

THE MOLOPO DECISION AND THE IMPACT OF OUR TAKEOVER RULES ON COLLECTIVE SHAREHOLDER ACTIVITY

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Legal Briefings - By **Adam Charles**

In two recent Takeovers Panel decisions, the Panel has given important reminders as to the reach of our rules on collective shareholder behaviour. As Australian shareholder activism continues to emerge, both Australian corporates and shareholders that are approached to collaborate in activist campaigns (including super funds), need to understand the rules.

IN BRIEF

- Shareholder activists are known for their collaboration;
- Our takeover rules can be important limitations on collective activist activity.
- The Takeovers Panel decisions in *Molopo Energy Limited 01 & 02* [2017] ATP 10 and *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12 are important reminders of how these rules operate.

BACKGROUND

Shareholder activists are known for their collaboration.

We have previously predicted that, as part of the continuing emergence of activism in the Australian market, foreign activists will look to local shareholders for support (please see: [Australian Shareholder Activism Is Taking Off](#)).

Our takeover rules can be important limitations on the extent to which activists can achieve their objectives in collaboration with other shareholders.

Australian corporates, from small-cap pharma and biotech innovators through to blue-chips, as well as shareholders, need to understand how these rules protect them.

In addition, with AU\$355 billion of super funds invested in Australian listed equities and a number of super funds having been front and centre in activist scenarios recently, this is an important issue for the superannuation sector to navigate. (APRA September quarter 2017).

LIMITATIONS ON COLLECTIVE ACTION

The Australian regulatory regime is conducive to activism. However, the regulation of collective action under our takeover rules represents an important defence for corporates and a potentially material risk for shareholders approached by activists to collaborate in a campaign.

Collective action between shareholders can cause them to become “associates”, or acquire a “relevant interest” in the securities held by the others, and thereby have their interests aggregated for the purposes of our takeover rules.

This may cause the shareholders to:

- have a “substantial holding” of 5% or more that must be disclosed to the market;
- risk a breach of our 20% cap on collective voting power; or
- risk the Takeovers Panel declaring that the circumstances are unacceptable (even where there has been no technical breach of the law) if the collective action has an effect on control or is inconsistent with the principles underlying our takeover rules.

MOLOPO ENERGY LIMITED 01 & 02 - INITIAL PANEL PROCEEDINGS

The long-running scenario in relation to Molopo Energy and two substantial shareholders, Keybridge Capital Limited and Aurora Funds Management Limited, is highly complex and has resulted in a number of Panel proceedings.

Molopo Energy Limited 01 & 02 concerned an application by ASIC and Molopo for a declaration of unacceptable circumstances in relation to the relationship between the two shareholders.

The roles of Mr Nicholas Bolton and Mr John Patton in the decision-making of both shareholders was significant.

The Panel found that:

- Mr Bolton was the largest unit holder in the vehicle that owns Aurora, and effectively controlled or had substantial influence over the relevant affairs of Aurora.
- Mr Bolton effectively controlled or had substantial influence over the relevant affairs of Keybridge's largest shareholder, Australian Style Group Pty Limited (ASG).
- Mr Bolton had significant knowledge of, and the capacity significantly to influence, the investment strategies of both Keybridge and Aurora in relation to Molopo.
- Mr Patton, who is a director of Aurora and the executive chairman of Keybridge and ASG's nominee director on the board of Keybridge, was conflicted in his role at Keybridge in relation to the acquisition and use of Molopo shares. Information barriers established in Keybridge to address conflicts were established late and were not fully effective.

The Panel determined that, on balance, an association had not arisen. This meant that Keybridge's and Aurora's shareholdings (19.95% and 17.92%, respectively) were not aggregated for the purposes of applying our 20% voting power cap.

Notwithstanding this, the Panel determined that the relationship between Keybridge and Aurora gave rise to unacceptable circumstances because of the effect on control (or potential control) of Molopo.

The Panel ordered that Molopo shares acquired by Keybridge and Aurora in the period since the unacceptable circumstances first arose be compulsorily divested (in addition to Keybridge and Aurora not being permitted to vote their respective shares at Molopo's upcoming AGM).

MOLOPO ENERGY LIMITED 03R, 04R & 05R - REVIEW PANEL PROCEEDINGS

In *Molopo Energy Limited 03R, 04R & 05R*, a review Panel considered an application by Molopo for review of the initial Panel's decision.

Molopo successfully argued that the initial Panel ought to have found an association between Keybridge and Aurora.

The review Panel inferred a consensus between the parties having regard to the cumulative effect of the material presented. The Panel found that the shareholders were associates on the basis that they had embarked on parallel conduct, which each was aware of or understood the other was engaging in, to achieve their shared objectives in relation to Molopo.

The review Panel agreed with the initial Panel's order for the divestment of the relevant shares. In addition, the review Panel made a 'standstill order' preventing Keybridge and Aurora from acquiring Molopo shares for a 6 month period.

COMMENT

Taken together, the Molopo decisions demonstrate the robustness of our takeover rules:

- **No breach required:** Historically, the Panel has been willing to determine that unacceptable circumstances have arisen in relation to relationships in the absence of association (*Online Advantage Ltd* [2002] ATP 14 and *Anaconda Nickel Ltd (No 16 - 17)* [2003] ATP 15). Whilst it is arguable that, more recently, the Panel has moved away from this approach on occasion (*Touch Holdings Ltd* [2013] ATP 3), the *Molopo Energy* decisions serve as an important reminder that shareholders must always comply with the fundamental principles underlying our takeover rules when acting collectively, not just the technical rules. The divesture and standstill orders highlight this risk.
- **Reliance on inferences:** Determining that an association has arisen can be very difficult. It often requires drawing inferences from patterns of behaviour, commercial logic and other evidence suggestive of association (*Anaconda Nickel Limited 15* [2003] ATP 17). *Molopo Energy Limited 03R, 04R & 05R* demonstrates that the Panel can and will draw inferences. Shareholders need to apply a critical eye to how relationships may appear from the outside.

As activism continues to grow in the Australian market, Australian corporates, along with super funds and potential recipients of approaches to collaborate in activist campaigns, should be mindful of the impact of the takeover rules.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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