [16] (appeal dismissed *Cemex Australia Pty Ltd v Takeovers Panel* [2009] FCAFC 78)

¹⁴ See, for example, *Mungana Goldmines Limited 01R* [2015] ATP 7 at [30]

¹⁵ Pursuant to regulation 16(1)(a) of the *Australian Securities and Investments Commission Regulations 2001* (Cth)

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Extension of time

45. The initial Panel decided under section 657C(3)(b) to extend time for the making of the applications by ASIC and Molopo.¹⁶
46. Section 657C(3) says:
- An application for a declaration under section 657A can be made only within:*
(a) two months after the circumstances have occurred; or
(b) a longer period determined by the Panel.
47. The review applications were made within the mandated timeframe for reviews.¹⁷ It is unclear whether the review applications intended or could seek review of the initial Panel's decision under section 657C(3)(b). For the avoidance of doubt and to the extent it is necessary, we affirm that decision, essentially for the same reasons as the initial Panel.

Undertakings

48. Following the making of final orders in *Molopo Energy Limited 01 & 02*, the undertakings given by Keybridge and Aurora in those proceedings fell away. We asked whether each of Keybridge and Aurora would provide undertakings on the same terms as those provided in *Molopo Energy Limited 01 & 02*. Keybridge and Aurora did so. Accordingly, Keybridge and Aurora agreed not to dispose of or acquire any shares in Molopo without the review Panel being given two business days' prior notice (**Annexure C**).

Interim orders

49. Molopo's annual general meeting was scheduled to be held on 20 June 2017. The agenda was to consider:
- (a) required items of business (accounts, reports and remuneration report)
 - (b) the reappointment of Mr Wayne Trumble, and the election of Mr Ben Norman (Aurora's nominee), as directors and
 - (c) the items the subject of the section 249D requisition (removal and election of directors nominated by Keybridge).
50. Keybridge sought an interim order that the resolutions considering the appointment or removal of directors should be adjourned until our proceedings were concluded. It submitted that this would preserve the status quo.
51. We decided not to make the interim orders. It is a serious matter to withhold from shareholders the right to consider matters on the agenda of a general meeting. We took account of the fact that the initial Panel's orders continued to limit the voting power of the alleged associates to exclude the Molopo shares vested in ASIC. Nevertheless, we were not satisfied that the balance of convenience favoured making the interim order sought by Keybridge.

¹⁶ The initial Panel's reasons at [244]-[253]

¹⁷ *Corporations Regulations 2001* (Cth), regulation 6.10.01

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Association test

52. Section 12 sets out the tests for association as applied to Chapter 6. There are two relevant tests here:
- (a) section 12(2)(b) - which provides, in essence, that B is an associate of A if (and only if) B is a person with whom A has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of a company's board or conduct of its affairs and
 - (b) section 12(2)(c) - which provides, in essence, that B is an associate of A if (and only if) B is a person with whom A is acting or proposing to act in concert in relation to the company's affairs.
53. A relevant agreement is an agreement, arrangement or understanding:
- (a) whether formal or informal or partly formal and partly informal and
 - (b) whether written or oral or partly written and partly oral and
 - (c) whether or not having legal or equitable force and whether or not based on legal or equitable rights.¹⁸
54. As stated by the Panel in *CMI Limited 01R*,¹⁹ the cases make it clear that there is significant overlap between the concepts of "acting in concert" and "relevant agreement" in section 12.
55. An understanding means an understanding - "*plainly a word of wide import*"²⁰ - as to some common purpose or object in relation to the company in question.
56. Often establishing an association requires the Panel "*to draw inferences from patterns of behaviour, commercial logic and other evidence suggestive of association.*"²¹
57. In *Viento Group Limited*,²² relying on *Mount Gibson Iron Limited*,²³ the Panel said circumstances which are relevant to establishing an association include:
- (a) a shared goal or purpose
 - (b) prior collaborative conduct
 - (c) structural links
 - (d) common investments and dealings
 - (e) common knowledge of relevant facts and
 - (f) actions which are uncommercial.

¹⁸ Section 9

¹⁹ [2011] ATP 5 at [33]-[34]

²⁰ *Adsteam Building Industries Pty Ltd & Anor v The Queensland Cement and Lime Co Ltd & Ors* (1984) 14 ACLR 456 at 459

²¹ *Winepros Limited* [2002] ATP 18 at [27]

²² [2011] ATP 1 at [120]

²³ [2008] ATP 4. These factors have been applied in several Panel decisions including *Ainsworth Game Technology Limited 01 & 02* [2016] ATP 9, *World Oil Resources Limited* [2013] ATP 1 and *CMI Limited* [2011] ATP 4

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58. The above ‘indicia’ are a useful guide in identifying and describing relevant circumstances, and we return to them below. While each of these may support a finding of association, none alone establish association. Similarly, the absence of one or more of the ‘indicia’ does not preclude such a finding where there is other probative material indicating an association.
59. The initial Panel provided parties with proposed preliminary findings it was considering making and on which the parties were invited to comment. The preliminary findings included a proposed finding of association between Keybridge and Aurora in relation to Molopo. After considering the submissions and rebuttals on the preliminary findings, the initial Panel said “*we have, on balance, hesitated to come to that conclusion in the face of the direct evidence from individuals in Keybridge and Aurora regarding the absence of a consensus as to their dealings concerning Molopo.*”²⁴ The direct evidence referred to consisted of affidavits provided by Mr Patton, Mr Hallam, Ms Poon, Mr Rowley and Mr Siciliano and a statutory declaration provided by Mr Kriewaldt, each in response to the preliminary findings. The initial Panel noted that its decision on this was “*finely balanced*”.²⁵
60. We considered on a *de novo* basis whether there was an association between Keybridge and Aurora in relation to Molopo, as well as other potential associations. For the reasons below, we consider that Keybridge and Aurora are associates on the basis that, through the influence of Mr Bolton, they embarked on parallel conduct, which each was aware or understood the other was engaging in, to achieve their mutual objectives in relation to Molopo. In our view, we can infer a consensus between the parties.
61. Our conclusion on the issue of association follows our consideration of the comments made by the parties on the preliminary findings of the initial Panel and the initial Panel’s reasons, as well as all the other material before us.
62. We considered the cumulative effect of all the material and have drawn inferences that, in our experience, seem appropriate. In doing so we had in mind that we must be satisfied by logically probative material. We also had regard to the potential seriousness of a finding of association in deciding whether there was sufficient material to support such a finding.²⁶
63. Further, when making an assessment of all the material in this matter we have relied on our skills, knowledge and experience as practitioners.²⁷ We have

²⁴ At [70]

²⁵ At [68]

²⁶ Under *Australian Securities and Investments Commission Regulations 2001* (Cth) regulation 16(2)(a) the Panel is not bound by the rules of evidence and so is not bound to apply the principles in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. See e.g. *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93 and *Kyriackou v Law Institute of Victoria Limited* [2014] VSCA 322 at [22]-[30]. Nevertheless, we consider this relevant in exercising our powers under section 657A

²⁷ See *Tinkerbelle Enterprises Pty Limited as Trustee for The Leanne Catelan Trust v Takeovers Panel* [2012] FCA 1272 at [114]

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procedural requirements to meet and statutory time constraints in which to make a decision.²⁸ In our view, we have met these.

64. Attached to these reasons is also a chronology of events (**Annexure B**) to assist the reader with what is otherwise a complex set of facts. The parties were given an opportunity to comment on the chronology but were asked to refrain from adding additional events. We have addressed parties' comments in the version attached and understand the facts outlined in the chronology to be uncontested. Keybridge submitted, in response to the restraint on adding additional events, that the chronology was incomplete and omitted material events relevant to the Panel's findings. We accept that the chronology is incomplete, as it focuses on the most salient events, but believe that it is still a useful reference.
65. We begin our description of the circumstances with a chronological account of three pertinent matters (and the role of Mr Bolton in each of them): Keybridge's sale of Aurora, Keybridge's investment in Molopo and Aurora's investment in Molopo. We then consider the cumulative effect of these matters under the headings of the relevant 'indicia' of association, before detailing our conclusions on association and unacceptability.

Background

Aurora and its sale

66. On 27 March 2015, Keybridge announced that it had completed its acquisition of Aurora from Aurora Funds Limited for \$3.82 million (plus deferred consideration).²⁹ At the time, Aurora had a relevant interest in 3,463,033 Molopo shares (or approximately 1.4% of Molopo).
67. Mr Bolton was the managing director of Keybridge at the time that it acquired Aurora and worked on the acquisition.
68. During 2015, Keybridge acquired a 21.08% interest in HHY and in June 2015 Aurora was appointed as investment manager and responsible entity of HHY.
69. After the acquisition, Aurora's retail funds under management significantly declined requiring Keybridge to restate the carrying value of the intangible asset recorded on its balance sheet as part of the transaction down to an overall value of \$1.576 million. On 29 February 2016, Aurora suspended applications, redemptions and trading on the ASX in relation to three funds as a result of liquidity concerns. In March 2016, Keybridge reported that it had begun to consider its strategic options in relation to its investment in Aurora.³⁰
70. Keybridge commenced negotiations for a potential sale of Aurora with two third party purchasers in February 2016 but by the end of May 2016 both parties had terminated discussions. Other potential purchasers were also contacted.

²⁸ In *Tinkerbelle Enterprises Pty Limited as Trustee for The Leanne Catelan Trust v Takeovers Panel* [2012] FCA 1272 at [54] Collier J said: "That the Panel was created to deal with takeover disputes in a relatively informal and expeditious manner is clear from its enabling legislation...."

²⁹ Keybridge ASX announcement dated 27 March 2015

³⁰ See Directors' Report to Keybridge's half year accounts released to ASX on 4 March 2016

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71. On 22 February 2016, Mr Sormann contacted Mr Bolton notifying him that Keybridge had received an offer for Aurora and asking whether he wished to put forward an offer. In response to a query from Mr Bolton about whether the offer that had been received was capable of acceptance, Mr Sormann indicated that the offer was above “*expected book value*”. Two days later, Mr Bolton sent Mr Sormann a term sheet (signed by Mr John Bolton) for ASG to acquire Aurora. In the term sheet, Mr John Bolton wrote that ASG strongly opposed any sale of Aurora at a discount to its acquisition cost and it was only in circumstances where Keybridge was determined to sell Aurora that ASG felt compelled to present the offer.³¹
72. The potential sale to ASG was progressed after the other potential purchasers had walked away. On 26 May 2016, Keybridge’s board asked Mr Sormann to investigate whether shareholder approval would be required for a sale to a major shareholder and to “*contact ASG re providing them with an opportunity to make an offer*”. Later that day, after Mr Sormann emailed a draft share sale agreement to Mr John Bolton, copying Mr Bolton, Mr Sormann advised Mr Bolton that Keybridge had received advice that shareholder approval was not required.
73. On the same day, Mr Bolton sent Mr Patton the draft agreement. Mr Patton deposed that Mr Bolton had first brought the Aurora investment opportunity to his attention towards the end of May 2016 because it was not possible for Mr Bolton to manage Aurora were he to acquire it (given his ban), suggesting that Mr Patton could manage Aurora. Mr Patton deposed that he told Mr Bolton he was not interested in managing the business as an employee. They subsequently discussed Mr Patton having an equity stake, as well as other Aurora employees.
74. In its submissions to the initial Panel’s brief, Seventh Orion submitted that “*Mr Patton was joined by other investors in acquiring Aurora, including the former managing director and portfolio manager of Keybridge (Nicholas Bolton and Victor Siciliano respectively) and the chief financial officer of Aurora (Betty Poon). Mr Patton believed that securing the expertise, experience and corporate knowledge of these investors would assist Seventh Orion to enhance and develop Aurora’s business...*”.
75. On 31 May 2016, Mr Patton signed a confidentiality deed in relation to the proposed sale of Aurora and was given access to due diligence materials. He deposed that he had some reservations about the opportunity given the substantive issues facing the business. He met with Mr Sormann who was responsible for the sale process on behalf of Keybridge on 8 June 2016. He deposed that Mr Sormann told him that if Aurora was not sold by 30 June 2016, the Aurora directors had decided that the best course of action would be to wind up the business (and the Keybridge directors would not oppose this). Mr Patton deposed that upon hearing this, he decided the investment may be worth considering on the basis that Keybridge should be happy to receive a price slightly higher than the wind up value. He deposed that extensive due diligence was conducted throughout June and the sale of Aurora to Seventh Orion (as trustee for the Aurora Trust) was negotiated and documented, primarily by himself on the Aurora side.

³¹ ASG also offered, in the alternative, to provide Keybridge with the option to put the business to ASG

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76. Mr Bolton submitted that he was actively involved in assisting Mr Patton with the Aurora purchase and did so in his personal capacity. His involvement, he submitted, was known to Keybridge and, given his personal financial interest in the acquisition, was not remarkable. Mr Patton deposed that he had enlisted Mr Bolton's assistance with the acquisition for a number of reasons including that Mr Bolton had detailed knowledge of the business, its history and issues which was critical to enabling Seventh Orion to meet Keybridge's 30 June 2016 deadline and that *"as the largest investor in the Aurora Investments Unit Trust, it was in his interests for Seventh Orion to acquire Aurora"*. Mr Patton also deposed that, given the compressed timetable, *"Mr Bolton provided a useful sounding board for completing the acquisition efficiently"*.
77. After Mr Bolton introduced Mr Patton to Keybridge as a potential purchaser, there appeared to be a desire from Keybridge's perspective to distance Mr Bolton from the acquisition. Mr Patton deposed that Mr Sormann had told him on 15 June 2016 that he (Mr Sormann) had authority to proceed the sale with Mr Patton *"if the purchasing entity was controlled by me (or my entity, Wilson Hanna) and not Australian Style Group Pty Ltd (ASG), an entity associated with Mr Bolton"*.³² It has not been explained why the Keybridge board was willing to contemplate a sale to ASG on 26 May 2016 and were a short time later concerned to ensure that ASG did not control the purchaser.
78. We consider that Mr Bolton was actively involved in the purchase of Aurora by Seventh Orion. His involvement was largely in the background with communications occurring primarily between Mr Sormann and Mr Patton. We consider that Keybridge was aware of Mr Bolton's involvement given that it received from Mr Patton on 10 June 2016 a confidentiality deed signed by Mr Bolton and Mr Bolton had a couple of calls with Mr Sormann regarding the progress of the sale during the relevant period. Mr Sormann's statement to Mr Patton about the purchasing entity not being controlled by ASG suggests awareness that ASG was involved in some manner behind the scenes. Mr Sormann was *"not particularly surprised"* when he later learned of Mr Bolton's interest in the Aurora Trust.
79. On the same day as Mr Patton's conversation with Mr Sormann regarding control of the acquisition vehicle occurred, Mr Patton emailed Mr Bolton asking him if he was comfortable holding no more than 49.9% in the Aurora Trust. Mr Bolton responded that he was happy to do so but asked for confirmation that he *"will be offered that 49.9%"*. While this is not a majority interest in the Aurora Trust, Mr Bolton is the largest unit holder.
80. Aurora submitted that Mr Bolton had no involvement in selecting or establishing Seventh Orion. Mr Bolton submitted that he had no involvement in the composition or appointment of the Aurora board. ASIC submitted that it was improbable that Mr Bolton, at the very least, did not sign off on the structure through which he holds his investment in Aurora. We agree with ASIC.

³² See the initial Panel's reasons at [113]-[115]

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81. While Mr Bolton had no formal role in the Aurora structure as a director, officer, employee or consultant following the acquisition, his expertise and knowledge of the business continued to be utilised by Aurora. Documents produced under notice to ASIC showed that Mr Bolton (among other things):
- (a) was consulted by Mr Patton on various documents and matters relating to different Aurora funds
 - (b) was involved in negotiating the potential sale of Buy-Write
 - (c) examined proxy forms relating to resolutions for the removal of Aurora as responsible entity of several Aurora funds³³ identifying technical deficiencies and
 - (d) advised on the validity of online voting for the meetings called to consider these resolutions.
82. Mr Bolton also produced a draft letter addressed to Mr Johnson (a director of Keybridge) from Mr Patton on Aurora's letterhead dated 20 December 2016 with a proposed settlement of outstanding items from Seventh Orion's acquisition of Aurora. The draft letter contained detailed information about Aurora's affairs post-acquisition. We infer from this that Mr Bolton had a deep knowledge of Aurora's affairs.
83. Aurora did not deny that Mr Bolton and Mr Patton consulted. Mr Patton deposed that, in the six months to 31 December 2016, he received about 45 emails from Mr Bolton or an average of one email every four days down from an average of two emails a day during June 2016. Aurora submitted that Mr Patton consulted Mr Bolton to take advantage of his knowledge of the Aurora funds as former managing director of Keybridge. However, there is evidence that Mr Bolton's involvement was not so limited; he was active in respect of current and future matters for Aurora, e.g., the potential sale of Buy-Write.
84. Aurora further submitted (relying on the affidavits of Ms Poon and Mr Siciliano) that it requested Mr Bolton's assistance with discrete, largely administrative tasks (referring to the assistance Mr Bolton provided in relation to the meetings called to remove Aurora as responsible entity of several Aurora funds) and occasionally used Mr Bolton's network to be introduced to potential counter-parties for transactions. However, Mr Patton deposed that "*[t]hings like canvassing a person's views, asking for a person's help or making the most of a relationship do not result (and have never resulted) in [Mr Patton] or Aurora being beholden to Mr Bolton or doing his bidding*".
85. In our view, as explained further below, Mr Bolton's involvement in Aurora did not arise only when he was asked and was not limited to administrative tasks or introductions.

³³ See paragraphs [160]-[167] for more details

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Keybridge and its investment in Molopo

86. Following Mr Bolton's resignation from Keybridge's board due to his ban, Keybridge's management faced pressure from its major shareholders.
87. On 12 May 2016, Keybridge announced that it had received a proposal from one of its shareholders, Wilson Asset Management, for a restructure of the company, subject to shareholders' approval.
88. Six days later, Bentley and its subsidiary Scarborough acquired 16.97% of Keybridge and immediately requested two Keybridge board positions. Mr Khan is a substantial shareholder in, and the Chairperson of, Bentley. On 30 May 2016, Scarborough advised Keybridge of its intention to call a section 249F meeting of Keybridge to remove Mr Andrew Moffat as a director and appoint two Scarborough nominees (Messrs Cato and Johnson, who are also directors of Bentley).
89. Shortly after Mr Bolton's resignation from Keybridge's board, ASG (through Mr John Bolton) began to express concerns with the on-going management of Keybridge. Following Scarborough's request for board seats (which ASG did not oppose) ASG considered it should also have at least two Keybridge board seats. Mr Bolton approached Mr Patton³⁴ about becoming a director of Keybridge and Mr Patton sent his resume to Mr John Bolton on 25 May 2016.
90. On 1 June 2016, Mr Khan emailed Mr Bolton to discuss various meetings he wanted to have with Mr Bolton to discuss "*the way forward*" and with each of Mr Sormann, Mr Bill Brown and Mr Bolton's "*rep*", Mr Patton.
91. On 2 June 2016, Mr Ian Pamensky (Keybridge's then chief financial officer and company secretary) sent a letter on behalf of Keybridge's then chairman, Andrew Moffat, to Mr John Bolton noting that he had received a board nomination of Mr Patton from Mr Bolton which Mr Bolton advised was with Mr John Bolton/ASG's knowledge and support.
92. On 3 June 2016, a meeting was held between Messrs Khan, Bolton, Patton and Johnson. At the meeting, Mr Patton was advised that Messrs Khan, Bolton and Johnson did not want Keybridge to sell Aurora.
93. On 7 June 2016, Keybridge convened an extraordinary general meeting to consider the resolutions proposed by Scarborough. Three days later, Keybridge announced that Wilson Asset Management had withdrawn its restructure proposal "*[g]iven the recent change in, and discussions with, substantial shareholders and the Keybridge board*".
94. In late June or early July 2016, Mr Bolton called Mr Jeremy Kriewaldt to discuss whether Mr Kriewaldt would be prepared to be proposed as a director of Keybridge by ASG.
95. On 25 July 2016, Mr Bolton noted in email correspondence with Mr Moffat, regarding Mr Bolton's vote to remove Mr Moffat at the Keybridge extraordinary general meeting, that he "*strongly disagreed with the sale of Aurora. It's worth*

³⁴ Mr Patton deposed that he had mentioned his interest in being considered for a director role at Keybridge to Mr Bolton in April 2016

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considerably more than what it was sold for, and again, just a few months after announcing the strategy built around that business, it was sold."

