



In the matter of Coopers Brewery Limited 01
[2005] ATP 18

Catchwords:

Eggleston principles - material omission - piece-meal communications - communications may confuse target shareholders - misleading announcements to the market - application dismissed - Pre-Emptive Rights Regime - "fair value" determined by auditor - clarifying letter to target shareholders - joint letter between bidder and target - not including additional matters in current application - Articles of Association - undertaking not to contact target shareholders - pre-bid agreements -

Coopers Brewery Limited; Lion Nathan Ltd; Lion Nathan Australia Pty Ltd

Corporations Act (Cth) 2001 - section 657A

Breakfree 04

These are the Panel's reasons for concluding proceedings without making a declaration of unacceptable circumstances or orders as a result of Lion Nathan Limited undertaking to deliver a letter to each Coopers Brewery Limited shareholder explaining, as far as practicable, the operation of the pre-emptive rights regime set out in the Coopers Articles of Association as it may operate in the context of the Lion Nathan Australian Pty Limited proposed takeover offer for Coopers. Lion Nathan also undertook not to contact a Coopers shareholder in relation to a matter that is directly related to Lion Nathan Australia's takeover offer and/or the transfer of shares from that shareholder (including under the pre-emptive rights regime) and the "fair value" mechanism unless and until that Coopers shareholder has received a copy of that letter. Coopers declined the Panel's invitation to give similar undertakings to participate in drafting the letter and send it jointly to its shareholders.

THE PROCEEDINGS

1. These reasons relate to an application (**Application**) to the Panel from Coopers Brewery Limited (**Coopers**) on 1 September 2005 under section 657C of the Corporations Act (*Cth*) 2001¹ in relation to a letter sent from Lion Nathan Limited (**LNL**) dated 1 September 2005 to Coopers' shareholders announcing a proposed off-market takeover offer (**Lion Nathan Offer**) of Coopers by Lion Nathan Australia Pty Limited (**LNA**). Coopers applied to the Panel for a declaration of unacceptable circumstances and final orders.

THE PANEL & PROCESS

2. The President of the Panel appointed Braddon Jolley (sitting President), Elizabeth Alexander (sitting Deputy President) and Susan Doyle as the sitting Panel (**Panel**) for the proceedings (**Proceedings**) arising from the Application.
3. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.

¹ Unless otherwise stated, all section references in these reasons are to sections of the Corporations Act.

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4. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

SUMMARY

Coopers

5. Coopers is an unlisted Australian public company limited by shares. It is based in South Australia and has approximately 117 shareholders. Its primary activity is the production, marketing and distribution of beer.

Lion Nathan

6. LNL is a company listed on Australian Stock Exchange Ltd and New Zealand Exchange Limited. It is an alcohol beverages company with operations in Australia and New Zealand. LNA is a wholly owned subsidiary of LNL.

Coopers' Articles of Association

7. Coopers' Articles of Association contain a complex and detailed pre-emptive rights regime (**Pre-emptive Rights Regime**) which applies when a Coopers' shareholder wishes to "transfer" his/her shares to a person other than the shareholder's relative. "Transfer" is defined broadly and would include accepting a takeover offer. The Pre-emptive Rights Regime is set out in Articles 38 to 53.²
8. Where the Pre-emptive Rights Regime applies, existing Coopers' shareholders (and their relatives) have the first pre-emptive right over any Coopers' shares to be transferred, the trustee(s) of the Coopers' employees' superannuation fund or funds have the second pre-emptive right and LNA currently has the third pre-emptive right.³
9. The Coopers board is required to seek Coopers shareholders willing to acquire the shares under the first pre-emptive right, and after 28 days must offer any residual shares to the superannuation funds and after a further 28 days must offer any still remaining shares to Lion Nathan. If any shares are still remaining, they may be sold to the buyer nominated by the original selling shareholder.
10. A person exercising their rights under the Pre-Emptive Rights Regime has the right to require that the sale price be at a "fair value" determined by the auditor of Coopers, acting as an expert.

Background

11. On 23 August 2005, Coopers sent a letter to all its shareholders ("**Coopers 23 August Letter**") advising them that:

² A copy of Articles 38 to 53 are attached as Annexure A of the reasons.

³ The Panel was made aware that the Supreme Court of South Australia had handed down a decision on 2 September 2005 in relation to entrenchment of the third pre-emptive right and that LNA had lodged an appeal in relation to that decision.

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- (a) it had recently been approached by Lion Nathan with regard to a potential joint venture under which all of the Coopers brands and Lion Nathan's South Australian brands would be combined in a 50/50 joint venture. The Coopers 23 August Letter stated that the board had rejected Lion Nathan's joint venture proposal;
 - (b) Lion Nathan had also indicated to Coopers it would be willing to acquire all or some of the shares in Coopers, on the assumption of an agreed transaction that was fully supported and unanimously recommended by the Coopers' board at a total price of \$360 million, if Lion Nathan obtained 100% ownership of Coopers, or \$305 million, if less than 100% ownership was obtained. The Coopers 23 August Letter also stated that the Coopers' board had rejected the Lion Nathan proposal; and
 - (c) if any shareholder accepted an offer from Lion Nathan, the acceptance would be subject to the Pre-emptive Rights Regime. The Coopers 23 August Letter stated that under that regime, the Coopers board would be required "to endeavour to find" a purchaser or purchasers of the relevant shares from the vendor's fellow Coopers' shareholders first. Any shareholder wishing to purchase those shares could require the shares to be valued by Coopers' auditors on a "fair value" basis. This value may be different from the price offered under the Lion Nathan Offer. There was no further discussion of the Pre-emptive Rights Regime.
12. On 1 September 2005, Lion Nathan announced via a press release that LNA intended to make an off-market takeover offer for Coopers at \$260 in cash per share (**1 September Press Release**). The 1 September Press Release included a reference to the Pre-emptive Rights Regime, in particular the third pre-emptive right which LNA currently held, but did not address the "fair value" provisions of the Pre-emptive Rights Regime. It also stated that Lion Nathan had received a number of unsolicited approaches from Coopers shareholders and had, as a result, secured and lodged with Coopers a transfer notice from a shareholder who wanted to sell his/her Coopers shares at \$260 per share, subject to the operation of the Pre-emptive Rights Regime.

The Lion Nathan 1 September Letter

13. On 1 September 2005, Lion Nathan also sent out a letter to Coopers' shareholders ("**Lion Nathan 1 September Letter**"). The Lion Nathan 1 September Letter informed each shareholder that LNA was making an offer to all Coopers shareholders to acquire shares at \$260 per share in cash. The Lion Nathan 1 September Letter stated that the offer of \$260 per share was almost six times the \$45.01 per share offered by Coopers in the 2003 share buy-back. As a result, Lion Nathan said, the Lion Nathan Offer gave shareholders "a rare opportunity to sell some or all of your shares at a demonstrably fair value". The letter did not mention that the Lion Nathan Offer was subject to the operation of the Pre-emptive Rights Regime and

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that, as a result, a Coopers shareholder who accepted the Lion Nathan Offer could end up selling their shares to a person other than LNA and at a price different to the offer price. The Lion Nathan 1 September Letter did refer to the fact that LNA had a third tier pre-emptive right under the Coopers Articles of Association but there were no other comments in relation to the Pre-emptive Rights Regime. The Lion Nathan 1 September Letter did, however, attach the 1 September Press Release.

APPLICATION

14. Under section 657A(1), Coopers sought a declaration that Lion Nathan's conduct constituted unacceptable circumstances.
15. The Application alleged the following in relation to the Lion Nathan 1 September Letter:
 - (a) the Lion Nathan 1 September Letter was misleading or deceptive as it did not adequately explain that as a result of the Pre-emptive Rights Regime, shareholders who wished to accept the Lion Nathan Offer could not do so without following the Pre-emptive Rights Regime and, as a result, such shareholders may wind up selling to a person other than LNA and may receive a price other than, and possibly less than, the price offered by LNA under the Lion Nathan Offer; and
 - (b) the recipients of the Lion Nathan 1 September Letter did not have the information necessary to make an informed decision regarding the contents of the Lion Nathan 1 September Letter and had, as a result, been misled by Lion Nathan about the Lion Nathan Offer.

Final orders sought in the Application

16. Coopers sought orders that:
 - (a) Lion Nathan write a letter of correction ("**Corrective Letter**"), as soon as practicable to every shareholder of Coopers advising them:
 - (i) that the Corrective Letter was prepared and circulated as a result of a declaration of unacceptable circumstances made by the Panel in relation to the affairs of Coopers and an order requiring the correction of statements made by Lion Nathan in the Lion Nathan 1 September Letter;
 - (ii) of the Pre-emptive Rights Regime together with a warning that the fair value set under Pre-emptive Rights Regime may be lower than the \$260 to be offered by Lion Nathan;
 - (b) the Corrective Letter was not to deal with any other matter and, specifically was not to make any recommendation about, or comment on, the Lion Nathan Offer;
 - (c) the Corrective Letter was not to be accompanied by any other document;

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- (d) Lion Nathan was to give the Panel a final draft of the Corrective Letter not less than one business day before it is sent to Coopers' shareholders and not send the Corrective Letter in purported compliance until the Panel has informed Lion Nathan that the form of the Corrective Letter was considered by the Panel to be appropriate;
- (e) Lion Nathan was not to contact Coopers' shareholders until the Corrective Letter had been received by them;
- (f) Lion Nathan was to refrain from making any statements (including, without limitation, statements to and in the media and statements to shareholders) that refer to, are based upon or in any way draw attention to the Lion Nathan 1 September Letter;
- (g) such further or other orders as the Panel considered appropriate; and
- (h) Lion Nathan was to pay Cooper's costs of, and associated with, making the application.