96. At the extraordinary general meeting on 29 July 2016, the resolutions proposed by Scarborough were approved to remove Mr Moffat and appoint Bentley's nominees Messrs Cato and Johnson. Following the meeting, Keybridge's board was composed of Messrs Cato, Johnson, Sormann and Mr Bill Brown (who assumed the position of Chairperson).
97. On 10 August 2016, following correspondence between Mr John Bolton and Mr Brown earlier in August, Mr Brown resigned from the board and Keybridge appointed Mr Patton as a non-executive director. Keybridge's announcement stated that Mr Patton "*represents the interests of [ASG]*".
98. Mr Sormann had also agreed in August to resign as a director of Keybridge following the finalisation of the annual report and some other legacy matters. Keybridge submitted that it needed to have a part-time executive to provide day to day oversight following Mr Sormann's departure and that Mr Patton was the obvious candidate (with none of the other directors being available for such a role). Mr Patton was first proposed for the role at a Keybridge workshop in Perth held on 16 and 17 August 2016 which was attended by Messrs Bolton, Khan, Ho and Johnson.
99. Mr Sormann resigned from the board of Keybridge on 13 October 2016. On the same day, Mr Patton was appointed as Chairperson of the board of Keybridge and was engaged in an executive role (minimum two days per week) and Mr Kriewaldt was appointed a non-executive director of Keybridge. Keybridge's announcement stated that Mr Kriewaldt "*represents the interests of [ASG]*".
100. Also, effective 13 October 2016, Mr Khan and Mr Bolton became consultants to Keybridge pursuant to separate consultancy agreements with substantially the same terms and at the same fees. Mr Patton signed both consultancy agreements on behalf of Keybridge. The agreements provided that the consultants report to Mr Patton. Mr Patton deposed, however, that they reported to Mr Johnson in relation to Molopo. It is not clear when the later arrangement became effective and we were not given any written evidence of it.
101. The initial Panel questioned why Keybridge, with an experienced board, needed two consultants. Keybridge submitted that this was to address its limited executive functions and fill the information gap concerning its history. We infer from this that Messrs Bolton and Khan had an active and significant role in the affairs of Keybridge. Keybridge submitted that their roles do not make them the controlling mind and will of Keybridge. We do not need to decide whether that is the case. As explained below, we consider it sufficient that the Keybridge board agreed to or acquiesced in the strategies and actions influenced or orchestrated by Mr Bolton in relation to Molopo.
102. Although Mr Sormann resigned from Keybridge, he remained as a director of Molopo while Keybridge sought to replace him with another representative. Mr Sormann was instructed by Keybridge to seek Mr David Sanders' appointment in

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his place, but he was unable to get Mr Sanders appointed. On 2 December 2016, he resigned from Molopo's board.

103. In his email dated 2 December 2016 to the Molopo board attaching his resignation letter, Mr Sormann stated:

I have thought long and hard over the last few days and had some wise counsel from a couple of Mentors in relation to the current situation I face having departed Keybridge and noting what they are now doing in combination with Aurora to take control of Molopo.

104. Mr Sormann said (in a conference held by the initial Panel) that he was referring to Keybridge's request to the Molopo board for Mr Sanders to replace him as a director and Aurora becoming a substantial holder in Molopo, adding that he "had a perception that Aurora was making its investment in support of Keybridge's ambitions to appoint the directors." Mr Sormann accepted when questioned in the conference that the email made a significant claim.

105. Mr Sormann stated that he made the "in combination" statement out of anger and frustration "just to put something out there without necessarily having thought about the specifics around the allegation". Aurora submitted that given this 'admission' from Mr Sormann, the 2 December email should not be treated as having any evidentiary value with respect to a finding of association between Keybridge and Aurora. Mr Sormann's lawyer submitted that the Panel should not question the veracity of Mr Sormann's statements given such matters were not put to him during the conference. Molopo submitted that Mr Sormann's statement was evidence of "some form of collaboration".

106. We accept Mr Sormann's description of the circumstances in which he made the statement, however we do not consider that this discredits his statement. Mr Sormann said that he based his 'perception' on Mr Patton being a director of both Aurora and Keybridge and Mr Bolton having ownership interests in both companies. Given Mr Sormann's knowledge of the circumstances and individuals involved based on his firsthand experience, we consider that his perception does have some probative value and was not unreasonable in the circumstances.

107. Mr Sormann also expressed concerns in the context of his position at Keybridge. On 23 September 2016, Mr Sormann emailed Ms Samantha Tough (Molopo's then Chairperson) stating:

As you also know, I am finding my position at Keybridge increasingly untenable, and do not see myself staying at the Company much longer...

108. By email dated 14 December 2016 to Mr Victor Ho (company secretary of Keybridge) and copied to Mr Patton, Mr Sormann similarly said:

... I felt that my position had been made untenable by the Substantial Shareholder notice lodged by Aurora.

109. In the conference held by the initial Panel, Mr Sormann explained that the references to "untenable" referred to him being excluded from discussions regarding the future direction of Keybridge. He said he had raised this with Ms

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Tough because he did not want Molopo to think that he was taking information back to Keybridge.

110. Shortly prior to Mr Sormann's email to Ms Tough, on 20 September 2016, Keybridge had acquired a further 1,682,763 Molopo shares (taking its holding to 19.15%). The acquisition was prompted by an email from Mr Johnson to Keybridge's other directors at the time, Messrs Sormann, Patton and Cato, stating that Keybridge's relevant interest in Molopo needed to move above 19% "ASAP" so that Keybridge could increase its interest using the 'creep' provisions of the Corporations Act. Mr Patton was involved in managing the acquisition.
111. Keybridge submitted that it considered Molopo (its largest investment) as a strategic stake and to realise maximum value from any sale of that investment, it would be desirable to sell the entire stake to one investor. It submitted that it decided to increase its Molopo stake on the basis that the larger the stake the more attractive it would be. It used as a model the sale on or about 26 August 2015 by Bentley of its shareholding in Molopo (at that time the largest shareholder in Molopo holding a little under 20%) for 26.5 cents per share (compared with a market price of approximately 15 cents per share).
112. From October 2016, Keybridge (through primarily Mr Khan) was in negotiations to sell its Molopo stake which broke off in mid-February 2017 due to a failure to finalise commercial terms. Also in October 2016, Keybridge (through Mr Bolton) had discussions with another potential purchaser. That purchaser had previously negotiated with the prior Keybridge board to acquire Keybridge's Molopo stake but, Keybridge submitted, that transaction failed to conclude at the last moment due to the apparent failure of the Molopo board to grant the purchaser a board seat. The negotiations with Mr Bolton did not proceed to an advanced stage as the price being offered was below both Keybridge's expectations and that being proposed by the other potential purchaser.
113. At the same time as pursuing a sale of the Molopo stake, Keybridge sought to replace Mr Sormann as its representative on the Molopo board. The request to appoint Mr Sanders was rejected by Molopo on 2 December 2016 citing the potential association between Keybridge and Aurora following the announcement of Aurora's substantial shareholding in Molopo. On 17 January 2017, Keybridge requested that Molopo appoint Mr Johnson as Keybridge's nominee to the board of Molopo (as an alternative to Mr Sanders). This was also rejected.
114. On 26 October 2016, Messrs Johnson, Cato, Patton, Kriewaldt, Khan and Bolton attended a Keybridge strategy meeting which had been called to "*map out a clear director (sic) for KBC – from both a strategic and operational perspective*". In relation to Molopo, the draft agenda for the meeting prepared by Mr Ho listed two items – a sale at \$ [REDACTED] per share and "*launch bid with KBC CRPN*" (ie. Keybridge's listed convertible notes).
115. The draft agenda also included the item "*Investments co-invested by [Keybridge] and [Aurora] – Manage association*". Keybridge submitted that this item was included in the draft agenda by Mr Ho to raise for discussion any investments in which Keybridge and Aurora independently had an interest. Mr Kriewaldt stated in his

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statutory declaration that the item was introduced at the strategy meeting by Mr Ho who said *"it was important for Keybridge to understand whether any acquisitions or disposals of shares by Aurora could affect the voting power of Keybridge, on the basis that ... Mr Patton was the controlling mind and will of Aurora ... and might therefore have a relevant interest in the shares held by Aurora."* Mr Kriewaldt stated further that *"Mr Patton said that, as far as he believed, he did not have any relevant interest in shares held by Aurora in funds managed by it, but that he would check that this was the case."*

116. According to Mr Kriewaldt, at the strategy meeting Keybridge's strategy remained to sell its entire investment in Molopo for a price of at least \$[REDACTED] per share and in keeping with that strategy, to replace its current representative on the Molopo board, in order to give an indication to any potential purchaser that they would also be likely to be able to secure a board seat. At the meeting, Mr Kriewaldt submitted that Mr Khan had suggested that if Molopo failed to appoint Keybridge's replacement nominee, Keybridge could consider either a member resolution to alter the composition of the Molopo board or launching a takeover bid. Mr Kriewaldt indicated that Mr Khan's suggestions were not supported in light of the strategy to sell.
117. In addition to the two actions described by Mr Kriewaldt of selling Keybridge's Molopo stake and seeking to replace its Molopo board representative, Mr Johnson emailed Mr Pamensky (copying Messrs Patton and Ho) on 27 October 2016 noting that at the strategy meeting it was agreed to *"top back up in Molopo as much as we can ... to just under 20%"*. This was supported by Mr Ho's notes of the meeting. Following its acquisition of Molopo shares on 20 September 2016, Keybridge continued to accumulate shares in Molopo until the commencement of the initial Panel's proceedings on 11 April 2017 increasing its shareholding to 19.95%.
118. Keybridge further submitted that its strategy in relation to its investment in Molopo changed in late February 2017 when the proposed sale of its Molopo stake fell through and Molopo declined Keybridge's request for a board seat to replace Mr Sormann and instead appointed two new directors who were not representatives of any shareholder. Keybridge submitted that its directors (excluding Mr Patton) *"then adopted the proposal of Mr Khan at that time (reviving the possibility that he had discussed at the 26 October 2016 strategy meeting) that the board composition of Molopo should be thrown open for shareholders to consider"*. Accordingly, on 12 March 2017, Keybridge lodged its section 249D requisition with Molopo.
119. Keybridge submitted that from 10 November 2016 onwards, Mr Patton was excluded from matters relating to Keybridge's investment in Molopo. At that time, Mr Patton conveyed that he was conflicted in relation to Molopo and an information barrier was established. We discuss this in detail below.

Aurora's investment in Molopo

120. Following the restoration of liquidity at the three frozen Aurora funds on 31 August 2016, Aurora began to focus on ways to attract new investment monies. Mr Patton deposed that Aurora decided to adopt a strategy of trying to attract investors who held large shareholdings in ASX-listed companies and encourage

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them to swap their shareholdings for units in Aurora's funds in order to build up their funds under management.

121. Mr Siciliano was the portfolio manager at Keybridge of HHY from February 2015 to July 2016. He invested in the Aurora Trust at the time of the Aurora acquisition by Seventh Orion and joined Aurora as a portfolio manager on 26 July 2016. In early October, after the departure of the former investment manager, Mr Siciliano assumed investment responsibility for AGIT and AFARF and began trading and rebalancing across the portfolios.
122. As part of the Aurora sale, Keybridge retained the investment management rights for HHY, while Aurora remained as responsible entity. Following Mr Siciliano's appointment by Aurora, Keybridge hired Mr Siciliano pursuant to a consulting agreement to action trades on instructions from Mr Johnson and to perform administrative services for HHY.
123. Mr Siciliano deposed that, sometime in September 2016, he raised the "*Molopo investment idea*" with Mr Patton. Mr Patton deposed that it looked like an interesting investment idea (based on the then current trading price) but he was concerned about the risk of investing in a company where about 50% of shares were held by three parties (one being Keybridge). Mr Patton subsequently mentioned Molopo, as well as Aurora's strategy for increasing its funds under management, to Mr Bolton. Mr Patton deposed that Mr Bolton said he knew investors located overseas who in aggregate held about 18% of Molopo and offered to sound them out about whether they would be interested in selling in exchange for units in an Aurora fund. Mr Siciliano also deposed that, at or around mid-October 2016, he and Mr Bolton discussed potential sellers of Molopo shares. Mr Bolton stated that "*Mr Siciliano did not communicate to me his buying of Molopo in October 2016*" but did not specifically deny having communications with Mr Siciliano regarding potential sellers of Molopo shares.
124. Mr Bolton emailed one Molopo shareholder on 28 September 2016 and another on 17 October 2016 in both cases forwarding the email exchanges to Mr Patton.
125. On 7 October 2016, Mr Siciliano commenced buying shares in Molopo. By 31 October 2016, Aurora's total interest had increased to approximately 3.5% of Molopo's issued capital.³⁵
126. Mr Siciliano deposed that he acquired the shares on the basis that Molopo was trading at a 48% discount to its cash backing. It was one of a number of stocks he purchased in similar weightings using this investment thesis and the acquisitions were made within the investment mandate delegated to him by Aurora (only investments representing more than 5% of net asset value of any given fund required Aurora board approval). Aurora submitted that Mr Siciliano "*was not required to seek the approval of the directors of Aurora, or otherwise notify them, before making these acquisitions (and did not do so)*". While Mr Patton received daily reports

³⁵ This included 418,385 Molopo shares (or 0.17% of the then issued capital) acquired on 20 July 2016 as a result of closing out an existing cash settled swap that Aurora held in Molopo

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setting out the number of shares held by the Aurora funds at each trading day, he deposed that he did not become aware of the buying until *"later in October 2016"*.

127. After he became aware of the buying, Mr Patton deposed that he asked Mr Siciliano to *"take it easy"* until Mr Patton had *"reached a landing about Molopo's suitability as an Aurora investment"*. Mr Siciliano kept buying Molopo shares but reduced Aurora's average daily spend.
128. Mr Patton deposed that, on or around 8 November 2016, he instructed Mr Siciliano to see whether he could build a stake up to 5% while Aurora concurrently progressed efforts to acquire the holdings of the three overseas investors contacted by Mr Bolton, with the view to building a stake in Molopo of approximately 14%. Mr Patton deposed that he thought this would be sufficient to secure a board seat.
129. In early November, Mr Siciliano prepared an investment paper at Mr Patton's request to summarise the analysis and to support the investment proposal. Referring to Molopo's shareholder base as appearing to be *"dysfunctional"*, the paper proposed that Aurora *"move to a 19.99% as a balance of power stake, seek board representation"*.
130. The paper was sent to Aurora's other directors on or around 18 November 2016. In the cover email from Mr Patton to Mr Hallam, Mr Patton wrote that he *"wouldn't normally run investment strategies past you but because of the potential for a substantial shareholder notice to be issued, just wanted to let you know in advance"*. Mr Hallam provided some comments on the investment paper (in mark-up) to Messrs Patton and Siciliano on 5 December 2016. His comments included: *"Does [Aurora] funds and/or executives/shareholders have related party issues"* and *"[Keybridge] holds 19% - how do we manage conflicts and being viewed as a collective holding"*. The next day he requested legal advice from Norton Gledhill on the issues raised by the Molopo investment paper.
131. In the meantime, however, Mr Siciliano had begun increasing the spend on Aurora's acquisitions of Molopo shares on market and on 29 November 2016, as Mr Patton deposed, *"the trade was consummated"* and Aurora became a substantial holder in Molopo.
132. Aurora submitted that it engaged in discussions with one of the overseas Molopo shareholders (**Seller A**), to acquire a block of approximately 10 million shares by a special crossing in November 2016, but the transaction did not proceed. It subsequently acquired over 10 million Molopo shares on 29 November 2016, through 29 standard on market trades.
133. Mr Siciliano was aware of the approaches to overseas Molopo shareholders and deposed that Mr Bolton had advised him of the position of each of these shareholders, including Seller A. Mr Bolton corresponded with representatives of Seller A between 19 and 23 November 2016 regarding settlement of the sale of Molopo shares to Aurora and forwarded or copied the correspondence to Mr Siciliano.
134. Aurora also sought legal advice from Mr Kriewaldt, in his capacity as a partner of the law firm Atanaskovic Hartnell, about whether there would be any legal

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impediments to its proposed Molopo investment. The advice, dated 18 November 2016, did not highlight any potential issues including any association issues with Keybridge.

135. Aurora continued to purchase Molopo shares on market through 15 December 2016 and then began buying again from 6 February 2017 through 21 March 2017. These acquisitions included Aurora entering into binding agreements on 17 March 2017 with another of the overseas Molopo shareholders introduced by Mr Bolton (**Seller B**) to acquire 9,629,118 Molopo shares (or 3.87% of Molopo's issued capital) in consideration for units in AFARF.
136. We were provided with confidential material by Aurora regarding its commercial objectives concerning Molopo during the period after January 2017. Aurora submitted that it was acquiring a strategic stake in Molopo in furtherance of these objectives which were incompatible with Keybridge's objective of replacing the Molopo board. We considered Aurora's confidential material but were not satisfied that it was relevant or significant in relation to the matters before us, and were not persuaded that it provided credible support for Aurora's submissions.³⁶
137. At a board meeting of Aurora on 16 February 2017, the board discussed seeking representation on the Molopo board in light of its then approximately 10% shareholding in Molopo. Aurora submitted that *"it was focussed on building an investment stake that would provide it with some influence on the use of Molopo's cash and to protect its substantial investment in Molopo (through a board representative)"*.
138. On 2 March 2017, Mr Patton wrote to Ms Tough to open communications between Aurora and Molopo. In a subsequent phone call that day between Mr Patton and Ms Tough, Ms Tough advised that Molopo had requested ASIC to investigate Keybridge and Aurora and Molopo would not consider granting Aurora a board seat at that time.
139. After Keybridge requisitioned a general meeting of Molopo, Mr Patton wrote to Ms Tough to confirm the due date for nominations for directors for election at the meeting. On 31 March 2017, Aurora put forward one nomination for director.

Association

Common investments and dealings and other structural links

140. We agree with the initial Panel that, in addition to their respective investments in Molopo, there are a considerable number of common investments and dealings and other structural links between Keybridge and Aurora, as highlighted in the diagram in Annexure A and described below.
141. Mr Bolton was the former managing director of Keybridge. He holds 1% of ASH, the holding company of ASG which holds 21.16% of Keybridge. He also holds 2.2% of Keybridge directly. He is currently a consultant to Keybridge. He also owns 49.9% of the Aurora Trust.

³⁶ Given that, and our view that the information was neither adverse nor materially beneficial to Keybridge, we concluded that procedural fairness did not require that Keybridge, or its advisers, be given an opportunity to make submissions on the information

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142. Mr Patton is currently Chairperson and an executive director of Keybridge, nominated by ASG. He and his wife through their self-managed superannuation fund have a small investment of approximately 0.09% of Keybridge. He is the managing director of Aurora. Mr Patton owns 26.1% of the Aurora Trust and 50% of its trustee, Seventh Orion. Mr Bolton was previously a client of Mr Patton's when Mr Patton worked at Ernst & Young. Mr Bolton introduced Mr Patton to the Aurora transaction and proposed his appointment to the Keybridge board.
143. Keybridge has a relevant interest in 27.98% of HHY and Aurora has a relevant interest in 12.18% of HHY being acceptances under a current takeover bid by AGIT for HHY. Aurora is the responsible entity for HHY and Keybridge is its investment manager. Keybridge hired Mr Siciliano, Aurora's portfolio manager and a unit holder in the Aurora Trust, to assist in the management of the fund. Mr Siciliano was a former employee of Keybridge. He has known Mr Bolton since 2012 and approached Mr Bolton about working at Keybridge in 2015.
144. Keybridge also holds a relevant interest in 5.02% of AGIT.
145. Aurora holds 385,825 Keybridge convertible preferred notes (ASX: KBCPA).
146. Mr Rowley is a friend and business partner of Mr Bolton. He has a relevant interest in 1.61% of Keybridge, a 7% interest in the Aurora Trust and a 50% interest in Seventh Orion. He is also a director of Seventh Orion. He was introduced to Mr Patton by Mr Bolton as a person interested in investing in Aurora. Aurora submitted that Mr Rowley invested in the Aurora Trust as a 'top up' investor for funding the Aurora acquisition.
147. On 19 December 2016, Keybridge moved its registered office to Melbourne so that it was in the same place as its chief executive, Mr Patton (although its administration moved to Perth). This was in the same office, or at least on the same floor, as Aurora, Seventh Orion and Mr Patton's entity, Wilson Hanna Pty Ltd.
148. Keybridge and Aurora also have or have had co-investments in PTB Group Limited (ASX: PTB), Metgasco Limited (ASX: MEL), Copper Strike Limited (ASX: CSE) and NAC (NAOS Absolute Opportunities Company Limited). Mr Patton is a non-executive director of Metgasco Limited, as a representative of Keybridge.
149. In relation to their common investment in Molopo, we have described in detail events surrounding the acquisition of Molopo shares by each of Keybridge³⁷ and Aurora³⁸ between September 2016 and April 2017. Keybridge submitted that the decisions by Aurora to acquire Molopo shares were co-incidences of which it had no knowledge. We do not accept this. While the contemporaneous buying of shares by two entities is not of itself evidence of an association, when considered together with other probative material before us,³⁹ we consider that it does support an inference in this case that the strategies of Keybridge and Aurora were compatible and becoming increasingly aligned and coordinated. As discussed below, Mr Bolton was aware of both Keybridge and Aurora's investment strategies

³⁷ See paragraphs [86]-[119] above

³⁸ See paragraphs [120]-[139] above

³⁹ See *Orion Telecommunications Ltd* [2006] ATP 23 at [107]

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for Molopo and used his influence to guide the strategies and actions of Keybridge and Aurora toward the ultimate objective shared by both companies to control Molopo and access its cash reserves.