DISCUSSION

17. The Application alleged that the Lion Nathan 1 September Letter did not adequately explain that, as a result of the Pre-Emptive Rights Regime, Coopers' shareholders who wished to accept the Lion Nathan Offer, or otherwise sell, transfer or dispose of their Coopers shares, could not do so without following the Pre-emptive Rights Regime, and did not explain that as a result of the "fair value" mechanism set out in the regime, such shareholders may receive a price other than, and possibly less than, the price offered by LNA under its Offer.
18. The Panel was concerned that before any of the formal documents relating to the Lion Nathan Offer had been issued Coopers' shareholders may have been confused by communications they had received as to the operation of the Pre-emptive Rights Regime. The Panel was concerned that the communications which had been provided to it did not, even when taken together as a whole, provide Coopers shareholders with a clear description of the Pre-Emptive Rights Regime and the implications of the Pre-Emptive Rights Regime for Coopers shareholders generally and specifically in relation to the Lion Nathan Offer. This concern was heightened by the piece-meal nature of the information being provided to Coopers shareholders on the Pre-Emptive Rights Regime.
19. The Panel was also concerned by the fact of pre-bid agreements being entered into by Lion Nathan with certain Coopers' shareholders prior to the lodgement of its bidder's statement. The Panel wanted to ensure that any agreements entered into before the lodgement of the bidder's and target's statements take place in an efficient, competitive and *informed* market.
20. The effect on a member of misunderstanding the effect of the Pre-emptive Rights Regime could be severe. By agreeing to sell shares to Lion Nathan at one price, a member may start a chain of events which results in the shares being purchased under the Pre-emptive Rights Regime for a price which

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could be lower by an amount that the member could not predict. Once a transfer notice has been given, the member has no right to withdraw it or prevent the shares being sold (unless the directors of Coopers agree). Since the average value of each member's holding in Coopers at the bid price is about \$3 million, the amounts involved may be substantial. By characterising its bid as an opportunity for Coopers shareholders to sell their shares at \$260 without adequately indicating this pitfall, Lion Nathan's letter may have misled them.

21. The Panel advised parties that it considered that the best way of resolving this matter was for both Lion Nathan and Coopers to prepare a letter for Coopers' shareholders which clearly explained the manner in which the Pre-emptive Rights Regime operates and its potential effect on the Lion Nathan Offer, both in terms of price and timing. In saying this, the Panel accepted parties' advice that there may be differences between the parties over interpretation of the operation of the Pre-Emptive Rights Regime. The Panel considered that those differences could be flagged to show Coopers shareholders where uncertainty over the operation of the Pre-Emptive Rights Regime lay.
22. The Panel considered that it would be best for Coopers' shareholders for both parties to undertake not to correspond with Coopers' shareholders, or meet them by telephone or in person until the joint letter had been sent out to all Coopers' shareholder.
23. Lion Nathan agreed to send out a joint letter to Coopers' shareholders and to give the undertaking. On that basis, the Panel declined the Application. The board of Coopers advised the Panel that it considered it was inappropriate for it to issue a joint letter with a bidder whose bid the Coopers board is not recommending and it did not think it could agree a form of words as to how the Pre-Emptive Rights Regime may operate in relation to the Lion Nathan Offer. The board of Coopers declined to send a joint letter and declined to give the undertaking as to contacting Coopers shareholders prior to them receiving the letter.
24. Lion Nathan prepared a draft letter which dealt with the above issues, which the Panel reviewed. Coopers was also given the opportunity to comment on that letter. The letter was sent to all Coopers' shareholders on Thursday, 22 September 2005. A copy of the letter is attached as Annexure B of the reasons.

OTHER MATTERS

25. The Panel notes that it also received submissions from Coopers regarding the following matters or alleging the following possible contraventions of the Act:
 - (a) the letter sent by Lion Nathan to KPMG regarding the "fair value" determination to be made by KPMG of Coopers' shares;
 - (b) pre-bid "letters of offer" sent by Lion Nathan to certain Coopers' shareholders may have contravened Div 5A of Part 7.9 of the Act;

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- (c) LNX Pty Ltd and ACN 116 149 092 Pty Ltd may have contravened the insider trading provisions of the Act; and
- (d) certain transactions which have been entered into by Lion Nathan and other Coopers' shareholders may result in the bid contravening sections 621(3), 622 or 623 of the Corporations Act.