Prior collaborative conduct

Voting at the 2016 NAC annual general meeting

150. ASIC had obtained under notice a series of email exchanges between Keybridge and Aurora in relation to NAC which ASIC submitted revealed Keybridge and Aurora collaborating on voting shortly before NAC's 2016 annual general meeting. At the time, Keybridge and Aurora held collectively approximately 11.4% of NAC.
151. Three resolutions were proposed at the annual general meeting relating to approval of the remuneration report and auditor remuneration and the re-election of one director.
152. In an email dated 14 November 2016 to Messrs Patton, Bolton, Johnson, Khan and Siciliano, Mr Ho listed "[o]ur voting shares" in NAC as two parcels of NAC shares held by Keybridge – one for itself and the other for ARARF (pending transfer to Aurora as responsible entity) – and a third parcel held by HHY. He then asked:

I am not sure about voting on the HHY holding as the corro (sic) goes to [Aurora]
Can I please have the Investment Committee's position on voting directions by COB Tuesday so that voting can be lodged Tuesday night (Perth time) and Wednesday morning...by [Aurora].
153. Keybridge's investment committee comprised Messrs Patton and Johnson. Mr Patton responded saying: "[Mr Johnson], I'm supportive of all the resolutions. Do you concur?"
154. In response, Mr Bolton suggested "Vote against REM report (as we can probably defeat it) and abstain on others (as we can't defeat). Nuisance value. Best to give them a reason to get us out, or bring them to the table." We infer that Mr Bolton was presuming that Keybridge and Aurora would vote in the same way in order to exert 'nuisance value'.
155. Mr Khan opposed all resolutions, saying "My inclination is to vote against all resolutions. We owe them nothing and our intention should be made clear ... They voted against us at the hhy meeting so why do them any favours now irrespective of whether (sic) our vote counts. It also sends a clear signal we are to be dealt with our (sic) we will be hostile". We infer that Mr Khan was also presuming that Keybridge and Aurora would act together to send a 'signal' to NAC. Mr Khan's response also shows how Keybridge and Aurora's shared interest in HHY⁴⁰ may influence their corporate strategy on another entity in which they are co-invested.
156. Mr Johnson agreed with Mr Khan. However, in response, Mr Patton queried "[s]houldn't we only vote against where we think it is likely to have an impact?"

⁴⁰ ASIC submitted that the reference to the HHY meeting was a reference to NAC voting in favour of Wilson Asset Management's proposal to remove Aurora as responsible entity of HHY at the meeting held on 29 September 2016

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157. Mr Bolton agreed with Mr Patton, however he noted that *"it's not necessary for Keybridge/HHY to vote the same way as Aurora"*. ASIC submitted that Mr Bolton's response suggested it was usual for them to do so. Mr Bolton submitted that he made the comment to demonstrate that Keybridge (as manager of HHY) could ask Aurora (as responsible entity) to vote in a particular way but it was Aurora's decision as to how to vote. We share the initial Panel's doubt that this comment conveyed the message that Mr Bolton submitted was its purpose.⁴¹ In any case, we consider that Mr Bolton's statement indicated his view of the NAC shares of Keybridge and HHY being a 'bloc'.
158. While the email exchange purportedly related to how Keybridge's investment committee would vote Keybridge's shares at the NAC meeting, the involvement of Mr Patton and Mr Bolton and the recognition that it was Aurora as responsible entity which would vote HHY's shares, showed a blurring of the activities of each of Keybridge and Aurora in relation to NAC.
159. This continued after the meeting when Mr Ho emailed Messrs Patton, Bolton, Johnson, Khan and Siciliano, as well as Ms Poon and Mr Pamensky, reporting that NAC just missed out on a first strike on the remuneration report and that a number of options held by HHY that could not be exercised in time for the meeting, would have tipped them over 25%.

Defending Aurora as responsible entity of HHY, AGIT and Buy-Write

160. Keybridge shareholder, Wilson Asset Management, also a major unit holder in Aurora funds, had requisitioned meetings to remove and replace Aurora as the responsible entity of HHY, AGIT and Buy-Write. ASIC submitted that Keybridge and Aurora collaborated to protect Aurora's position as responsible entity. Aurora submitted that there were commercial reasons for Keybridge to wish for Aurora to remain the responsible entity of the funds because Keybridge was entitled to earn-out consideration on the sale of Aurora contingent on Aurora remaining the responsible entity of AFARF. Aurora submitted that this had nothing to do with Aurora's investment in Molopo.
161. In the lead up to the requisitioned meeting of HHY, Mr Johnson emailed Messrs Sormann, Patton and Cato on 12 September 2016 saying *"[Keybridge] should increase its holding in HHY if we wish to defend the position of Aurora as Responsible Entity."* Keybridge subsequently increased its holding in HHY from 21.08% to 24.03%.⁴²
162. In respect of AGIT and Buy-Write, Aurora's board papers circulated on 17 October 2016 show that Aurora's directors decided to issue significant numbers of units to defend Aurora's position as responsible entity. In both cases, the resolutions for replacement were defeated. ASIC submitted that in the case of AGIT, the issue of units was critical to the defeat.
163. Keybridge subscribed for units in each of AGIT and Buy-Write up to 4.9% using funds from a redemption of AFARF units. On 1 December 2016, Mr Ho noted in an

⁴¹ At [194]

⁴² The meeting was due to be held on 29 September 2016 but was adjourned due to the announcement that day of a takeover bid by AGIT for HHY

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email that Keybridge needed to “*have the units allotted by Friday as the EGMs for [AGIT] and [Buy-Write] are on next Tuesday*”. He also noted that Keybridge would hold the AGIT units until matters were resolved with Wilson Asset Management whereas the Buy-Write units could be redeemed after the meeting (which they were on 9 December 2016, three days after the meeting).

164. In AGIT, Aurora issued units equal to around 44% of its pre-issued capital. In addition to Keybridge, AGIT issued units to Aurora (directly and through AFARF) of 19.9% and, as submitted by ASIC, to Bentley/Scarborough of 4.9%. Buy-Write issued units to AFARF up to 4.9%.
165. ASIC submitted that Aurora and Keybridge personnel collaborated to ensure that the investments by Keybridge and Bentley/Scarborough stayed below the substantial holder threshold of 5%. Mr Patton by email dated 3 December 2016 instructed Ms Poon to alter the allocations and have more units allocated to AFARF. Ms Poon in a later email stated that she had obtained final numbers “*per phone call from Nick*”. Although her email was in response to Mr Patton’s instruction to increase Aurora’s investment, Ms Poon deposed that her reference to Mr Bolton related to Keybridge’s investment allocations in the Aurora funds and believed Mr Bolton was acting in his role as a consultant of Keybridge. That may be so, but this nevertheless provides an example of close cooperation in which it is difficult to delineate the roles of Messrs Bolton and Patton in relation to Keybridge and Aurora.
166. In our view, the examples above relating to voting at the NAC annual meeting and the defence of Aurora’s position as responsible entity show that Keybridge and Aurora have acted together in relation to a number of listed entities, at times with a significant level of involvement by Mr Bolton (e.g., his email proposal “*abstain on [other resolutions] (as we can’t defeat them)*”).
167. In our view neither Keybridge nor Aurora have adequately addressed the evidence relating to collaboration and it is reasonable to infer from this, taken together with the other material before us, that Keybridge and Aurora also acted together in relation to Molopo.

Common knowledge of relevant facts

Mr Bolton’s knowledge of Keybridge’s strategy in relation to Molopo

168. Notwithstanding that Mr Bolton was not a director of Keybridge and did not attend board meetings⁴³, on the materials, we consider that Mr Bolton was aware of Keybridge’s strategy in relation to Molopo at all relevant times. For example:
 - (a) on 13 October 2016, Mr Bolton emailed Messrs Johnson, Cato, Patton, Kriewaldt, Khan and Ho regarding his consulting agreement and noted that he had an interested purchaser in Keybridge’s Molopo stake detailing their terms for sale
 - (b) on 19 October 2016, Mr Khan emailed Messrs Johnson, Bolton, Patton and Ho with an update on his negotiations with the other potential purchaser of

⁴³ See initial Panel’s reasons at [98]

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Keybridge's Molopo stake. Mr Khan said that he felt that the purchaser did not have the cash to raise his price and so in Mr Khan's view "*we should get the cash position of Keybridge up and then creep to the maximum possible amount and then launch a scrip bid for Molopo using Keybridge con notes*"

- (c) on 26 October 2016, Mr Bolton attended the Keybridge strategy meeting which discussed Keybridge's strategies in relation to Molopo
- (d) subsequently, he was copied on multiple emails with updates regarding Mr Khan's negotiations with the potential purchaser of Keybridge's Molopo shares
- (e) from 9 November 2016 through 20 February 2017, Mr Bolton received multiple emails attaching correspondence between Keybridge and Molopo regarding Keybridge's replacement board nominee
- (f) in a text from Mr Khan to Mr Bolton on 3 January 2017, Mr Khan asked Mr Bolton whether he recalled when Keybridge "*can creep on mpo*"
- (g) on 11 January 2017, Mr Johnson suggested in an email holding "*a board conference in the next few days (with Nick and Farooq attending)*" to decide whether to go ahead with the sale of Keybridge's Molopo stake. Mr Bolton responded that he would not attend a Keybridge board discussion on Molopo on the advice of Mr Patton. Mr Bolton indicated in his statutory declaration that Mr Patton told him not to participate given his knowledge of Aurora's interest to buy more Molopo shares
- (h) on 9 February 2017, Mr Bolton responded to an email from Mr Khan asking which Molopo directors were subject to rotation and reelection at Molopo's next annual general meeting
- (i) on 17 February 2017, Mr Bolton and Mr Khan met in Sydney. Subsequently, Mr Khan emailed Messrs Johnson and Ho referring to his meeting and stated:

We agreed that we should send a share register request to MPO on Monday and then wait till the end of the week to see if they hold a board meeting and appoint either William or David.

If they don't by cob Friday we should serve before cob Friday a request for them to convene a meeting to add William and David as board members.

Thereafter we can see if they appoint both anyway (say a week later) and if not then serve another requisition this time calling our own meeting to remove the two Ion representatives.

On that basis, Vic could you please prepare and serve the request for the register...

Mr Johnson responded to Messrs Khan and Ho stating "*Sounds like a plan!*"

- (j) on 24 February 2017, Mr Bolton indicated that he would provide comments on a draft letter to the Molopo board regarding board representation that had been sent to him and in the interim provided information on the investment thesis Keybridge had previously presented to Molopo

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- (k) in a text from Mr Khan to Mr Bolton on 1 March 2017, Mr Khan again asked Mr Bolton when Keybridge can creep on Molopo. Mr Bolton responded to the question although he noted that he would prefer not to be involved in any Keybridge trading if it chooses to do so
 - (l) on 8 March 2017, Mr Bolton and Mr Khan exchanged text messages regarding the composition of the Molopo board, including whether the newly appointed managing director of Molopo would be up for reelection at the annual general meeting and the notice period for appointment of a director
 - (m) on 10 March 2017, Mr Khan emailed Mr Bolton and others attaching a draft ASX announcement regarding Keybridge's requisition notice to Molopo and
 - (n) also on 10 March 2017, Mr Khan sent an email to Mr Ho (copying Messrs Kriewaldt and Johnson) which advised that he had just spoken to Mr Bolton and both he and Mr Bolton supported the proposal to stand behind the director fees of Mr Hartnell (one of Keybridge's proposed nominees). A follow up email also noted that Mr Bolton commented on the fees payable to Ms Tough as Chairperson of Molopo.
169. Mr Bolton declared in his statutory declaration that he distanced himself from discussions at Keybridge regarding Molopo from November 2016 onwards when it became clear to him that Aurora was to progress its own strategy in relation to Molopo. He indicated that he informed Messrs Johnson, Ho and Khan to the effect that he could no longer provide any advice or information to Keybridge in relation to Molopo. None of Messrs Johnson, Ho or Khan could recall being so informed by Mr Bolton in November 2016, although they acknowledged (through Keybridge's submissions) that may have occurred. Even assuming that occurred, the material outlined above suggests that Mr Bolton generally was not excluded from correspondence or discussions⁴⁴ regarding Molopo from November 2016 onwards.
170. Mr Bolton further declared that prior to November 2016, his involvement as a consultant to Keybridge was "*reasonably limited*" given that Keybridge had limited occasion to meet following his appointment effective on 13 October 2016. We note, however, that the 26 October 2016 strategy meeting occurred in this period. Mr Bolton declared in his statutory declaration that the advice he did provide in this period was in relation to Keybridge's historic attempts and continued effort to sell its Molopo stake. We know that discussions in relation to Molopo during this period in which Mr Bolton participated, whether he was providing 'advice' as a consultant or otherwise, were not limited to selling Keybridge's stake.
171. Mr Bolton further declared in his statutory declaration that he was engaged as a consultant to provide detail on the past investment ideas he had presented to Molopo as the then managing director of Keybridge and to provide a history of the previous prospective purchaser of Keybridge's Molopo stake. Mr Bolton's description of the scope of his consultancy as it relates to Molopo generally suggests a focus on past events. However, his consulting agreement provided for services including the "*generation of investment ideas, corporate and board planning and*

⁴⁴ Apart from one meeting in January 2017

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strategies and executive management and corporate and commercial affairs". It is also difficult to reconcile a purely historical focus with the reason provided by Keybridge for hiring Mr Bolton as a consultant.⁴⁵ More importantly, in practice, Keybridge's communications and meetings relating to Molopo in which Mr Bolton was involved related to Keybridge's current and future events and strategies, not simply past events.

172. Mr Bolton also submitted, more generally, that a person cannot help being the recipient of an email and receiving an email is not evidence of the exercise of influence, in particular, when the recipient of the email does not reply. We agree with the first part of his submission but not the second. We consider that Mr Bolton being copied on multiple emails demonstrates a desire by relevant Keybridge representatives to confer with Mr Bolton and supports a finding that he was copied because he was heavily involved in Keybridge matters. For the reasons below, we consider that Mr Bolton does exercise influence over Keybridge.

Mr Bolton's role and influence in the affairs of Keybridge

173. As the former managing director of Keybridge, Mr Bolton was fully across Keybridge's investments and strategies. Following his resignation due to his disqualification from managing a corporation, Mr Bolton was unhappy with the direction taken by Keybridge's then management, including its decision to sell Aurora, as communicated to Mr Moffat.⁴⁶ We know on 1 June 2016, the day after Scarborough advised of its intention to call a section 249F meeting of Keybridge, Mr Khan contacted Mr Bolton (presumably as a representative of ASG) to discuss "*the way forward*".
174. When Mr Bolton approached Mr Kriewaldt about Mr Kriewaldt's interest in becoming a director of Keybridge in late June or early July 2016, Mr Kriewaldt stated:

I asked who the other directors of Keybridge were. Mr Bolton indicated that he expected that at an extraordinary general meeting of Keybridge the current chairman was likely to be removed and Mr Cato and Mr Johnson appointed. In that situation, the other Keybridge directors, Mr Brown and Mr Sormann, might well resign and there might then be a need for one or two further directors to be proposed by ASG. Mr Bolton explained to me that ASG and Bentley Capital Ltd (Bentley), both of which held approximately 20% of Keybridge's issued share capital, respectively, thought that the board should have two members proposed by each of them and should operate, in effect on the basis that three directors would need to vote in favour of any proposal (with the chairman not having a casting vote).

I pointed out that this was an unusual arrangement to which Mr Bolton replied that Bentley and ASG had been concerned with how the then existing board of Keybridge had made decisions without approaching apparently considering (sic) the interests of current shareholders and this arrangement was designed to ensure that the board in future it (sic) would not behave in that way. Mr Bolton also stated that Bentley and ASG did not have any significant history of working with each other and so this was

⁴⁵ See paragraph [101] above

⁴⁶ See paragraph [95] above

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(sic) arrangement was also designed to ensure that the proposals or goals of either of them could not be pushed through on the casting vote of a chairman.

175. As indicated, the then Chairperson, Mr Moffat, was removed and Messrs Brown and Sormann did resign. Thereafter, Messrs Patton and Kriewaldt were appointed 'representing the interests of ASG' with the balance of the board consisting of Bentley's nominees, Messrs Cato and Johnson. We agree with Mr Kriewaldt that this arrangement is "*unusual*".
176. Aurora submitted that Messrs Patton and Kriewaldt were nominated to represent the interests of all shareholders of Keybridge, not just ASG. It is true that their duties require them to act in the best interests of the company, but does not prevent them taking account of the interests of the shareholder who nominated them nor prevent expectations on the part of that shareholder that its interests will be promoted. Mr Patton deposed that he does not consult with, report back to or receive any instructions, directions or other communications from ASG or any representative of ASG, including Mr Bolton, in relation to the affairs of Keybridge. We accept that Mr Patton is not simply a nominee director of Keybridge and does not take whatever action ASG may instruct. However, we do not consider Mr Patton's statement is inconsistent with Mr Bolton having the potential to exercise influence in relation to the strategy and actions of Keybridge, particularly in light of their close consultative relationship.
177. Mr Bolton was responsible for selecting Messrs Patton and Kriewaldt as nominees with Mr John Bolton's consent. We have no evidence of ASG, Mr Bolton or Mr John Bolton disagreeing with any actions taken by their nominees in relation to Keybridge. We infer, based on Mr Kriewaldt's evidence, that ASG, Mr Bolton and Mr John Bolton would view Messrs Patton and Kriewaldt as their representatives and expect ASG's interests, as a current shareholder, to be considered when making decisions.
178. The arrangement between Mr Khan on behalf of Bentley and Mr Bolton on behalf of ASG to re-constitute the Keybridge board with two nominees each implies that all Keybridge decisions effectively require the agreement of Bentley and ASG. While decisions may be formally made at the board or investment committee level, the material before us suggests a pattern whereby Mr Bolton is consulted or his agreement is sought (usually by Mr Khan) before certain decisions are made or implemented. For example, Mr Khan and Mr Bolton agreeing the course of action in respect of requisitioning a meeting of Molopo shareholders when they met on 17 February 2017 and the proposal to stand behind the director fees of Mr Hartnell on 10 March 2017.
179. In relation to Mr Khan's email dated 17 February 2017, Mr Bolton submitted that he had not reached the agreement attributed to him by Mr Khan and their conversation was only a generic discussion about sections 249D and 249F requisitions. He also submitted that no agreement should be attributed to him because of an email sent by Mr Khan, on which he was not copied.
180. Keybridge submitted that the course of action described in Mr Khan's email had been discussed and agreed by Messrs Khan, Johnson and Ho prior to 16 February

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2017. Referring to their 16 year history of working together, Keybridge submitted that this was a course of action that Messrs Khan, Johnson and Ho had adopted in the past in relation to other companies. Keybridge submitted that Mr Khan simply discussed with Mr Bolton the previously agreed strategy.

181. Neither Keybridge nor Mr Bolton explained why Mr Khan's email referred to an agreement that he reached with Mr Bolton if there was no such agreement or why Mr Johnson responded "*Sounds like a plan!*" if there was already a previously agreed plan. We also received no evidence that Mr Kriewaldt had previously agreed to the plan.⁴⁷
182. In our view, Mr Bolton's submissions are a reflection of his opinion of his conversation with Mr Khan. While Keybridge submitted that the conversation merely discussed a previously agreed strategy, Mr Khan's contemporaneous record of the conversation referred to an agreement to implement the strategy described in that email and that strategy was in fact implemented.
183. In relation to the decision by Keybridge to stand behind the director fees of Mr Hartnell, the initial Panel considered that this topic was properly the preserve of Keybridge's directors.⁴⁸ Keybridge submitted that neither Mr Khan nor Mr Bolton was involved in the decision to stand behind Mr Hartnell's director fees, but instead the decision was made by Mr Johnson. According to Keybridge, Mr Johnson communicated that decision to Mr Kriewaldt (who was communicating with Mr Hartnell) before Mr Khan communicated his discussion with Mr Bolton. However, according to a timeline provided by Keybridge, Mr Kriewaldt asked Mr Johnson for confirmation of the decision a few hours after Mr Johnson purportedly communicated the decision and after Mr Khan communicated his discussion with Mr Bolton.
184. Mr Bolton denied in his statutory declaration that he was giving his consent or instruction on the matter to Mr Khan, did not consider that Mr Khan was seeking his approval and submitted that Mr Khan's email overstated what Mr Bolton had said. Even if that is accepted, this is still a further example of Mr Bolton's opinions being sought before the Keybridge board acts. Whether or not Mr Johnson waited for Mr Bolton's views in relation to this particular matter, does not change the fact that Mr Bolton was contacted and his views were sought. We consider this supports an inference that Mr Bolton has a significant role and influence in relation to the strategies and actions of Keybridge.
185. Keybridge submitted that Mr Bolton's involvement was "*simply*" as a former managing director and consultant from whom information could be sought. As discussed above, we do not accept that Mr Bolton's consultancy was so limited. We also know that Mr Bolton was involved in discussions regarding Keybridge's corporate and operational matters before he was appointed a consultant, for example, his attendance at the workshop in Perth in August 2016 when it was agreed to offer Mr Patton the role of part-time executive. We assume Mr Bolton was at the table because he was representing ASG.

⁴⁷ We assume that Mr Patton was excluded from this decision because of his standing conflict

⁴⁸ See initial Panel's reasons at [106]

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186. Keybridge submitted further that while Mr Bolton had involvement in the 26 October 2016 strategy meeting, the decisions made at the meeting were not influenced by him and were those independently assessed by the directors.
187. We do not accept Keybridge's submission. In our view, Mr Bolton has knowledge of, and the capacity to influence substantively, the investment strategy of Keybridge in relation to Molopo. Keybridge's strategy was the strategy that was employed previously when he was managing director of Keybridge⁴⁹ and came back into focus after the sale of Aurora by Keybridge to Seventh Orion when, as we discuss below, the opportunity arose for Keybridge and Aurora to collaborate to achieve their shared goal.
188. In our opinion, based on all the material before us and relying on our experience, we infer the Keybridge board knew and agreed to, or at least acquiesced in, the strategies for Keybridge's investment in Molopo as influenced by Mr Bolton. We make this inference based on the following:
- (a) that Mr Bolton was involved in all material discussions and decisions in respect of the strategy
 - (b) these discussions and decisions largely occurred outside of meetings of the board or the investment committee
 - (c) ASG had two representatives on the Keybridge board of four directors and there was an expectation that those representatives would consider ASG's interests when making decisions
 - (d) until the information barrier was implemented, one of the two representatives, Mr Patton, was directly involved in Aurora's investment strategy for Molopo and
 - (e) Mr Bolton's agreement or support was necessary before actions were put into motion by Keybridge.
189. The minutes of Keybridge's board meetings were drafted in a standard form from month to month and did not record the details of any material board discussions regarding Molopo. Accordingly, those minutes are not inconsistent with our inference that some decisions relating to Molopo have in substance been determined outside the Keybridge boardroom. We note that the 26 October strategy meeting itself was not a board meeting.
190. Keybridge submitted that there were no documents evidencing the decisions or discussions of its investment committee in relation to Molopo, and no discussions by the committee regarding Molopo, between 13 October 2016 and 10 April 2017. However Mr Kriewaldt declared in his statutory declaration that every Keybridge decision concerning Molopo since 13 October 2016 *"has been made by the board or the investment committee"*. It is possible that Mr Kriewaldt's statement is an expression of company policy which, in relation to the investment committee, had no application after Mr Patton excused himself from Molopo matters and Mr Johnson was left as the sole member of the committee. Although, even in these

⁴⁹ See paragraph [231] below

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circumstances, we would normally expect records of committee decisions. The lack of records is consistent with our view that Keybridge's strategies and actions relating to Molopo were in substance not determined at the board level and we are more comfortable with drawing the inference above.

191. We also note that we did not receive direct evidence from Messrs Johnson and Cato denying our findings on Mr Bolton's knowledge and role in Keybridge's strategy in relation to Molopo. Keybridge submitted that we should not infer anything from the fact that certain individuals did not provide sworn statements. It also submitted that during the initial Panel proceedings each of Messrs Khan, Johnson, Cato and Ho said they would provide sworn statements if required. It is up to parties to respond to matters put to them by the Panel. Keybridge had repeated opportunities to provide statements from Messrs Khan, Johnson, Cato and Ho over the course of two proceedings, if it thought they would be helpful.

Mr Bolton's knowledge of Aurora's strategy in relation to Molopo

192. At the same time that Mr Bolton was aware of the strategies and activities relating to Keybridge's Molopo investment, he also had knowledge of Aurora's strategies and activities in relation to Aurora's Molopo investment.
193. Mr Bolton acknowledged that he was aware of Aurora's strategy to build its Molopo stake when he decided, on the advice of Mr Patton, not to attend the Keybridge board meeting proposed by Mr Johnson on 11 January 2017.
194. The materials reveal that he was aware of Aurora's strategies as early as September 2016 when Mr Patton discussed Molopo with him and he offered to approach three overseas Molopo shareholders he knew to see if they were interested in selling their Molopo shares. Mr Bolton was involved in the settlement of the purchase of Molopo shares from one of the three overseas shareholders (Seller A) in November 2016. In our view, it is reasonable to infer that he was involved in advancing the purchase of further Molopo shares from the second of the three overseas shareholders (Seller B) in March given that he was the direct contact with Seller B, his continued involvement with Seller A after it was introduced to Aurora and his acknowledgement in January that he was aware of Aurora's strategy to build its Molopo stake.
195. ASIC submitted that it is likely that the idea of Aurora investing in Molopo originated with Mr Bolton given his keen interest over a long period of time in how Molopo's cash could be deployed. Mr Siciliano deposed that he first raised his Molopo investment idea with Mr Patton in September 2016 after being aware of the opportunity three years earlier. We do not need to decide the issue of where the investment idea originated. In our view, it is sufficient that Mr Bolton took the opportunity to use Aurora's interest in investing in Molopo to facilitate its pursuit of a shared goal, consistent with his interests, in combination with Keybridge.

Mr Bolton's role and influence in the affairs of Aurora

196. As noted above, Aurora submitted (relying on the affidavits provided by Mr Patton, Ms Poon and Mr Siciliano) that Mr Bolton's involvement in Aurora was limited to assisting with ad-hoc administrative tasks and providing introductions

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to potential counter-parties for transactions. These things, it submitted, do not equate to Aurora being beholden to Mr Bolton.

197. We do not accept that Mr Bolton was only involved in administrative tasks as requested by Aurora. The matters of which we are aware involving Mr Bolton have been strategically important for Aurora. For example, defending the attempt by Wilson Asset Management to remove Aurora as the responsible entity of several Aurora funds was critically important to Aurora's business. Mr Bolton's review of proxy forms and advice on online voting show his close involvement in the day-to-day business of Aurora.
198. Similarly, Mr Bolton's knowledge of the Molopo shareholder base and his ability to contact potential sellers of Molopo shares was critical to Aurora's strategy of building its stake in Molopo, as well as its general business strategy of building its funds under management by making investments in consideration for units in Aurora funds. One of his three contacts in fact agreed to sell its Molopo shares in return for AFARF units.
199. Mr Bolton declared in his statutory declaration that "*I have and have had no influence in Aurora and in particular any decision making in relation to its acquisition of Molopo shares*". This is an expression of opinion that, in our view, is contradicted by contemporaneous records.
200. Mr Patton regularly consults with Mr Bolton regarding corporate and fund matters. Mr Patton deposed that this consultation with Mr Bolton does not result and has never resulted in Mr Patton or Aurora being "*beholden to Mr Bolton or doing his bidding*." In his sworn statement, Mr Patton provided a list of examples as evidence of instances "*where Aurora did not agree to or give effect to Mr Bolton's requests or views*". Three things are evident from this list. First, the examples show that, rather than Mr Bolton being consulted as needed by Mr Patton, Mr Bolton regularly initiates contact with Mr Patton in relation to Aurora matters. Second, the examples also show that the matters raised by Mr Bolton related to materially strategic matters for Aurora such as restructuring the business to split the investment manager and responsible entity functions, divest the responsible entity function of Aurora and sell Buy-Write. In the case of the last two matters, Mr Bolton had prospective purchasers and advanced the potential sale of Buy-Write. Thirdly, given the breadth of matters raised by Mr Bolton and the submission that these are examples where Aurora 'did not agree to or give effect to' Mr Bolton's requests or views, we infer that there were also matters raised by Mr Bolton to which Aurora did agree to or give effect to his views. Evidence of some disagreement does not rule out agreement or even frequent agreement.
201. In our view, Mr Bolton has a strong interest in the Aurora business and its success. He wanted Keybridge to retain the Aurora business. Rather than see the business sold at a discount to its acquisition cost, ASG offered to purchase the business or provide Keybridge with the option to put the business to ASG. Once faced with the prospect of Aurora being wound up, ASG moved to acquire the business first tapping Mr Patton to manage the business for ASG and then ultimately Mr Bolton decided to take a 49.9% stake in the investment vehicle. Consistent with Mr Bolton's opposition to the sale in the first place, shortly after the sale, Mr Patton

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deposed that Mr Bolton asked him if he would have any interest in selling the Aurora business back to Keybridge.

202. Mr Bolton submitted (in response to the initial Panel's preliminary findings) that he does not have a material financial interest in the Molopo shares in which Aurora has a relevant interest because Aurora has no beneficial interest in those shares which are held on trust for AGIT and AFARF. In our view, the interests are broader than pecuniary interests such as management fees which Aurora would receive as manager and responsible entity of the underlying funds and which ultimately benefit the owners of the Aurora Trust. Interests include the credibility and success of the business as a whole which ultimately impact the financial returns of its owners.
203. Notwithstanding Mr Patton's interactions with Mr Bolton, Aurora submitted that the actions or state of mind of Mr Bolton (or Mr Patton or both) could not be attributed to Aurora because all actions of Aurora are determined by its board by consensus, and in practice, only by unanimous resolution. Mr Patton also deposed that Mr Bolton has never attended, or been invited to attend, a board meeting.
204. Mr Hallam stated to ASIC under a section 19 examination, in response to a question as to why the information barrier affecting Mr Patton at Keybridge was important in the context of Aurora's interests, that *"Aurora needs to have effective management. And you need a CEO who's able to represent Aurora's investors' interests. We don't, we want someone who can act for us, not act for Keybridge. And I could see situations where, frankly, it would fall more and more back on to me, because I would be the person, as the independent non-executive, or the CFO, who would not be capable of making, in my view, material investment decisions, and that's not her role."*
205. Mr Hallam's statement indicates that not all the directors of Aurora have the same influence. However the material below establishes that his influence is less than he suggests. In addition, notwithstanding that decisions are said to have been passed by unanimous consent, there would appear to be some disconnect at the Aurora board level.
206. First, evidence from Mr Patton and Mr Siciliano indicates that Mr Hallam is not involved in investment strategies. In Mr Patton's email to Mr Hallam on or around 17 November 2016 forwarding the Molopo investment paper he writes *"wouldn't normally run investment strategies past you but..."*. Similarly, Mr Siciliano deposed that he consults with Mr Hallam but his direct supervisor is Mr Patton and in relation to Molopo *"[u]ltimately...the investment strategy has been as agreed by Mr Patton"*. While we appreciate that Mr Hallam as an independent director is not involved in the day-to-day business of Aurora, the board of Aurora is required (as acknowledged by Mr Hallam in his sworn evidence) to decide any investment above 5% of the funds under management of the relevant fund. One would expect that this involves considering the investment strategy.
207. Secondly, we have two examples where it is unclear whether Mr Hallam has approved investments over 5%. As noted above, in relation to Molopo, the investment paper was sent to Mr Hallam on or around 17 November 2016. Mr Hallam provided comments on the paper on 5 December 2016 presenting some

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concerns about conflicts and the investment being viewed as a 'collective holding' with Keybridge. However, prior to providing those comments, Aurora had already increased its Molopo stake to at least 9.75% of Molopo. We also consider that Mr Hallam's concerns in response to Mr Siciliano's investment paper support the view of collaboration between Keybridge and Aurora.⁵⁰

208. In the second example, Mr Hallam appears not to have been fully aware of the activities surrounding Aurora's efforts to defend its position as responsible entity⁵¹ when he emailed Mr Patton and Ms Poon on 6 December 2016 asking who the investor was after seeing AGIT's Appendix 3B filed on the ASX that day. On 9 December 2016, he asked Atanaskovic Hartnell to ask Mr Patton for the board minutes in relation to the issue of units. As noted above, the units issued by AGIT equated to 44% of its pre-issued capital and AFARF's subscription gave it 19.9% of AGIT. We consider that it would have been reasonable to expect Aurora's independent director to be fully aware of this transaction in light of the requirements of Aurora's investment approvals.
209. Aurora submitted that Mr Bolton does not give instructions to Aurora, its board or employees, and Aurora, its board or employees do not take instructions from Mr Bolton. We do not need evidence of Mr Bolton providing 'instructions' to decide whether he has influence over the strategies and actions of Aurora. In our view, the material provided to us considered in the light of our own experience supports an inference that Mr Bolton has the capacity to influence substantively the investment strategies and actions of Aurora, including its investment in Molopo. This inference is supported by his position as the largest unit holder in the Aurora Trust and strong interest in the success in the Aurora business, his close consultative relationship with Mr Patton and his involvement in strategically important matters affecting Aurora. It is also supported by the actions implemented by Aurora in support of its Molopo strategy, namely, building its stake and requesting board representation, which align with the strategies of Keybridge. We refer to this shared goal in detail below.
210. We also infer, based on the material before us considered in the light of our experience, that the Aurora board knew and agreed to, or at least acquiesced in, the strategies for Aurora's investment in Molopo, as influenced by Mr Bolton, and knew that those strategies would be aligned with Keybridge's and their shared goal discussed below.⁵² This inference is supported in part by the close relationship between Mr Bolton and Mr Patton and Mr Patton's role (as deposed by Mr Siciliano) as the person with whom the Molopo investment strategy is agreed.
211. We do not consider Ms Poon's affidavit to be inconsistent with this inference. She deposed that "*Mr Bolton has not attended any Aurora board meetings, and I have not seen any influence of his control or influence over the board of Aurora, or any of its directors. In particular, I have not seen any evidence of his contributing to any decision or strategy relating to Aurora's investments in Molopo.*" We understand this statement to

⁵⁰ We note the initial Panel's reasons at [173] which expresses alternative views

⁵¹ See paragraphs [160]-[167] above

⁵² See paragraphs [224]-[234] below

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be focused on “control or influence over” the Aurora board and its directors. We take “influence over” to mean something very close to control, since it would otherwise be inconsistent with other statements in Ms Poon’s affidavit, for example, her statement that “*Mr Bolton’s involvement in Aurora is as a large investor in the Trust which owns Aurora. It is Aurora that initiates contact with Mr Bolton to canvass his opinion or seek his assistance with administrative matters during busy periods*”. We are not suggesting that Mr Bolton controls Aurora or its board. However, we do infer that Mr Bolton had sufficient influence with respect to Aurora’s strategies regarding Molopo to facilitate their alignment with those of Keybridge. To the extent that Ms Poon’s affidavit addresses matters that she was in a position to observe or have reliable knowledge of, we do not consider it to be inconsistent with that inference.

212. Aurora submitted that our decision that the Aurora board was aware or acquiesced in the Molopo strategy was “*egregious*” in light of Mr Hallam’s sworn evidence that he would have nothing to do with Mr Bolton or any business of which he was a part (and would not have accepted his appointment to the Aurora board if Mr Bolton had been involved in Aurora’s management). Mr Hallam deposed that he joined the board on the condition that “*Mr Bolton would have no involvement in the business of Aurora*” and “*specifically said to Mr Patton at the time I joined the board that I did not want to meet Mr Bolton or have anything to do with him*”. We accept that, but in the light of the material before us, we do not consider that Mr Hallam was successful in his aim to prevent or at least minimise Mr Bolton’s influence. It is possible that Mr Hallam’s stance on this issue may even have, perversely, increased the extent of Mr Bolton’s ability to indirectly influence the other members (and majority) of the board. We accept, as Mr Hallam deposed, that he saw “*little or no involvement of Mr Bolton in any part of Aurora’s business*” and was “*annoyed*” by the limited involvement he did see. We consider that most of the involvement of Mr Bolton established by the material before us would not have been seen by Mr Hallam.

Mr Patton’s knowledge of Keybridge’s strategy in relation to Molopo

213. The initial Panel considered that the information barrier established in Keybridge to address Mr Patton’s conflict in his role at Keybridge in relation to Molopo matters was established late and had not been fully effective.⁵³
214. Mr Patton first raised that he was conflicted regarding Molopo matters on 10 November 2016 in an email reply to Mr Johnson (copying Messrs Pamensky and Ho) who had asked him for his approval in relation to Keybridge topping up its Molopo shareholding to 19.99%. At the next Keybridge board meeting on 23 November 2016, Mr Patton provided standing notice of his role at Aurora and its investment in Molopo.
215. Keybridge knew that Aurora held a small percentage of Molopo shares when Aurora was sold to Seventh Orion in mid-2016 because it lodged an amended substantial holder notice at that time. Keybridge submitted that at the time of Mr

⁵³ See initial Panel’s reasons at [212]-[222]

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Patton's appointment as a director in August 2016, none of the current directors of Keybridge were familiar with Aurora's holdings, except Mr Sormann who did not disclose the common investment. Molopo submitted that Keybridge should have asked Mr Patton (or Mr Bolton) to disclose any common investments between Keybridge and Aurora at the time of his appointment. Keybridge submitted that in any event a co-investment in itself does not constitute a conflict of interest and is a not uncommon situation in Australian corporate experience. That may be so, but we would expect that any conflicts arising from co-investment would normally be discussed at board level.

216. However, in September 2016, Mr Patton was considering the direction of Aurora's Molopo strategy and he was aware sometime after 7 October 2016 that Mr Siciliano was purchasing Molopo shares. Also in September 2016, Mr Patton was involved in the acquisition of Molopo shares by Keybridge, which wanted to increase its holding to over 19% so that it could utilise the creep provisions.⁵⁴ In our view, at this point, if not earlier, it should have been clear to Mr Patton that the interests of Keybridge and Aurora would conflict if both wished to invest in Molopo. Unless they proposed to do so as associates, combining their voting power for the purpose of substantial holding disclosure and the 20% threshold, each would need to ensure that they did not become associates and did not contravene the insider trading provisions.
217. Accordingly, we agree with the initial Panel that the information barrier was established late (and Mr Patton acknowledged the same in his sworn statement). By 10 November 2016, Mr Patton had knowledge of Keybridge's various proposals and strategies for Molopo. In addition to managing Keybridge's purchase of Molopo shares in September 2016, Mr Patton had attended the Keybridge strategy meeting on 26 October 2016 that discussed Keybridge's broader Molopo strategy.
218. To the extent the information barrier was established late, Keybridge further submitted that Keybridge's strategy at the time the information barrier was implemented was to sell its entire stake in Molopo and replace its nominee director on the Molopo board to assist the potential purchaser of its stake getting a seat. It submitted that by the time Keybridge's strategy changed to requisitioning a meeting for the election of directors, Mr Patton was excluded and had no knowledge of that strategy.
219. We do not accept this submission. By the time the information barrier was in place, Mr Patton had (at the very least) attended the 26 October 2016 strategy meeting at which a broad range of strategies in relation to Keybridge's investment in Molopo were discussed. Based on that discussion, we infer that Mr Patton knew that board representation, whether that be achieved through a board appointment of one director or by a board spill, was an important part of Keybridge's strategy to maximise its return on its Molopo investment.⁵⁵
220. Keybridge disputed the initial Panel's conclusion that the information barrier was ineffective because of what it submitted were isolated instances where Mr Patton

⁵⁴ See paragraph [110] above

⁵⁵ See, for example, paragraphs [224]-[228] below

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was not excluded from communications. It submitted that Keybridge had provided to ASIC and/or the Panel hundreds of emails in relation to Molopo of which less than a half dozen email 'threads' were sent to Mr Patton and in each instance they were inadvertent and did not relate to Keybridge decision making involving Molopo. In each case, it submitted the breach was corrected. Mr Patton also deposed that he immediately deleted the communications without reading them and would confirm this contemporaneously by email.

221. We accept that inadvertent communications may happen from time to time when an information barrier exists. We do have concerns, however, as to the adequacy of Keybridge's information barrier and its implementation. Keybridge provided no evidence of actions taken to implement the information barrier on the part of Keybridge, such as preparing and circulating a conflicts procedure or protocol or creating separate email groups, other than initially recording Mr Patton's conflict as a standing item in board agendas and minutes and later (in response to ASIC's investigation) sending separate board agendas.⁵⁶
222. We also note that on 2 December 2016 Mr Patton was copied on a series of emails regarding Molopo's rejection of Keybridge's request for the appointment of a board nominee and a letter of response by Keybridge. In Keybridge's response to Molopo's queries regarding the relationship between Keybridge and Aurora, Keybridge specifically referenced in the letter how Mr Patton had excused himself from all matters relating to Keybridge's Molopo investment and that a 'Chinese wall' had been erected within Keybridge with respect to Mr Patton and Molopo matters. We were not provided with evidence of how this breach of the information barrier was corrected, and infer that it was not given that Molopo's response on 6 December 2016 to Keybridge's letter was again forwarded to Mr Patton by Mr Ho.
223. ASIC also queried the effectiveness of the information barrier from another perspective. Given Mr Bolton's close connections with Aurora and Mr Patton (who he selected for appointment to the Keybridge board), ASIC submitted that excluding Mr Patton and not Mr Bolton meant that the information barrier failed to prevent the flow of information about Keybridge's investment strategy in relation to Molopo to Aurora because the evidence showed that Mr Bolton was heavily involved in Keybridge's Molopo strategy at all times. We agree with ASIC. This is supported by our findings above regarding Mr Bolton's role in Keybridge and Aurora.

Shared goal

224. In our view, Keybridge and Aurora both want to maximise their return on their investments in Molopo and have as their ultimate goal obtaining sufficient control of Molopo to gain access to Molopo's cash assets.

⁵⁶ Mr Ho noted in an email to Messrs Patton, Johnson, Kriewaldt and Cato on 27 January 2017 which raised the separate agendas and board packs that "*this provides clearer separation and is a lesson learnt from the ASIC Notice to produce...*"

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225. Keybridge submitted that as at 26 October 2016 Keybridge did not have any purpose of controlling or influencing the composition of the Molopo board or the conduct of Molopo's affairs for purposes of section 12. As part of its strategy to sell its entire stake in Molopo, Keybridge agreed to increase its stake to 19.99% of Molopo and to seek to maintain a representative on the Molopo board but, it submitted, seeking one board seat was very different from seeking to control or influence the composition of Molopo's board or the conduct of its affairs. We do not accept that Keybridge's strategy was so limited.
226. Referring to Mr Kriewaldt's statutory declaration, Keybridge submitted that Mr Khan's alternative suggestions at the strategy meeting (of seeking to requisition a meeting to alter the composition of Molopo's board or takeover of Molopo) were not part of its strategy at that time. Mr Kriewaldt stated in his statutory declaration that "[n]either of those suggestions were considered to be likely steps...since Keybridge was not looking to do anything other than replace an existing representative position and sell out of its investment".⁵⁷ As noted above, we know that many discussions regarding Keybridge's strategy in relation to Molopo occurred outside the boardroom setting and it is reasonable to infer that Mr Kriewaldt was not privy to all of those discussions (as he has acknowledged).⁵⁸
227. Keybridge submitted that Mr Khan's proposal of putting the board composition of Molopo to a shareholder vote was only adopted in late February "*reviving the possibility that he had discussed at the 26 October 2016 strategy meeting*". It submitted that "[a]s a seller, all Keybridge sought to do was to maximise the opportunity of selling its stake and maximise the profit on sale." Keybridge submitted that we should look to the conduct of Keybridge following the strategy meeting which conduct was entirely consistent with the strategy agreed at the strategy meeting including that Keybridge through Mr Khan applied significant time (from October 2016 through February 2017) and effort in attempting to sell its entire Molopo stake to a potential purchaser.
228. We have no reason to doubt Keybridge's profit motive nor do we need to question whether its attempt to sell its Molopo stake was genuine. However, we do not accept Keybridge's attempt to compartmentalise its strategy at different points in time. We know that Mr Khan, the individual responsible for negotiations with the potential purchaser, had concerns as early as 19 October 2016 that the potential purchaser did not have the available cash to match Keybridge's price expectations.⁵⁹ In these circumstances, it is reasonable to consider that the alternative strategies remained on the table. Two of the three action items arising out of the strategy meeting, the decision to increase Keybridge's Molopo stake and seek to replace its board representative, were not inconsistent with the alternative strategies. In fact, there appears to have been a decision to acquire a control interest

⁵⁷ We note that it was also agreed at the meeting that Keybridge "*top back up in Molopo as much as we can ... to just under 20%*". See paragraph [117] above

⁵⁸ See paragraph [238(a)] below

⁵⁹ See paragraph [168(b)] above

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weeks prior to the strategy meeting.⁶⁰ In our view, efforts undertaken to sell Keybridge's Molopo stake did not preclude the pursuit of the alternative strategies. Based on the material before us, including its willingness to act together with Aurora in relation to other listed companies, we infer that Keybridge was ready and willing to pursue alternative strategies with Aurora once Aurora had acquired a sufficient stake to assist.

229. Keybridge submitted that it only became aware of Aurora's purchasing of Molopo shares when Aurora lodged its initial substantial holder notice on 1 December 2016. In response to an email from Mr Johnson forwarding the announcement, Mr Khan responded (copying Mr Ho): "*Interesting. I wonder why and what their plans are?*". Keybridge submitted that Mr Khan's contemporaneous email at a time when Mr Khan was deep in negotiations to sell Keybridge's Molopo stake was evidence against a finding of a shared goal or that the parties were working together. On 8 February 2017, Mr Khan sent a similar email to Messrs Johnson, Cato and Ho saying "*I see that [AGIT] are buying MPO again ... I wonder what they are up to*". The motivation and tone of these emails is unclear. There are many ways to interpret them. We do not consider that these emails are necessarily inconsistent with our inferences, nor do we think they outweigh other contemporaneous evidence, direct and circumstantial, supporting our inferences and findings. Certainly at the time of the second email, ASIC's investigation of the potential association was on foot and Mr Khan knew that Mr Bolton was aware of, and engaged in, Keybridge's plans and activities relating to replacing the Molopo board.
230. In its submissions to the initial Panel, Keybridge acknowledged that it had a number of alternative goals in relation to Molopo all of which were directed towards Keybridge (as a listed investment company) maximising the return on its investment in Molopo. In addition to selling its Molopo stake, it submitted that other ways for Keybridge to realise value on its investments would be for some or all of Molopo's cash to be deployed in investments which themselves were profitable, a return of cash by Molopo to its shareholders whether through dividend, capital return, buyback or otherwise, or even a voluntary liquidation of Molopo with all surplus cash after payment of liabilities distributed to shareholders. It submitted that none of these goals required Keybridge to control Molopo but all of them would be served by Keybridge having a representative on the Molopo board.
231. We accept that these goals would not require Keybridge to control Molopo if the Molopo board was willing to implement one or more of these initiatives. However, given Keybridge and Mr Bolton's knowledge of Molopo's history and the other large shareholders on the register, we consider that Keybridge was well aware that it would be difficult or impossible to accomplish these goals (other than selling its stake) without control of the Molopo board or another large shareholder's support. Previous attempts by Keybridge to effect a return of capital⁶¹ or otherwise

⁶⁰ See paragraph [110] above referring to Mr Johnson's statement that Keybridge's interest needed to move above 19% "ASAP" and paragraph [168(b)] above referring to Mr Khan's statement regarding creeping to the "*maximum possible amount*" in reference to one of the alternative strategies

⁶¹ ASX announcement by Molopo dated 22 December 2014 and initial Panel's reasons at [165]

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persuade the Molopo board to deploy cash to make investments (even with a Keybridge representative on the Molopo board)⁶² have been unsuccessful.

232. There is clear evidence that Aurora also was aware that a sufficient degree of control was likely to be necessary to the success of the strategies that inspired its investment in Molopo. Aurora's investment paper on Molopo provided that Aurora would *"move to a 19.99% as a balance of power stake, seek board representation"*. Mr Siciliano deposed that Molopo's shareholder base was dysfunctional because its two largest shareholders, Keybridge and Ion Limited, were unlikely to support each other's strategy and considered that Aurora *"as a fresh entrant"* could broker a strategy that those shareholders would consider satisfactory. In our view, this squarely acknowledges the need to obtain effective control. On the basis of the material before us we infer that Aurora had already arranged its ally, namely, Keybridge.
233. Mr Patton deposed that the objective of Aurora's investment in Molopo was *"to lift the share price so that it was closer to the share's cash backing, and then either sell out Aurora's investment or continue investing Molopo's cash for the benefit of all Molopo's shareholders. Any increase in the value of Molopo would primarily directly benefit the underlying unit holders in the Aurora funds for which the Molopo shares were held on trust (and, in turn, Aurora and its owners)."* We have no issue with that as a general statement, but it does not explain how the share price would be lifted. For the reasons given above in relation to Keybridge, we consider that Aurora was aware that achieving the goal would likely require effective control of Molopo or an ally among the large shareholders.
234. We consider that Keybridge and Aurora both want to maximise their return on their investments in Molopo by unlocking Molopo's cash. While they have many ways of getting there, that is their end goal. In order to achieve that goal they need to control or influence the composition of Molopo's board. And, to do that, they need an ally to counter the voting power of Molopo's other large shareholders. We do not view the attempt by Keybridge to sell its Molopo stake or the proposal addressed by Aurora's confidential material⁶³ as different goals. Rather, they are other options the parties considered, while continuing to pursue together their ultimate objective.

Sworn statements

235. ASIC submitted that the initial Panel gave undue weight to the sworn statements in concluding that there was no consensus between Keybridge and Aurora in their dealings concerning Molopo. First, ASIC submitted that the statements were compromised by the passage of time and potentially self-interest and accordingly, more weight should be given to contemporaneous documentary evidence that conflict with the statements. Secondly, ASIC submitted that, other than Mr Patton, the individuals who provided sworn statements in the initial proceedings were not privy to Aurora and Keybridge's strategies for Molopo or involved in relevant dealings with Mr Bolton or Mr Patton.

⁶² In September 2015, Keybridge presented an investment thesis to Molopo which was rejected

⁶³ See paragraph [136] above

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236. During the course of our proceedings, additional sworn statements were provided by Mr Bolton and his father. ASIC submitted that Mr Bolton's statement was of questionable reliability listing a number of alleged incorrect or false statements.
237. Aurora submitted that it was not open to the initial Panel or us to infer anything where there is direct evidence, provided under oath, which contradicts that inference.
238. There may be inconsistencies between the sworn statements and the contemporaneous documentary evidence. In our view, and having had more time than the initial Panel to consider the sworn statements which were only provided late in the initial proceedings, there is a considerable amount of circumstantial evidence from which we can draw inferences that support the finding of an association between Keybridge and Aurora which is not inconsistent with the sworn statements. This is primarily because:
- (a) many of the individuals who provided the sworn statements were not involved or closely involved in the relevant circumstances. For example, Mr Kriewaldt acknowledges in his sworn statement that in relation to Keybridge *"it is possible that Mr Khan and Mr Bolton had some discussions of which I am not aware"*, noting that he was not aware of their discussion in Sydney on 17 February 2017
 - (b) when read carefully, the statements generally do not address or are not inconsistent with the inferences we have drawn or the nature of the association we have found, which may differ slightly from that considered in the initial Panel's preliminary findings. For example, in his sworn statement Mr Patton denied, in response to the initial Panel's preliminary findings, that the structure adopted for the acquisition of Aurora was to avoid the disclosure of any involvement of Mr Bolton and to keep him apparently at a distance. We have not relied on this preliminary finding of the initial Panel in drawing any inference or finding the association we have found and
 - (c) the statements made on some matters express or assume opinions on questions of law or other matters on which we can and should form our own views.
239. As noted by the Panel in *Anaconda Nickel Limited 16 & 17*⁶⁴ in relation to statements that had been provided by relevant individuals denying any association:
- ... perceptions of what constitutes association vary greatly. It is for the Panel, on the basis of facts found on the basis of evidence, to characterise those facts and determine whether they give rise to an association: it is not the role of witnesses to testify as to that characterisation.*

Conclusion

240. The initial Panel stated that Keybridge and Aurora have *"harmonious goals in relation to Molopo... However, on balance, we consider that goals which overlap and coincidences in timing have not in this case established that Keybridge and Aurora have an*

⁶⁴ [2003] ATP 15 at [46]

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understanding in the strict sense."⁶⁵ While the initial Panel found that Mr Bolton was involved in both Keybridge and Aurora and their respective investments in Molopo, it did not get them to the point of a shared goal between Keybridge and Aurora at a decision-making level. The initial Panel concluded on balance, and given the information available in the time available for inquiry, that there was not the requisite level of satisfaction for "*as a factual matter, some form of meeting of the minds between the alleged associates*".

241. ASIC submitted that by requiring a need "*to be satisfied of 'some form of meeting of the minds between the alleged associates' similar to the commonly cited threshold for contractual agreement*", the initial Panel took an overly conservative approach to the Act's concept of 'association' (referring to the definition of 'relevant agreement').⁶⁶ ASIC also submitted that this potentially overlooked the Panel's ability to infer the existence of such a 'meeting of the minds' or 'shared goal'. It does not appear to us that the initial Panel was adopting a narrow view of the concept of 'association'.⁶⁷ Rather the initial Panel was not satisfied, after considering the sworn evidence regarding Mr Bolton's involvement in the decision making of the Keybridge and Aurora boards, that a consensus was established.
242. We have had the benefit of considering further submissions and additional material, including the sworn statements provided by Mr Bolton and his father, which were not before the initial Panel. Although those statements sought to deny the basis for any allegations of association, they do nevertheless provide us with Mr Bolton's evidence and views on the matters before us.
243. We consider that there is sufficient logically probative material now before us to draw inferences supporting a finding that Keybridge and Aurora have an understanding or are acting in concert in relation to Molopo. Their shared goal of wanting ultimately to access Molopo's cash assets culminated in Keybridge's requisition of a meeting to replace the Molopo board. However, in our view, the association arose at a much earlier point in time, when there was no concrete plan to requisition a board spill.
244. In our view, drawing on our experience, the material described above supports an inference that, by no later than 26 October 2016, the day of Keybridge's strategy meeting, Keybridge and Aurora had an understanding that they would act together for their mutual benefit to achieve their ultimate goal of gaining access to Molopo's cash assets. A number of strategies and actions were on the table. In other circumstances a more definitive plan as to the agreed strategy or actions may have been necessary to give rise to association.⁶⁸ However, in the unusual circumstances of this matter, we consider that the understanding of Keybridge and Aurora that they would act together, pursuing one of a number of alternative

⁶⁵ See the initial Panel's reasons at [174]

⁶⁶ See paragraph [53] above

⁶⁷ See, for example, the initial Panel's reasons at [181]

⁶⁸ We note that the definition of association in section 12 encompasses proposing to enter into a relevant agreement under section 12(2)(b) and proposing to act in concert under section 12(2)(c). As to what is required to establish association on this basis see *Elders IXL Ltd v NCSC* [1987] VR 1, 15-6 and *Endresz v Whitehouse* (1997) 24 ACSR 208, 219-22. See also *Anzoil NL 01* [2002] ATP 19 at [54]

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options, was sufficient. We would highlight two aspects, in particular, of the circumstances here: (1) the role of Mr Bolton and his capacity, of which we infer both Keybridge and Aurora were aware and acquiesced in, to influence or orchestrate their respective strategies and (2) the extent of Keybridge and Aurora's prior collaborative conduct in relation to other listed entities, as well as their links and history with respect to Molopo.

245. By no later than 26 October 2016, the strategies of both Keybridge and Aurora in relation to Molopo were already in motion and known to Messrs Bolton and Patton. With Mr Bolton advising both companies and involving himself in the activities of both companies, to their knowledge, there was no pressing need to agree exactly how the strategy would proceed. Keybridge and Aurora embarked on parallel conduct which each understood the other was engaging in. That conduct was not coincidental. It was designed to reach the point where the parties could combine to achieve their shared goal. Each party increased its holding of Molopo shares, and separately sought board representation, on an expectation that they would use their joint voting power (if necessary) when it was time to do so. The boards of directors of Keybridge and Aurora were aware of this and agreed to, or at least acquiesced in, those strategies and actions.
246. Each of Keybridge and Aurora would have trouble on its own achieving its ultimate objective. The likelihood of success was greatly improved if they acted in combination. Mr Bolton has the 'ear' of both companies. The materials establish that he provides advice to both Keybridge and Aurora and plays a significant role in the affairs of each of them. There are differences of opinion on topics and discrepancies in the actions of Keybridge and Aurora, but this does not diminish nor contradict Mr Bolton's influence. He has knowledge of the investment strategies of both Keybridge and Aurora in relation to Molopo. Given his expertise, background knowledge of both Keybridge and Aurora and relationships, he has the capacity to influence substantively both Keybridge and Aurora's strategy for its Molopo investment. In our view, Mr Bolton has used this capacity to influence or orchestrate and facilitate coordination in the strategies and actions of Keybridge and Aurora to further their ultimate aim of control of Molopo and access to Molopo's cash.
247. Taking into account the cumulative effect of all the material before us and having drawn inferences that, in our experience, seem appropriate, we are satisfied that Keybridge and Aurora are associates in relation to Molopo.

Other associations

248. Having reached our conclusion on the issue of association between Keybridge and Aurora, we considered but did not find it necessary to form a view on any of the other potential associations raised in the initial applications.⁶⁹
249. We also did not find it necessary to determine whether either Mr Bolton or Mr Patton had a relevant interest or voting power in the Molopo shares held by Keybridge and/or Aurora.

⁶⁹ See paragraph [41] above

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Unacceptable circumstances based on consideration of policy

250. While the initial Panel was not satisfied of an association between Keybridge and Aurora in relation to Molopo, it concluded that the relationship between Keybridge and Aurora nevertheless gave rise to unacceptable circumstances because of the effect on control or potential control of Molopo.

251. The initial Panel stated:

239. *We take from the material the following propositions:*

- (a) *Mr Bolton is the largest unit holder in the Aurora Trust and effectively controls or has substantial influence over the relevant affairs of Aurora*
- (b) *Mr Bolton effectively controls or has substantial influence over the relevant affairs of Keybridge's largest shareholder, ASG*
- (c) *Mr Bolton has significant knowledge of the investment strategies of each of Keybridge and Aurora in relation to Molopo*
- (d) *Mr Bolton has capacity significantly to influence the investment strategies of each of Keybridge and Aurora in relation to Molopo*
- (e) *Mr John Patton is conflicted in his role at Keybridge in relation to the acquisition or use of Molopo shares given his role at Aurora. Information barriers established in Keybridge to address such conflicts were established late and have not been fully effective and*
- (f) *Despite Mr Patton being fully appraised of Keybridge's strategy in relation to Molopo, there is no evidence of Aurora establishing an information barrier when it embarked on its strategy for Molopo.*

240. *The actions of Mr Bolton and Mr Patton, combined with the material financial interest each had in Aurora and Keybridge, and the influence that each exerted in Aurora and to an extent in Keybridge, gives rise to a control effect in Molopo that is otherwise unacceptable. Generally speaking, the Panel is concerned with the effect of circumstances and the effect of the circumstances here which, even absent an association, has many of the same characteristics and consequences of an association.*

252. We consider that there is probative material supporting a finding of unacceptable circumstances, further or in the alternative to our finding of association, based on a consideration of policy and largely agree with the initial Panel's reasoning above.⁷⁰

253. We do not need to go so far as finding that Mr Bolton "effectively controls" the relevant affairs of Aurora. In our view, it is sufficient for our finding of unacceptable circumstances based on policy that Mr Bolton has substantial influence over the relevant affairs of Aurora. For the reasons we have described in detail above, we infer that Mr Bolton has substantial influence over the investment strategies and actions of Aurora, including in relation to Molopo.⁷¹

⁷⁰ See also the initial Panel's reasons at [235]-[243]

⁷¹ See paragraphs [196]-[212] above

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254. In relation to ASG, we agree with the initial Panel's findings that the relevant materials show that Mr Bolton has substantial influence over the relevant affairs of ASG. For instance, Mr Bolton was responsible for submitting an offer for and discussing with Keybridge the potential acquisition of Aurora on behalf of ASG and for approaching and procuring the appointment of Mr Patton and Mr Kriewaldt to the Keybridge board as representatives of ASG.⁷²
255. As noted above, in these proceedings we received a statutory declaration from Mr John Bolton. Mr John Bolton declared in his statutory declaration: *"I am aware that the Initial Panel considered that I did not act in my role as director independently of Nicholas Bolton. In my view that is factually incorrect. I consider that I have made decisions as a director of my own accord, and while listening to advice I have not allowed any such advice to replace my own responsibility to make decisions as a director."*
256. The initial Panel found that Mr Bolton has substantial influence or *"effectively controls"* the relevant affairs of ASG. We do not need to go as far to say that Mr Bolton effectively controls the relevant affairs of ASG, particularly in light of Mr John Bolton's affidavit. Mr Bolton submitted that he discussed ASG's investments with his father. The evidence also showed that Mr John Bolton had some communications with Keybridge directors directly and signed and sent formal documents on behalf of ASG. In these circumstances, we do not have sufficient grounds for inferring that decisions of ASG are not determined by Mr John Bolton, notwithstanding the advice he receives from his son. However, in our view, we consider that Mr Bolton has at least substantial influence over the relevant affairs of ASG and this supports our finding of unacceptable circumstances based on a consideration of policy.
257. We also consider that Mr Bolton and Mr Patton have a number of material financial interests in Keybridge and Aurora. These interests are broader than the ownership of shares or units in Keybridge and Aurora, respectively. These interests include the consultancy fees of Mr Bolton under his consultancy agreement with Keybridge, the management fees of Mr Patton under his employment agreement with Aurora and, more generally, the viability of the Aurora business, as a whole.⁷³
258. In our view, we consider the actions of Mr Bolton and Mr Patton, combined with the material financial interests each had in Keybridge and Aurora, and the influence that each exerted over Aurora and to an extent over Keybridge, gives rise to a control effect in Molopo that is otherwise unacceptable from no later than 10 August 2016, being the date of Mr Patton's appointment to the Keybridge board as a director.
259. Aurora submitted that any finding of unacceptable circumstances based on the evidence before the Panel would be against the public interest *"as it would create significant uncertainty for Aurora and other market participants in their commercial dealings"*. It submitted that the finding would effectively require disclosure to the market by participants before trading of certain relationships (other than those

⁷² See initial Panel's reasons at [73]-[90]

⁷³ See, also, paragraph [202] above

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giving rise to a relevant interest or association) that may be unacceptable where there is no guidance from the Panel or ASIC regarding the disclosure requirement and participants may not have knowledge of the circumstances.

260. Keybridge made a similar submission saying that the Panel needed to explain “[a]t very least how something that is not sufficient to trigger legal disclosure obligations can give rise to issues relating to a lack of information”.
261. Mr Bolton submitted that the principles in section 602 were not infringed by the relevant conduct because the activities of Keybridge and Aurora did not meet the standard of association and so the principles relating to an acquisition of control cannot be applicable.
262. We do not accept any of these submissions. The Panel's power to declare unacceptable circumstances in section 657A is exercisable if, even in the absence of a contravention, the circumstances are unacceptable having regard to the effect on control or potential control or the acquisition or proposed acquisition of a substantial interest or are otherwise having regard to the purposes set out in section 602.⁷⁴ In exercising the power, the Panel must have regard to the purposes of Chapter 6 set out in section 602, the other provisions of the Corporations Act, any rules or regulations and any other matters it thinks are relevant.⁷⁵ It may only make a declaration if it considers that doing so is not against the public interest.⁷⁶
263. Accordingly, we agree with the initial Panel that the Panel should be concerned with the effect of circumstances and that in this case the circumstances have many of the same characteristics and consequences of an association. We do not view the initial Panel's decision to be based simply on failure to make disclosure. In any event, we consider that the likely effects of the circumstances on the potential control of Molopo are unacceptable, regardless of any failure to make disclosure.
264. Having found an association, we do not need to discuss what disclosure may be required in the case where there is a finding of unacceptable circumstances based on policy, but no finding of association.

DECISION

265. Based on our conclusions above, we consider that, by no later than 26 October 2016, Keybridge and Aurora:
- (a) have, or propose to enter into, a relevant agreement for the purpose of controlling or influencing the composition of the board of Molopo or the conduct of Molopo's affairs and are associated with each other under section 12(2)(b) or
 - (b) are acting, or propose to act, in concert in relation to the affairs of Molopo and are associated with each other under section 12(2)(c).
266. Further or in the alternative to association, the Panel considers the actions of Mr Bolton and Mr Patton, combined with the material financial interests each had in

⁷⁴ Section 657A(2)(a) and (b)

⁷⁵ Section 657A(3)

⁷⁶ Section 657A(2)

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Keybridge and Aurora, and the influence that each exerted over Aurora and to an extent over Keybridge, gives rise to a control effect in Molopo that is otherwise unacceptable from no later than 10 August 2016.

Contraventions of section 606

267. Immediately prior to 26 October 2016, the aggregate voting power of each of Keybridge and Aurora in Molopo shares was 22.49%.
268. As a result of our finding of association between Keybridge and Aurora, each acquisition of Molopo shares by Keybridge and Aurora occurring on or after 26 October 2016 has resulted in a contravention of section 606 with the voting power of each of Keybridge and Aurora increasing with each acquisition from a starting point that is above 20% and below 90%. None of the exceptions in section 611 applied.

Contraventions of section 671B

269. As a result of our finding of association between Keybridge and Aurora, since 26 October 2016, Keybridge and Aurora have failed to lodge notices of change in substantial holding disclosing their association in contravention of section 671B.

Effect

270. It appears to us that the acquisition of control over voting shares in Molopo has not taken place in an efficient, competitive and informed market and the holders of shares in Molopo do not know the identity of persons who have acquired a substantial interest in Molopo.
271. It appears to us that the circumstances are unacceptable circumstances:
- (a) having regard to the effect that we are satisfied they have had, are having, will have or are likely to have on the control, or potential control, of Molopo
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602
 - (c) in the further alternative, because they:
 - (i) constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6 or 6C or
 - (ii) gave or give rise to, or will or are likely to give rise to, a contravention of a provision of Chapter 6 or 6C.
272. Accordingly, we set aside the declaration made on 30 May 2017 in relation to the affairs of Molopo and substitute the declaration set out in **Annexure D** and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3).
273. Aurora submitted in response to our draft declaration that our finding of association was a rejection of the direct sworn evidence in circumstances where the basis for that rejection was not put to the parties for comment and thereby denying them procedural fairness. We do not accept this. It was clear in our brief that, notwithstanding the sworn evidence, we were considering association against the

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backdrop of the initial Panel's preliminary findings and reasons. Parties had adequate opportunity to make submissions and rebuttals and did so.

Orders

274. Following the declaration, we made the final orders set out in **Annexure E**. Even though Aurora's review application concerned the initial Panel's orders and we have substituted our declaration for theirs, we considered Aurora's review application when considering what final orders we should make. Under section 657D, the Panel is empowered to make 'any order'⁷⁷ if four tests are met:

- (a) it has made a declaration under section 657A. This was done on 30 June 2017.
- (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We are satisfied that our orders do not unfairly prejudice any person. This is discussed below.
- (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 5 July 2017. Each party potentially affected by the orders made submissions and rebuttals.
- (d) relevantly, it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. The orders do this by addressing the aggregation of voting power consequence of the association or unacceptable circumstances. This is discussed below.

275. Both Molopo and ASIC submitted that the Panel should vest the Molopo shares acquired by Keybridge and Aurora on or after 10 August 2016, being the date from which the Panel accepted that the actions and influences of Messrs Bolton and Patton gave rise to unacceptable circumstances.

276. ASIC submitted that this was "*the most appropriate order to remedy the unacceptable circumstances*".

277. Relying on the principle in *Sovereign Gold*,⁷⁸ Molopo submitted:

The objective of the Panel's orders is to remedy the undesirable control effect brought about by the unacceptable circumstances. Accordingly, the Panel should make orders which, as close as possible, puts (sic) the parties in the position they would be in but for the acquisition of control which occurred in unacceptable circumstances and therefore should not have taken place at all

278. On the other hand, Aurora submitted that such an order would be punitive (including in relation to the underlying unit holders in AFARF and AGIT), unlikely to be achievable by ASIC, and would make it practically impossible for Aurora to process redemptions because it could not price requests accurately.

⁷⁷ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

⁷⁸ *Sovereign Gold Company Limited* [2016] ATP 12 at [143]

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279. A vesting order is not made to punish. Nor is it clear why it would necessarily be unachievable. Perhaps the shares are thinly traded, but that does not deny that there is a market at an appropriate price, or mean that a large block cannot be sold through an appropriate process. Our orders are specific in requiring that the appointed seller “*use the most appropriate sale method to secure the best available sale price for the Sale Shares that is reasonably available...*”. Perhaps also there is a risk, as Aurora pointed out, that without sufficient operations ASX may suspend trading in Molopo’s shares, but Molopo has been working on resolving the position with ASX.
280. Aurora also submitted that vesting would “*cause unfair prejudice to other Molopo shareholders, through depressing the market price for Molopo shares, causing a significant overhang in the market.*” We accept that there may be a short term depression of the market price for Molopo shares and accordingly we have provided more time for the investment bank or stockbroker appointed by ASIC to sell the shares.⁷⁹ However we do not think that this amounts to unfair prejudice. Vesting is likely to have this short term effect in every case involving a significant number of shares. It cannot, absent extreme circumstances, have been intended that the remedy would not be available when it is clearly included in the definition of ‘remedial order’.⁸⁰
281. Aurora also submitted in its review application that the divestment order made by the initial Panel would have “*unintended consequences and cause significant prejudice to other parties*” because (a) it delivered significant control of Molopo to another major shareholder, giving it a blocking stake of more than 25% of the shares that could be voted, until ASIC has disposed of the vested shares and (b) was likely to entrench the current Molopo board when it was considering undertaking new major investment projects. We consider that it is far from clear whether our orders would have that effect or even if they did have that effect, other parties would be prejudiced.
282. We agree with the initial Panel’s reasons why vesting is not unfairly prejudicial.⁸¹ In our view, vesting of the shares acquired after 10 August 2016 is appropriate and best protects rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. We do not consider that our orders are “*likely to achieve nothing*” or their benefits are “*so minimal or benefited so few shareholders*” that the prejudice far outweighs the benefits likely to be attained.⁸²
283. While the initial Panel made a declaration of unacceptable circumstances without finding an association (see paragraphs 250 to 264 above), it also made a vesting order. Aurora submitted in its review application that the initial Panel’s vesting order was unprecedented, punitive given the initial Panel’s findings, did not cure

⁷⁹ For six months, compared to the usual three months given in previous cases when the Panel has ordered shares divested

⁸⁰ See section 9 definition of ‘remedial order’

⁸¹ See initial Panel’s reasons at [269]-[271]

⁸² *Gjergja v Cooper* [1987] VR 167, 218-9, quoted in *Sovereign Gold Company Limited* [2016] ATP 12 at [144] and *Touch Holdings Limited* [2013] ATP 3 at [127]

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the effect of the unacceptable circumstances and was an unworkable precedent. We do not agree and agree with the initial Panel's reasons on this point.⁸³

284. Arguably consistently with its review application, Aurora submitted that only shares purchased after 26 October 2016 ought to be subject to a vesting order. Keybridge also submitted that we should only vest shares acquired following the association. Given that the Panel's orders seek to protect rights and interests of persons affected by the unacceptable circumstances, and given our finding that the circumstances which arose on 10 August 2016 had a similar effect to association, we consider that 10 August 2016 is the appropriate date.
285. Keybridge submitted, so far as the potential orders were against it, that vesting went "*beyond what is necessary to remedy any unacceptable circumstances as they relate to Keybridge and protecting the interests of holders of Molopo shares and of persons who may trade in Molopo shares.*" It submitted that vesting was unfairly prejudicial. For the reasons above, and because Keybridge also acquired shares, we do not agree.
286. Keybridge also submitted that substantial holder notice disclosure was a sufficient remedy against it. We do not accept this. Disclosure is part of the remedy, but in our view it alone cannot remedy the aggregation of voting power in this case.
287. To sum up, we think that vesting of all the shares acquired after 10 August 2016, largely for the reasons that the initial Panel gave, and which we agree with, and also because of our finding of association, is the appropriate order. We note that the date from which the initial Panel's orders relate was 30 June 2016 (being the date that Aurora was sold to Seventh Orion), but nothing turns on this as Keybridge made no acquisitions of Molopo shares between that date and 10 August 2016.⁸⁴
288. While there is no vote currently proposed, for certainty, we also considered that a voting freeze should be applied to the Sale Shares (as defined in the orders) until they have been divested by ASIC.
289. In terms of disclosure, ASIC submitted that the market would not adequately be informed as to the identity of persons who have acquired substantial interests in Molopo without a substantial holder notice. Molopo submitted that such an order was easy to comply with, and required only the disclosure of information that should have been provided anyway. We agree with these submissions.
290. Both ASIC and Molopo submitted that we should go further and also require an explanatory covering letter with the disclosure. We do not think it is necessary to go beyond substantial holder notice disclosure in a form approved by us.
291. Molopo also submitted that a 'standstill order' should be made, limiting for 12 to 18 months the ability of Keybridge and Aurora to acquire voting power in Molopo in excess of their aggregate voting power immediately prior to the association.

⁸³ See initial Panel's reasons at [266]-[268]

⁸⁴ Aurora only made one purchase between 30 June 2016 and 10 August 2016 (pursuant to closing out a swap) which was excluded from the vesting order made by the initial Panel

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292. ASIC partially agreed. It submitted that “to uphold the underlying policy of item 9 of s611 (and indeed s602) it is also necessary for Keybridge and Aurora to be restrained from relying on item 9 of s611 for a period of time starting on the lodgement of Keybridge's and Aurora's respective substantial shareholder notices....”

293. We think it is appropriate for there to be a standstill, consistent with the policy underpinning item 9. That policy is said to be based on the premise that investors are given ample opportunity to become informed and react accordingly.⁸⁵ And as was said in *Sovereign Gold*:

*The 'creep' order is to ensure that the market has time to appreciate the aggregation of voting power. The limitation imposed on creeping is consistent with the limitation in item 9 when coupled with adequate disclosure.*⁸⁶

294. In our view, it is appropriate to limit acquisitions by Keybridge and Aurora (and their respective associates) of Molopo shares in two ways:

- (a) For certainty, by limiting any acquisitions for 6 months after the date of the orders. That is the time period that would have restricted further acquisitions beyond 20% following disclosure in accordance with the ‘creep’ exception. We think that requiring there to be no acquisitions for 6 months from the date of our orders adequately protects rights and interests by allowing the market time to understand what has been occurring in Molopo and to make decisions accordingly. Had Keybridge and Aurora notified the market of their association at the time they reached an aggregate of 19% of Molopo, they would have been required to wait a further 6 months before purchasing shares taking them beyond 20%.
- (b) Thereafter, by removing the Sale Shares from the calculation of voting power in accordance with the ‘creep’ exception. This prevents any potential sudden aggregation of voting power.

295. Aurora submitted that there were alternative orders that were appropriate:

- (a) a proposed share buy-back by Molopo of the shares held by Keybridge and Aurora that would otherwise be divested. It submitted that this would be preferable because it would be less likely to be punitive, more likely to be achievable and would avoid unfair prejudice to Molopo shareholders. Molopo submitted that, while the proposal had been raised with the Chairperson, there was no agreement to it and the proposal had not been discussed by the board. This proposal is inchoate. We do not consider it further.
- (b) an in-specie distribution to the underlying unit holders in the AFARF and AGIT of all the Molopo shares Aurora held as responsible entity on behalf of

⁸⁵ R da Silva Rosa, M Kingsbury and D Yermack, “Evaluating Creeping Acquisitions” [2015] 37 Sydney Law Review 37, 41, quoting parliamentary debate. The Explanatory Memorandum for the *Companies (Acquisition of Shares) Act 1980*, section 15, which introduced the original provision, does not identify a policy. While the article goes on to note that the “efficacy of creeping in facilitating a gradual, transparent change in control with equal treatment of shareholders is disputed”, this is not our concern

⁸⁶ *Sovereign Gold Company Limited* [2016] ATP 12 at [143]

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those funds. However, as Aurora itself noted, this would likely need ASIC to be involved. Moreover, Molopo submitted that this proposal was “*against the spirit of s657D*” and would be difficult for the Panel and ASIC to monitor. We agree that it would be difficult to implement and monitor, and for those reasons alone we do not seek to pursue it.

296. Molopo sought costs for itself and ASIC. ASIC made no submission on costs. Aurora submitted that it took care in the review to make submissions only in relation to relevant issues and presented a case of reasonable merit in an efficient and businesslike way. Keybridge submitted that “*there are no aspects of the Molopo 03R, 04R and 05R applications which would justify the Panel departing from its position that costs orders are the exception not the rule.*”
297. The proceedings before us were not protracted and reasonable arguments were presented on the review (even though they were not all accepted).
298. In our view, therefore, the reviews were not made, or conducted, in such a way as to warrant the exercise of our discretion to award costs and no order for costs is made.

Ian Jackman SC

President of the sitting Panel

Decision dated 30 June 2017 (declaration), 7 July 2017 (orders)

Reasons given to parties 11 August 2017

Reasons published 22 August 2017

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Advisers

Party	Advisers
Aurora	Norton Gledhill
Keybridge	Bennett + Co
Molopo	King & Wood Mallesons
Nicholas Bolton	Baker McKenzie



Australian Government

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Annexure B

CHRONOLOGY OF MATERIAL EVENTS

Date	Event
19/08/2014	Aurora commences acquiring shares in Molopo as RE for AFARF.
20/01/2015	Aurora commences acquiring shares in Molopo as RE for AGIT.
16/02/2015	Keybridge announces entry into a contract for the purchase of Aurora.
27/03/2015	Keybridge announces the completion of the acquisition of Aurora.
1/07/2015	Keybridge acquires 2,577,676 Molopo shares (bringing interest to 19.68%).
25/08/2015	Bentley sells 19.95% interest in Molopo to Ion. Its sale agreement includes a standstill obligation on Bentley not to obtain a relevant interest in any Molopo securities for a period of 12 months.
27/08/2015	David Sanders resigns as a director of Molopo.
21/12/2015	Correspondence between John Bolton and Andrew Moffat in relation to Keybridge's position, with Bolton noting " <i>As Chairman of Australian Style Group and the major shareholder of Keybridge, I wish to convey some concern as to the on-going management of the company, in light of the recent developments.</i> "
8/01/2016	Correspondence between Antony Sormann, Steuart Roe (of Aurora) and Minerva representative regarding potential sale of Aurora. Sormann notes his discussion with Andrew [presume Moffat; chair of Keybridge] in relation to Keybridge's strategy for Aurora, and notes that he and Andrew agree " <i>a sale is likely the right transaction</i> ".
11/02/2016	Antony Sormann emails Pengana representatives with an overview of Aurora.
22/02/2016	Minerva sends Keybridge an executed term sheet to acquire Aurora. Antony Sormann emails Nicholas Bolton noting Keybridge has received an offer for Aurora, and asks Bolton to put forward a written proposal if he would like to make an offer. Further correspondence between Sormann and Bolton regarding value of offer.
24/02/2016	Nicholas Bolton emails Antony Sormann, copying John Bolton, attaching a letter with a term sheet for ASG (signed by John Bolton) to acquire Aurora.
26/02/2016	Pengana sends Keybridge an offer to acquire Aurora.
29/02/2016	John Bolton sends Antony Sormann an email (addressed to 'Andrew' - presume Moffat) asking for an update on his offer for Aurora.

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Date	Event
4/03/2016	Keybridge releases its half year accounts, where it noted that it is currently considering its strategic options in relation to its investment in Aurora.
Late April 2016	Patton mentioned to Nicholas Bolton his potential interest in being considered to be a director of Keybridge.
2/05/2016	Ion announces that Yaniv Stern (previously their nominee director to the Molopo board) is no longer considered their representative. Molopo board following this is made up of Samuel Belzberg (Gibralt nominee), Ronnen Rosengart (Ion nominee), Antony Sormann (Keybridge nominee), Yaniv Stern and Samantha Tough (Chair).
12/05/2016	Keybridge announces that it has received a proposal from Wilson Asset Management for a restructure of the company and, subject to due diligence and negotiation of binding agreements, the board proposed to convene a shareholders meeting to consider the proposal. The proposal involved a change in Keybridge's investment manager, a share buy-back and public offer.
18/05/2016	Bentley and Scarborough acquire Keybridge shares (interest in Keybridge to 16.97%).
23/05/2016	Andrew Stals (Minerva) emails Antony Sormann explaining that the change in Keybridge's shareholder base is likely to mean their acquisition of Aurora would not be successful.
	Ian Pamensky (Company Secretary and CFO of Keybridge) sends a letter to John Bolton noting that Keybridge has received a request from Bentley for 2 Keybridge board positions, and asks whether ASG would wish to be represented on the Keybridge board.
24/05/2016	Pengana representative emails Antony Sormann explaining that their original proposal to acquire Aurora looks unlikely.
	John Bolton emails Andrew Moffat in reply to Keybridge's letter of 23 May, noting that ASG requires a "material change" in Keybridge's board. Bolton notes he considers it appropriate that ASG have at least 2 representative board seats, and would not oppose Bentley's request for Keybridge board representation.
25/05/2016	After being approached by Nick Bolton for appointment to the Keybridge board, John Patton provides John Bolton with a copy of his resume.
26/05/2016	Keybridge board meeting. Minuted that a sale of Aurora to Pengana looks unlikely. Outstanding item from this board meeting was for Antony Sormann to " <i>investigate what would be rules to sell AFML to a major shareholder and if shareholder approval would be required ... contact ASG re providing them with an opportunity to make an offer</i> ".
	Antony Sormann emails John Bolton, copying Nicholas Bolton, attaching a draft Share Sale Agreement (SSA). Nicholas Bolton asks Sormann whether

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Date	Event
	Keybridge has obtained ASX waiver, or whether shareholder approval is required. Sormann advises Bolton that Keybridge has received advice that approval isn't required.
	Nicholas Bolton sends John Patton a draft Aurora SSA.
30/05/2016	Bentley and Scarborough advise Keybridge of intent to call s249F meeting of Keybridge to remove Andrew Moffat as a director and appoint 2 Scarborough nominees (Simon Cato and William Johnson).
	Betty Poon sends John Patton a Confidentiality Deed in relation to the proposed sale of Aurora, copying Antony Sormann.
31/05/2016	Antony Sormann forwards Nicholas Bolton the email sent by Betty Poon on 30 May 2016.
	John Patton signs a Confidentiality Deed in relation to the proposed sale of Aurora and sends it to Antony Sormann.
1/06/2016	Farooq Khan emails Nicholas Bolton to discuss various meetings they will have with each of the existing Keybridge directors on 3 June. Bolton forwards this email to John Patton and John Bolton.
2/06/2016	John Patton is provided access to due diligence materials on Aurora.
	Ian Pamensky sends a letter to John Bolton regarding their correspondence on 23/24 May and noting that he had received a board nominee of John Patton from Nicholas Bolton which Nicholas Bolton advised was with John Bolton/ ASG's knowledge and support. John Bolton forwards this letter to Nicholas Bolton who then forwards it to John Patton.
3/06/2016	Meeting between Farooq Khan, Nicholas Bolton, John Patton and William Johnson where Patton is advised that the others did not want Aurora to be sold.
6/06/2016	Andrew Moffat sends John Bolton a letter requesting Bolton confirm that <i>"John Patton is (ASG's) "nominee for an independent role, and that ASG is prepared to enter a standstill agreement as described in our letter."</i> John Bolton forwards this letter to Nicholas Bolton who then forwards it to John Patton.
7/06/2016	Keybridge convenes EGM to consider resolutions proposed by Bentley and Scarborough for s249F meeting.
8/06/2016	Antony Sormann and John Patton meet regarding the proposed Aurora sale.
	Correspondence between Antony Sormann and John Patton regarding Nicholas Bolton signing a Confidentiality Deed.
	John Patton sends Nicholas Bolton a draft Heads of Agreement for comments.
9/06/2016	John Patton sends Nicholas Bolton mark-ups of the Heads of Agreement for comments.

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Date	Event
10/06/2016	Keybridge announces that Wilson Asset Management have withdrawn their restructure proposal “[g]iven the recent change in, and discussions with, substantial shareholders and the Keybridge board”.
10/06/2016	Nicholas Bolton signs a Confidentiality Deed, which John Patton forwards to Antony Sormann.
14/06/2016	Correspondence between John Patton and Nicholas Bolton regarding the Heads of Agreement.
15/06/2016	Correspondence between John Patton and Nicholas Bolton confirming that Bolton will hold no more than 49.9% interest in the investment vehicle.
	Meeting between John Patton and Antony Sormann regarding the Aurora Sale. Patton writes in his notebook that Sormann has confirmed for Patton to be Keybridge’s preferred buyer of Aurora and that Patton needs a nominee entity that is controlled by him or Wilson Hanna.
	Keybridge board call. Patton’s draft Heads of Agreement, Antony Sormann's " <i>Plan B</i> " and a comparison of the Minerva/Patton transactions were circulated to board members before the call. This Minerva proposal was a revised proposal, submitted by Minerva following its initial withdrawal.
17/06/2016	Nicholas Bolton emails Jeremy Leibler asking if he is available for instructions on the acquisition of Aurora from Keybridge.
19/06/2016	Nicholas Bolton emails Jeremy Kriewaldt and John Patton to introduce each other and for instructions on the acquisition of Aurora from Keybridge.
	John Patton emails Nicholas Bolton with comments on the Aurora SSA.
20/06/2016	Correspondence between John Patton and Nicholas Bolton regarding comments on the Aurora SSA.
22/06/2016	Seventh Orion incorporated. John Patton is sole-shareholder and director at the time of its incorporation.
	Wairoa Nominees subscribed for initial units in the Trust atf the Patton Family Trust.
23/06/2016	Keybridge board pass a circular resolution authorising Antony Sormann to finalise the SSA with Wilson Hanna (John Patton's investment vehicle) or his nominee.
	Antony Sormann emails Brody Clarke of Atanaskovic Hartnell (acting for John Patton) noting that Patton's exclusivity passed its deadline on 22/06/16.
27/06/2016	Keybridge announces sale of Aurora to Seventh Orion for up to \$1.8m.
30/06/2016	Mr Patton and Mr Hallam are appointed as directors of Aurora. Betty Poon was already a director.

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Date	Event
	Wairoa Nominees atf Patton Superannuation Fund, Nicholas Bolton, Betty Poon, Victor Siciliano and Stephen Rowley subscribed for units in the Aurora Investment Unit Trust. Wairoa Nominees subscribed for additional units in the Trust atf the Patton Family Trust.
On or about 30/06/2016	Sale of Aurora to Seventh Orion completes.
Late June / Early July	Nicholas Bolton called Jeremy Kriewaldt to discuss if Kriewaldt would be prepared to be proposed as a director of Keybridge by ASG.
4/07/2016	Keybridge releases a Molopo 604 which notes it is no longer an 'associate' of Aurora. Keybridge's voting power in Molopo reduced to 18.48%.
13/07/2016	John Bolton emails ASG's voting instructions for the Keybridge EGM.
20/07/2016	Aurora, as RE for AGIT, acquires 418,385 Molopo shares. These shares resulted from the close out of an existing cash settled swap that Aurora held in Molopo.
25/07/2016	Email correspondence between Nicholas Bolton and Andrew Moffat regarding Bolton's vote to remove Moffat at the Keybridge EGM. Bolton notes in his email that he " <i>strongly disagreed with the sale of Aurora. It's worth considerably more than what it was sold for, and again, just a few months after announcing the strategy built around that business, it was sold.</i> "
26/07/2016	Victor Siciliano joins Aurora as a portfolio manager from HHY Fund, following offer from John Patton.
29/07/2016	Keybridge EGM held. The resolutions proposed by Bentley and Scarborough were approved to remove Andrew Moffat (Chair) and appoint Bentley's nominees Simon Cato and William Johnson. Keybridge board following EGM is made up of Cato, Johnson, Antony Sormann (MD) and Bill Brown (Deputy Chair who assumed the position of Chair following Andrew Moffat's removal as a director).
Late July	Nicholas Bolton called Jeremy Kriewaldt again to discuss if Kriewaldt would be prepared to be proposed as a director of Keybridge by ASG.
1/08/2016	Bill Brown emails John Bolton noting that he has been elected as Keybridge chairman following the EGM, and asks for John's " <i>/ASG's current views on KBC board composition in advance of the first meeting of the newly constituted KBC board</i> ".
4/08/2016	Bill Brown met with John Bolton.
8/08/2016	Correspondence between Bill Brown and John Bolton. Bolton sends Brown a consent to act for ASG's nominee director, John Patton, and notes that the second nominee director, Jeremy Kriewaldt, wishes to conduct due diligence. Brown confirms he will pass Patton's consent onto the Keybridge board for due consideration, requests Patton and Kriewaldt's CV's and notes that there is a " <i>scheduled board meeting in a couple of weeks</i> ".

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Date	Event
10/08/2016	Bill Brown resigned from the board of Keybridge. Keybridge appoints John Patton as a non-executive director, "representing the interests of ASG". John Patton sent the wording for the Keybridge announcement to Nicholas Bolton for comment. Keybridge board following this is made up of Simon Cato, William Johnson (both Bentley), Antony Sormann (MD, not representing any shareholder at that time) and John Patton (ASG).
16-17/08/2016	Keybridge workshop in Perth which was attended by Nicholas Bolton, Farooq Khan, Victor Ho and William Johnson. The workshop was to discuss a range of corporate and operational matters. It was proposed at this workshop that Mr Patton be offered an executive role with Keybridge.
22/08/2016	Victor Siciliano emailed Andrew Ward asking if he wants to buy more Molopo shares.
7/09/2016	Correspondence between Antony Sormann and Ian Pamensky regarding how many shares Keybridge can acquire in Molopo to go over 19%.
12/09/2016	William Johnson sends an email to Sormann, Patton and Cato, flagging that Keybridge's relevant interest in Molopo needs to move above 19% as soon as possible so that they can increase their interest through creep. Johnson asks Patton to manage this acquisition because of Sormann's role as a Molopo director.
	John Patton emails Ian Pamensky asking if he is okay "to acquire circa \$120-150K of MPO shares".
	Correspondence between John Patton, Ian Pamensky and Antony Sormann regarding how many Molopo shares are held by Keybridge and Keybridge's available cash to purchase more Molopo shares.
20/09/2016	Keybridge announces its acquisition of a further 1,682,763 Molopo shares (now 19.15%).
22/09/2016	Keybridge board meeting.
24/09/2016	Antony Sormann emails Samantha Tough in relation to his status at Keybridge in light of Keybridge's recent acquisitions in Molopo.
28/09/2016	Correspondence between Nicholas Bolton and a representative of Seller B regarding at what price Seller B would sell its interest in Molopo. Bolton forwards this exchange to John Patton.
September 2016	John Patton and Victor Siciliano discuss an investment in Molopo. Patton subsequently (prior to 7/10/2016) mentioned Molopo to Bolton who offered to introduce Aurora to 3 investors holding 18% of Molopo.
3/10/2016	Keybridge releases its 2016 Annual Report, which refers to its shareholding in Molopo as a "strategic investment".
11/10/2016	Aurora as RE for AFARF begins acquiring 3,687,009 Molopo Shares.
13/10/2016	Farooq Khan enters into a Consultancy Agreement with Keybridge.

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Date	Event
	<p>Antony Sormann resigns as a director of Keybridge. John Patton is appointed Chairman of the Keybridge board and is engaged in an executive role (minimum two days per week). Jeremy Kriewaldt appointed to the Keybridge board as "represent[ing] the interests of [ASG]". Keybridge board following this is Simon Cato, William Johnson (both Bentley), John Patton (Executive Chair) and Jeremy Kriewaldt (both ASG).</p> <p>Nicholas Bolton emails William Johnson, Jeremy Kriewaldt, Simon Cato, Farooq Khan and Victor Ho accepting his proposed Consultancy Agreement with Keybridge "<i>subject to Jeremy/AH confirming that they are satisfied that it complies with my current limitation under the act</i>". He also notes two parties are interested in acquiring Keybridge's Molopo stake.</p>
14/10/2016	<p>Nicholas Bolton enters into a Consultancy Agreement with Keybridge.</p> <p>William Johnson emails Jeremy Kriewaldt, John Patton, Simon Cato, Nicholas Bolton, Farooq Khan and Victor Ho suggesting a Keybridge strategy meeting on 26 October.</p>
Mid-October/2016	<p>Victor Siciliano became aware Aurora had begun a dialogue with Nicholas Bolton to see if he had any contacts who may be sellers of a material line in Molopo shares.</p>
17/10/2016	<p>Nicholas Bolton emails a Molopo shareholder explaining that he is "<i>consulting for a firm that is interested in acquiring a block of MPO shares.</i>" Bolton forwards the reply to John Patton asking for thoughts.</p> <p>Stephen Rowley becomes a 50% shareholder in Seventh Orion (through SNDR Investments Pty Ltd) and was appointed as a director at the invitation of John Patton, who suggested he had received legal advice that the introduction of another director may be beneficial, although not essential.</p>
18/10/2016	<p>Farooq Khan emails Nicholas Bolton with an email titled "KBC" and notes "<i>couple of things to talk about</i>" and asks about their meeting the following week. Bolton forwards this email to John Patton.</p>
21/10/2016	<p>Keybridge board meeting where it is minuted that William Johnson "<i>provided the Board with an overview regarding the potential sale by KBC of its stake in MPO</i>". John Patton in attendance.</p> <p>Email correspondence between Patton, Bolton, Khan, Kriewaldt, Cato, Johnson, Ho and Pamensky regarding PTB. Cato notes that "<i>It presents Molopo as a [sic] even more important to sell</i>".</p>
24-25/10/2016	<p>Victor Ho sends William Johnson, Jeremy Kriewaldt, John Patton, Simon Cato, Nicholas Bolton and Farooq Khan a preliminary and updated agenda for the Keybridge strategy meeting on 26 October.</p>
26/10/2016	<p>Keybridge strategy meeting. John Patton, Nicholas Bolton, Simon Cato, William Johnson, Farooq Khan and Victor Ho in attendance. Ho's notes</p>

Takeovers Panel

Reasons - Molopo Energy Limited 03R, 04R & 05R [2017] ATP 12

Date	Event
	suggest that the decision was made, among others, to top up Keybridge's Molopo shares to 19.99%, and then advance a sale of those shares. The alternative strategy considered and rejected at the meeting was to launch a bid for Molopo with KBC convertible notes.
27/10/2016	Correspondence between William Johnson and Ian Pamensky, copying Patton and Ho, noting that it had been discussed at the 26 October Keybridge strategy meeting " <i>that we should top back up in Molopo as much as we can ... to just under 20%</i> ". Johnson asks for this "top up" subject to Patton's agreement.
October 2016	Victor Siciliano acquired 3.5% of Molopo for AIB and AFARF. Siciliano discussed this with John Patton, who had some reservations regarding the investment and wanted some time to consider further.
Early November 2016	Victor Siciliano prepared an investment paper on Molopo at John Patton's request. Paper suggested purchasing 19.99% of Molopo as a "balance of power stake".
	John Patton sought advice from Atanaskovic Hartnell on legal implications of Aurora acquiring Molopo shares.
2/11/2016	Aurora as RE for AFARF begins acquiring 14,546,116 Molopo Shares
4/11/2016	Aurora as RE for AGIT begins acquiring 970,231 Molopo Shares
7/11/2016	Correspondence between John Patton, Victor Ho, William Johnson, Farooq Khan and Nicholas Bolton regarding Keybridge entering an arrangement with Aurora for Victor Siciliano to provide limited services to Keybridge regarding HHY Investment Management
8/11/2016	John Patton instructed Victor Siciliano to acquire up to 5% in relation to Molopo while concurrently progressing acquisitions of the interests of investors Nicholas Bolton had proposed to introduce.
9/11/2016	Keybridge sends Molopo a request that David Sanders replace Sormann as Keybridge's nominee to Molopo
10/11/2016	Correspondence between John Patton and William Johnson in relation to Keybridge topping up its Molopo shareholding to 19.99%. Johnson asks for Patton's approval and for Patton to organise this top-up with Keybridge's company secretary. Patton replies that he is conflicted in relation to Molopo.
15/11/2016	Emails from Victor Ho to Betty Poon regarding Keybridge transferring shares to Aurora in NAC, in advance of NAC's AGM on 18 November.
16/11/2016	Correspondence between Patton, Bolton, Ho, Siciliano and Khan regarding Keybridge and Aurora's voting intentions at the NAC AGM.
	John Patton emails Nicholas Bolton document titled 'Chairman's Address' for comments.

Takeovers Panel

Reasons - Molopo Energy Limited 03R, 04R & 05R

[2017] ATP 12

Date	Event
17/11/2016	John Patton sends Jim Hallam an Aurora investment proposal for Molopo, noting that Aurora seeks to increase its position to 19.99%.
18/11/2016	Jeremy Kriewaldt (of Atanaskovic Hartnell & director at Keybridge) provides Aurora with advice on its proposed acquisition of 8% of shares in Molopo.
	AGIT finalises and releases Bidder's Statement for off-market takeover bid for all of the units in HHY Fund.
	Molopo investment proposal circulated to Aurora directors. Nicholas Bolton is not copied.
19/11/2016	Correspondence between a representative of Seller A and Nicholas Bolton regarding settlement instructions for the sale of Seller A's Molopo shares. Bolton forwards these instructions to Victor Siciliano.
22/11/2016	Correspondence between Bolton and Kriewaldt regarding Bolton's query as to whether ASG would be eligible to vote on the resolution regarding the remuneration report at the Keybridge AGM. Bolton comments " <i>I haven't checked this with ASG, but would have thought ASG would be ineligible to vote on the resolution?</i> " Mr Kriewaldt and Bolton agree that Bolton does not control ASG, and as such ASG is eligible to vote.
23/11/2016	Keybridge board meeting occurred, which noted that John Patton provided standing notice of his role at Aurora and its investment in Molopo. At this board meeting, the Keybridge board also resolved to appoint only John Patton and William Johnson to Keybridge's investment committee.
29/11/2016	Farooq Khan forwards correspondence about the possible sale of Keybridge's stake to William Johnson, Nicholas Bolton, Victor Ho and John Patton.
1/12/2016	Aurora 603 lodged in respect of Molopo disclosing that it has voting power of 9.75% in Molopo.
	Correspondence between Farooq Khan, William Johnson and Victor Ho regarding Aurora's Form 603.
2/12/2016	Antony Sormann sends an email to the Molopo board, resigning as a director. In his email to the Molopo board, Antony Sormann notes the situation he faces " <i>having departed Keybridge and noting what they are now doing in combination with Aurora to take control of Molopo</i> ". Molopo board following this is made up of Samuel Belzberg (Gibralt nominee), Ronnen Rosengart (Ion nominee), Yaniv Stern and Samantha Tough (Chair).
	Molopo raises concerns about an association between Keybridge and Aurora. Keybridge sends a letter to Molopo, stating that there is no relationship between Keybridge and Aurora with respect to the affairs of Molopo and seeking a replacement nominee director to the Molopo board.

Takeovers Panel

Reasons - Molopo Energy Limited 03R, 04R & 05R

[2017] ATP 12

Date	Event
5/12/2016	Jim Hallam emails John Patton and Victor Siciliano with comments on the Molopo investment paper.
6/12/2016	Jim Hallam requests legal advice from Norton Gledhill on the issues raised by the Molopo investment paper.
12/12/2016	Nicholas Bolton emails Victor Siciliano and Farooq Khan regarding the cost of Keybridge's auditor.
	Molopo submits a report of misconduct to ASIC concerning the potential association between Keybridge and Aurora.
14/12/2016	Antony Sormann emails Victor Ho and John Patton, referring to a phone call with Patton on 13 December, noting he <i>"felt that my position had become untenable [as a director of MPO] by the Substantial Shareholder notice lodged by Aurora."</i>
16/12/2016	Keybridge announces that its registered address will change with effect from 19 December to the same address as Aurora, Seventh Orion and Wilson Hanna.
20/12/2016	ASIC serves notices on Keybridge (s30), Aurora (s30), Seventh Orion (s30) and Mr Patton (s33).
	Nicholas Bolton produced a draft letter addressed to William Johnson from John Patton on Aurora's letterhead dated 20 December 2016 with finalisation of outstanding items from the Aurora acquisition.
1/01/2017	Farooq Khan forwards Johnson, Ho and Bolton an email chain between him and a redacted individual negotiating the sale of Keybridge's stake in Molopo.
10/01/2017	Victor Siciliano prepared a revised fund strategy for Aurora, and sent to John Patton, including building a 19.9% stake in Molopo.
11/01/2017	Jeremy Kriewaldt responds to an email from William Johnson (cc: Cato, Patton, Ho, Bolton and Khan). Johnson's email of the same date suggested holding "a board conference call in the next few days (with Nick and Farooq attending)" to discuss Khan's recent negotiating of a sale of Keybridge's stake in Molopo.
	John Patton emails Johnson, Cato, Kriewaldt, Ho, Bolton and Khan noting that he will not attend a Keybridge board discussion on the sale of its Molopo shares.
13/01/2017	Nicholas Bolton emails Kriewaldt, Cato, Johnson, Ho and Khan noting he would not attend a Keybridge board discussion on Molopo on advice of John Patton.
17/01/2017	Keybridge requests that Molopo appoint William Johnson as Keybridge's nominee to the board of Molopo (as an alternative to David Sanders).

Takeovers Panel

Reasons - Molopo Energy Limited 03R, 04R & 05R

[2017] ATP 12

Date	Event
24/01/2017	Aurora submitted that this was the first date that the Aurora board first discussed the concept of the Aurora Proposal.
25/01/2017	Keybridge announces its Initial Substantial Holder Notice disclosing its acquisition of 360,651 AIB Units on 2 December 2016 (being 5.02% as at 23 January 2017).
	Keybridge announces its interest in HHY had increased from 24.76% to 26.46% as a result of on-market buy-backs.
27/01/2017	Ho sends Keybridge board meeting agenda for 30 January meeting to Keybridge directors, noting that there will be a separate agenda circulated for matters in which " <i>John is conflicted/excluded by choice</i> ".
2/02/2017	Keybridge board meeting attended by Johnson, Cato, Kriewaldt and Ho (not Patton). Various matters relating to Molopo appear to have been discussed, including appointment of Keybridge nominee to Molopo board and the sale of Keybridge's stake in Molopo.
8/02/2017	AMFL announces its acquisition of a further 27,331,692 Molopo Shares (to 10.97%).
10/02/2017	Victor Ho sends Nicholas Bolton an email with a query regarding ASG's substantial holder notice in relation to Keybridge. Bolton responds that he will check. Ho asks if a parcel " <i>belongs to ASG</i> " and Bolton confirms that it " <i>sounds right</i> ".
16/02/2017	Aurora submitted that on this date the Aurora board discussed actually seeking board representation in Molopo in order to provide it with some influence on the use of Molopo's cash through.
17/02/2017	Farooq Khan and Nicholas Bolton met in Sydney, where Khan subsequently notes in an email to Victor Ho and William Johnson that " <i>we agreed that we should send a share register request to MPO on Monday</i> ". Bolton is not copied on the email. Bolton says that in his discussion with Khan, Bolton did not offer any opinion, and the conversation was a generic discussion of the advantages of s249F v s249D requisitions.
20/02/2017	AMFL announces its acquisition of a further 2,770,404 Molopo Shares (to 12.09%).
	Keybridge sends Molopo its request for a copy of Molopo's current share register.
24/02/2017	Nicholas Bolton emails Johnson, Kriewaldt, Cato, Ho and Khan providing comments on a draft letter to the Molopo board regarding board representation.
	Farooq Khan emails Bolton, Johnson, Kriewaldt, Cato and Ho also providing comments on the draft letter to the Molopo board.

Takeovers Panel

Reasons - Molopo Energy Limited 03R, 04R & 05R

[2017] ATP 12

Date	Event
27/02/2017	Yaniv Stern resigns as a director of Molopo. Wayne Trumble and Alexandre Gabovich are appointed as directors. Molopo board following this is Samuel Belzberg (Gibralt), Ronnen Rosengart (Ion), Alexandre Gabovich, Wayne Trumble and Samantha Tough (Chair).
	Keybridge sends Molopo a letter confirming there is no association between it and Aurora in relation to Molopo.
Late Feb 2017	Jeremy Kriewaldt deposes that the strategy for requisitioning a meeting of Molopo was decided at a telephone meeting involving him, William Johnson, Simon Cato, Farooq Khan and Victor Ho. Bolton was not in attendance.
Feb/March 2017	Aurora purchased Molopo shares via an off-market transfer from Seller B, with the consideration being units in the AFARF.
2/03/2017	John Patton wrote to Samantha Tough to introduce himself as managing director of Aurora. He notes he also sits on the board of Keybridge, but that there is an effective 'Chinese Wall' in place.
	Subsequent phone call that day between Patton and Tough where Tough advises Molopo had requested ASIC investigate Keybridge and Aurora and would not consider granting Aurora a board seat at that time.
6/03/2017	Aurora announces its acquisition of a further 4,009,119 Molopo Shares (to 13.70%).
8/03/2017	Alexandre Gabovich is appointed Managing Director of Molopo.
10/03/2017	ASIC serves s30 notice on Keybridge.
	Farooq Khan emails Bolton, Johnson, Ho, Kriewaldt, Cato and Sanders attaching a draft Keybridge ASX announcement re its requisition notice to Molopo.
	Correspondence between Khan, Ho, Kriewaldt and Johnson relating to the salary of Keybridge's proposed nominee to the Molopo board.
	Jim Hallam emails John Patton in relation to the Aurora Proposal, noting that he raised certain issues in November and "cannot recall getting a response".
13/03/2017	Molopo announces that it has received s249D notice from Keybridge for the removal of all the directors and the appointment of Hartnell, Sanders and Johnson.
	Victor Ho forwards the Molopo announcement re the s249D notice as previously published on ASX to a group comprising the Keybridge directors, Farooq Khan, Nicholas Bolton and David Sanders (Bennett + Co Lawyers). David Sanders replies to all recipients with statements relating to the s249D requisition. Patton asks to be removed from the thread.
	John Patton circulates a proposal regarding Molopo to the Aurora board.

Takeovers Panel

Reasons - Molopo Energy Limited 03R, 04R & 05R

[2017] ATP 12

Date	Event
17/03/2017	Aurora board paper requesting that AIB acquire Molopo securities from AFARF (both Aurora funds).
21/03/2017	Aurora announces its acquisition of a further 10,443,616 Molopo shares (to 17.89%).
	Aurora, as RE for AIB, acquires a further 75,000 Molopo shares (to 17.92%).
22/03/2017	John Patton wrote to Molopo on behalf of Aurora asking to put forward a candidate for the board at the Keybridge requisitioned EGM or at Molopo's AGM.
24/03/2017	Molopo announces the 249D will be considered at the AGM on 15 May 2017 and that Chairman, Samantha Tough, resigned effective 31 March 2017. Molopo board following this is made up of Samuel Belzberg, Ronnen Rosengart, Alexandre Gabovich (MD) and Wayne Trumble.
28/03/2017	Aurora board meeting where the Aurora Proposal was discussed.
29/03/2017	ASIC s19 examination of Mr James Hallam.
3/04/2017	Victor Ho emailed John Patton setting out Patton's declared interests/conflicts to the Keybridge board.
4/04/2017	Molopo wrote to Aurora raising concerns regarding a potential association between Aurora and Keybridge.
6/04/2017	Aurora wrote to Molopo seeking written assurance that it will not make any material acquisition or investment without obtaining shareholder approval to do so.
	Aurora submitted that the form of the proposal letter to Molopo regarding the Aurora Proposal was tabled at an Aurora board meeting on this day. A representative from Aurora's legal advisors, Norton Gledhill, attended the meeting and was instructed to make further changes to the proposal letter in order to make it more attractive to Molopo shareholders.
7/04/2017	Aurora responds to Molopo that a 'Chinese wall' has been put in place at Keybridge which precludes Patton from having any involvement regarding Molopo.
11/04/2017	ASIC and Molopo each make applications to the Panel in relation to Molopo's affairs.
	Keybridge acquires a further 27,033 Molopo shares (19.95%).



Australian Government

Takeovers Panel

Annexure C

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A UNDERTAKING

MOLOPO ENERGY LIMITED 03R

Keybridge undertakes to the review Panel that, without the review Panel's consent, it will not, and will procure that each of its associates does not, dispose of, acquire, transfer, charge or otherwise deal with shares in Molopo without providing the review Panel with at least two (2) clear business days' notice in advance of any such proposed dealing.

This undertaking continues until the conclusion of the review Panel's proceedings. Keybridge agrees to confirm in writing to the review Panel when it has satisfied its obligations under this undertaking.

In this undertaking the following terms have the corresponding meaning:

Keybridge Keybridge Capital Limited (ACN 088 267 190)

Molopo Molopo Energy Limited (ACN 003 152 154)

**Signed by David Sanders of Bennett + Co
with the authority, and on behalf, of Keybridge Capital Limited**

Dated: 15 June 2017

Takeovers Panel

**Reasons - Molopo Energy Limited 03R, 04R & 05R
[2017] ATP 12**

**AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A
UNDERTAKING**

MOLOPO ENERGY LIMITED 04R

Keybridge undertakes to the review Panel that, without the review Panel's consent, it will not, and will procure that each of its associates does not, dispose of, acquire, transfer, charge or otherwise deal with shares in Molopo without providing the review Panel with at least two (2) clear business days' notice in advance of any such proposed dealing.

This undertaking continues until the conclusion of the review Panel's proceedings. Keybridge agrees to confirm in writing to the review Panel when it has satisfied its obligations under this undertaking.

In this undertaking the following terms have the corresponding meaning:

Keybridge Keybridge Capital Limited (ACN 088 267 190)

Molopo Molopo Energy Limited (ACN 003 152 154)

**Signed by David Sanders of Bennett + Co
with the authority, and on behalf, of Keybridge Capital Limited**

Dated: 15 June 2017

Takeovers Panel

**Reasons - Molopo Energy Limited 03R, 04R & 05R
[2017] ATP 12**

**AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A
UNDERTAKING**

MOLOPO ENERGY LIMITED 03R

Aurora undertakes to the review Panel that, without the review Panel's consent, it will not, and will procure that each of its associates does not, dispose of, acquire, transfer, charge or otherwise deal with shares in Molopo without providing the review Panel with at least two (2) clear business days' notice in advance of any such proposed dealing.

This undertaking continues until the conclusion of the review Panel's proceedings. Aurora agrees to confirm in writing to the review Panel when it has satisfied its obligations under this undertaking.

In this undertaking the following terms have the corresponding meaning:

- Aurora** Aurora Funds Management Limited (ACN 092 626 885), including in its capacity as responsible entity for the Aurora Fortitude Absolute Return Fund (ARSN 145 894 800) and Aurora Global Income Trust (ARSN 127 692 406)
- Molopo** Molopo Energy Limited (ACN 003 152 154)

**Signed by Alasdair McLean of Norton Gledhill
with the authority, and on behalf, of Aurora Funds Management Limited, including in
its capacity as responsible entity for the Aurora Fortitude Absolute Return Fund and
Aurora Global Income Trust**

Dated: 15 June 2017

Takeovers Panel

**Reasons - Molopo Energy Limited 03R, 04R & 05R
[2017] ATP 12**

**AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A
UNDERTAKING**

MOLOPO ENERGY LIMITED 04R

Aurora undertakes to the review Panel that, without the review Panel's consent, it will not, and will procure that each of its associates does not, dispose of, acquire, transfer, charge or otherwise deal with shares in Molopo without providing the review Panel with at least two (2) clear business days' notice in advance of any such proposed dealing.

This undertaking continues until the conclusion of the review Panel's proceedings. Aurora agrees to confirm in writing to the review Panel when it has satisfied its obligations under this undertaking.

In this undertaking the following terms have the corresponding meaning:

- Aurora** Aurora Funds Management Limited (ACN 092 626 885), including in its capacity as responsible entity for the Aurora Fortitude Absolute Return Fund (ARSN 145 894 800) and Aurora Global Income Trust (ARSN 127 692 406)
- Molopo** Molopo Energy Limited (ACN 003 152 154)

**Signed by Alasdair McLean of Norton Gledhill
with the authority, and on behalf, of Aurora Funds Management Limited, including in
its capacity as responsible entity for the Aurora Fortitude Absolute Return Fund and
Aurora Global Income Trust**

Dated: 15 June 2017



Australian Government

Takeovers Panel

Annexure D

CORPORATIONS ACT SECTIONS 657EA AND 657A DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

MOLOPO ENERGY LIMITED 03R, 04R & 05R

The Takeovers Panel sets aside the declaration made on 30 May 2017 in relation to the affairs of Molopo Energy Limited (**Molopo**) and substitutes this declaration.

CIRCUMSTANCES

1. Molopo is an ASX listed entity. It currently has no operating activity and holds cash on hand of approximately \$67 million.
2. Keybridge Capital Limited (**Keybridge**) is an ASX listed entity. It currently has a relevant interest in 19.95% of Molopo.
3. Australian Style Group Pty Ltd (**ASG**) holds 21.16% of Keybridge. ASG is wholly owned by Australian Style Holdings Pty Ltd (**ASH**) whose shareholders are Mr Nicholas Bolton (1%) and Mr Bolton's sister (99%). Mr Bolton's father is the sole director of ASG and ASH. Prior to being disqualified from managing a corporation in December 2015, Mr Bolton was a co-director of ASG with his father and the sole director of ASH.
4. Mr Bolton also holds 2.2% of Keybridge in his personal capacity.
5. Mr Bolton was managing director of Keybridge until his disqualification.
6. Aurora Funds Management Limited (**Aurora**) is an unlisted funds manager. It currently has a relevant interest in 17.89% of Molopo, as responsible entity for Aurora Global Income Trust and Aurora Fortitude Absolute Return Fund.
7. Aurora was wholly owned by Keybridge until 30 June 2016. On or about that date, Keybridge sold Aurora to Seventh Orion Pty Ltd (**Seventh Orion**) as trustee for Aurora Investments Unit Trust. At the time, Aurora had a relevant interest in approximately 1.88% of Molopo.
8. Mr John Patton owns 50% of Seventh Orion and is one of its two directors. Mr Patton is the managing director of Aurora.
9. Units in the Aurora Investments Unit Trust are held indirectly by Mr Patton (26.1%)⁸⁷ and directly by Mr Bolton (49.9%).

⁸⁷ Through a corporation owned by Mr Patton and his wife that acts as the trustee for (i) a discretionary family trust and (ii) a superannuation fund

Takeovers Panel

Reasons - Molopo Energy Limited 03R, 04R & 05R [2017] ATP 12

10. On 1 July 2016, Keybridge filed a substantial shareholder notice advising that its relevant interest in Molopo had reduced to 18.48% as a result of the sale of Aurora.⁸⁸
11. On 10 August 2016, Mr Patton was appointed as a non-executive director of Keybridge, nominated by ASG.
12. On 20 September 2016, Keybridge filed a substantial holder notice stating that it had acquired 1,682,763 Molopo shares and had voting power of 19.15% in Molopo.
13. On 13 October 2016, Mr Patton was appointed Chairman of the Keybridge board and engaged in a part time executive role.
14. On 14 October 2016, Mr Bolton was appointed as a consultant to Keybridge to provide Keybridge with advice and assistance in relation to its investments, including in Molopo.
15. From 7 October 2016, Aurora acquired shares in Molopo.⁸⁹ While Mr Patton received daily reports setting out the number of shares held by the Aurora funds at each trading day, he did not become aware that Aurora's portfolio manager had commenced buying Molopo shares until "*later in October 2016*". By 31 October 2016, Aurora's total interest had increased to approximately 3.5% of Molopo's issued capital.
16. On 26 October 2016, Keybridge held a strategy meeting at which both Mr Bolton and Mr Patton were in attendance and where Keybridge's strategy in relation to acquisitions and disposals of Molopo shares and representation on the Molopo board was discussed.
17. In early November 2016, at Mr Patton's request, an investment paper was prepared and sent to Aurora's board members proposing that Aurora "*move to a 19.99% as a balance of power stake, seek board representation*".
18. On 1 December 2016, Aurora lodged a notice of initial substantial holder disclosing that it had voting power of 9.75% in Molopo.
19. Aurora continued to acquire shares in Molopo through to 21 March 2017, resulting in its then relevant interest in 17.92% of Molopo's issued capital.
20. On 13 March 2017, Keybridge requisitioned a meeting of Molopo shareholders under section 249D⁹⁰ to consider resolutions for the removal of all the directors of Molopo and the appointment of three new directors nominated by Keybridge.
21. On 22 March 2017, Mr Patton on behalf of Aurora wrote to the Chair of Molopo indicating that Aurora would seek to nominate one or more persons for election to the Molopo board. Aurora ultimately nominated one director.⁹¹

⁸⁸ Keybridge disclosed voting power in Molopo of 18.48% (netting the disposal and recent purchases of 1,704,222 shares)

⁸⁹ Aurora had previously acquired 418,385 Molopo shares on or about 20 July 2016 as a result of the unwinding of an equity derivative

⁹⁰ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

Takeovers Panel

Reasons - Molopo Energy Limited 03R, 04R & 05R [2017] ATP 12

22. Mr Bolton plays a significant role in the affairs of Keybridge and Aurora. Mr Bolton provides advice to both Keybridge and Aurora. He has knowledge of, and the capacity to influence substantively, the investment strategies of both Keybridge and Aurora in relation to Molopo. He has used this capacity to influence or orchestrate strategies and actions at Keybridge and Aurora that have as their ultimate aim control of Molopo and access to Molopo's cash. The boards of directors of Keybridge and Aurora were aware of this and agreed to, or at least acquiesced in, those strategies and actions.
23. Accordingly, the Panel considers that, by no later than 26 October 2016, Keybridge and Aurora:
- (a) have, or propose to enter into, a relevant agreement for the purpose of controlling or influencing the composition of the board of Molopo or the conduct of Molopo's affairs and are associated with each other under section 12(2)(b) or
 - (b) are acting, or propose to act, in concert in relation to the affairs of Molopo and are associated with each other under section 12(2)(c).
24. Further or in the alternative to association, the Panel considers the actions of Mr Bolton and Mr Patton, combined with the material financial interests each had in Keybridge and Aurora, and the influence that each exerted over Aurora and to an extent over Keybridge, gives rise to a control effect in Molopo that is otherwise unacceptable from no later than 10 August 2016. For example:
- (a) In addition to Mr Bolton's substantial influence over the investment strategies of each of Keybridge and Aurora in relation to Molopo, he has at least substantial influence over ASG, Keybridge's largest shareholder.
 - (b) Mr Patton is conflicted in his role at Keybridge in relation to the acquisition or use of Molopo shares given his role at Aurora. Information barriers established in Keybridge to address such conflicts were established late and have not been fully effective.
 - (c) Despite Mr Patton being fully appraised of Keybridge's strategy in relation to Molopo, there is no evidence of Aurora establishing an information barrier when it embarked on its strategy for Molopo.

Contraventions of section 606

25. Immediately prior to 26 October 2016, the aggregate voting power of each of Keybridge and Aurora in Molopo shares was 22.49%.
26. Each acquisition of Molopo shares by Keybridge and Aurora occurring on or after 26 October 2016 has resulted in a contravention of section 606 with the voting power of each of Keybridge and Aurora increasing with each acquisition from a starting point that is above 20% and below 90%. None of the exceptions in section 611 applied.

⁹¹ On 20 June 2017, at the annual general meeting where the resolutions to change the board were considered, none of the resolutions seeking the removal of the existing directors or the appointment of Keybridge and Aurora nominees were passed

Takeovers Panel

Reasons - Molopo Energy Limited 03R, 04R & 05R [2017] ATP 12

Contraventions of section 671B

27. Since 26 October 2016, Keybridge and Aurora have failed to lodge notices of change in substantial holding disclosing their association in contravention of section 671B.

EFFECT

28. It appears to the Panel that the acquisition of control over voting shares in Molopo has not taken place in an efficient, competitive and informed market and the holders of shares in Molopo do not know the identity of persons who have acquired a substantial interest in Molopo.

CONCLUSION

29. It appears to the Panel that the circumstances are unacceptable circumstances:
- (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on the control, or potential control, of Molopo
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602
 - (c) in the further alternative, because they:
 - (i) constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6 or 6C or
 - (ii) gave or give rise to, or will or are likely to give rise to, a contravention of a provision of Chapter 6 or 6C.
30. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Molopo.

Bruce Dyer
Counsel
with authority of Ian Jackman SC
President of the sitting Panel
Dated 30 June 2017



Australian Government

Takeovers Panel

Annexure E

**CORPORATIONS ACT
SECTION 657D
ORDERS**

MOLOPO ENERGY LIMITED 03R, 04R & 05R

The Panel made a declaration of unacceptable circumstances on 30 June 2017.

DIVESTMENT ORDERS

1. The Sale Shares are vested in the Commonwealth on trust for Keybridge and Aurora respectively.
2. ASIC must:
 - (a) sell the Sale Shares in accordance with these orders and
 - (b) account to Keybridge and Aurora respectively for the proceeds of sale, net of the costs, fees and expenses of the sale and any costs, fees and expenses incurred by ASIC and the Commonwealth (if any).
3. ASIC must:
 - (a) retain an Appointed Seller to conduct the sale and
 - (b) instruct the Appointed Seller:
 - (i) to use the most appropriate sale method to secure the best available sale price for the Sale Shares that is reasonably available at that time in the context of complying with these orders, including the stipulated timeframe for the sale and the requirement that none of the Associated Parties or their respective associates may acquire, directly or indirectly, any of the Sale Shares
 - (ii) to provide to ASIC a statutory declaration that, having made proper inquiries, the Appointed Seller is not aware of any interest, past, present, or prospective which could conflict with the proper performance of the Appointed Seller's functions in relation to the disposal of the Sale Shares
 - (iii) unless the Appointed Seller sells Sale Shares on market, that it obtain from any prospective purchaser of Sale Shares a statutory declaration that the prospective purchaser is not associated with any of the Associated Parties and
 - (iv) to dispose of all of the Sale Shares within six months from the date of its engagement.

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4. The Company and the Associated Parties must do all things necessary to give effect to these orders, including:
 - (a) doing whatever is necessary to ensure that the Commonwealth is registered with title to the Sale Shares in the form approved by ASIC and
 - (b) until the Commonwealth is registered, complying with any request by ASIC in relation to the Sale Shares.
5. None of the Associated Parties or their respective associates may, directly or indirectly, acquire any of the Sale Shares.
6. None of the Associated Parties or their respective associates may dispose of, transfer or charge any Sale Shares otherwise than in accordance with these orders.
7. None of the Associated Parties or their respective associates may vote any Sale Shares.
8. Nothing in these orders obliges ASIC to invest, or ensure interest accrues on, any money held in trust under these orders.

ACQUISITION RESTRICTION ORDERS

9. None of the Associated Parties or their respective associates may, directly or indirectly, acquire any shares in the Company before the date that is six months after the date of these orders.
10. From the end of the period referred to in order 9, none of the Associated Parties or their respective associates may take into account any relevant interest or voting power that any of the Associated Parties or their respective associates had, or have had, in the Sale Shares when calculating the voting power referred to in Item 9(b) of s611 of the Corporations Act 2001 (Cth), of a person six months before an acquisition exempted under Item 9 of s611.

DISCLOSURE ORDER

11. Within 2 business days after the date of these orders, the Associated Parties must disclose, in the form of a substantial holder notice, as approved by the Panel:
 - (a) that the Associated Parties became associated in relation to the Company by no later than 26 October 2016 and their current holdings in the Company
 - (b) the name of each associate who has a relevant interest in voting shares in the Company
 - (c) the nature of their association
 - (d) details of any relevant agreement through which they have a relevant interest in shares in the Company and
 - (e) all transactions undertaken during the period covered by the disclosure.

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Interpretation

12. In these orders the following terms apply.

Appointed Seller	an investment bank or stock broker
ASIC	Australian Securities and Investments Commission, as agent of the Commonwealth
Associated Parties	Keybridge and Aurora
Aurora	Aurora Funds Management Ltd, including as responsible entity for the Aurora Fortitude Absolute Return Fund and Aurora Global Income Trust
Company	Molopo Energy Limited
Keybridge on market	Keybridge Capital Limited in the ordinary course of trading on Australian Securities Exchange and not by crossing or special crossing
Sale Shares	3,666,285 ordinary shares in the issued capital of Company held by Keybridge 39,540,910 ordinary shares in the issued capital of Company held by Aurora

Bruce Dyer
Counsel
with authority of Ian Jackman SC
President of the sitting Panel
Dated 7 July 2017