The Panel considered that the above matters fall outside the issues raised under the current Application, being an allegation of misleading or deceptive statements by Lion Nathan. The Panel noted comments it has previously made in decisions such as *Breakfree 04* as to being willing to expand the scope of Panel proceedings to include related issues and circumstances, but considered that these additional issues raised were sufficiently different to the basic elements of the current application that they should more properly be the subject of separate panel proceedings should any of the parties wish to pursue the relevant matter. The Panel further noted that some of these additional matters appear to fall outside the jurisdiction of the Panel.

DECISION

Declaration and Undertaking

26. The Panel was concerned that before any of the formal documents relating to the Lion Nathan Offer had been issued Coopers' shareholders may have been confused by communications they had received as to the operation of the Pre-emptive Rights Regime. The Panel accepted an undertaking from Lion Nathan to send a letter to Coopers' shareholders explaining, as far as practicable, the operation of the Pre-emptive Rights Regime as it may operate in the context of the Lion Nathan Offer. A copy of that undertaking is attached as Annexure C of the reasons. On that basis, the Panel declined the Application. On 21 September 2005, the Panel announced that, under Regulation 20 of the Australian Securities and Investments Commission Regulations 2001, it had declined to make a declaration of unacceptable circumstances.

Orders

27. As the Panel had made no declaration of unacceptable circumstances, it made no orders as to costs or otherwise.

Effect

28. As a result of the undertaking from Lion Nathan, the Panel did not consider there was any real likelihood made out by Coopers in its Application that the Lion Nathan 1 September Letter of which Coopers complained, had caused unacceptable circumstances having regard to the effect of that letter on:
- (a) the control or potential control of Coopers; or
 - (b) the acquisition, or proposed acquisition, of a substantial interest in Coopers.

Braddon Jolley

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President of the Sitting Panel

Decision dated 21 September 2005

Reasons published 7 October 2005

Annexure A – Articles 38 to 53 of Coopers’ Articles of Association

TRANSFER AND TRANSMISSION OF SHARES

38. Notwithstanding the provision of any other Article including Article 54, the Directors must register any transfer of shares which requires registration and which is expressly permitted by Articles 40-53 or which is made in compliance with such Articles. No member may make any transfer of shares and the Directors must not register any transfers of shares without complying with Articles 40-53.

39. In Articles 38-53, “transfer” includes:-

- (a) sell, assign, offer, dispose of, transfer or deal in any way with any right, title or interest in any share (whether legal or beneficial and whether for valuable consideration or not); and
- (b) to agree to sell, assign, offer, dispose of, transfer or deal in any way with any right, title or interest in any share (whether legal or beneficial and whether for valuable consideration or not); and
- (c) create, declare or allow to be created any trust over any share.

A member shall be entitled to mortgage, charge or otherwise encumber its shares provided that if the person taking the mortgage, charge or encumbrance seeks to become or have some other person become the registered holder of the shares the member will then be deemed to have offered to sell those shares to the other members. In such event that member irrevocably authorised and empowers the Directors and for such purposes appoints the Directors as its agent and attorney to sign a Transfer notice under Article 40 with respect to those shares. The price of those shares will be the value as certified by the Auditor under Article 42.

40. Except where the transfer is made pursuant to Article 53 the person proposing to transfer any share (hereinafter called “the proposing Transferor”) shall give notice in writing (hereinafter called “the Transfer Notice”) to the Company that the proposing Transferor desires to transfer the same. Such Transfer Notice shall specify the sum the proposing Transferor fixes as the fair value and shall constitute the Company agent of the proposing Transferor for the sale of the share to any member of the Company at the price so fixed or at the option of the Purchaser at the fair value to be fixed by the Auditor in accordance with these Articles. A Transfer Notice may include several shares and in such case shall operate as if it were a separate notice in respect of each. A Transfer Notice shall not be revocable except with the sanction of the Directors.

41. The Directors shall on the receipt of such Transfer Notice endeavour to find a member or a Member’s relative of any such member willing to purchase the same and if within the space of 28 days after being served with a Transfer Notice the Directors shall find a member or a Member’s relative of any such member willing to purchase the shares (hereinafter called “the Purchasing Member”) and shall give notice thereof to the proposing Transferor, the proposing Transferor shall be bound upon payment of the price so fixed as aforesaid or the fair value as the case may require to transfer the share to the purchasing member.

42. In case any difference arises between the proposing Transferor and the Purchasing Member as to the fair value of a share, the Auditor shall, on application of either party,

certify in writing the sum which in the Auditor's opinion, is the fair value and such sum shall be deemed to be the fair value and in so certifying the Auditor shall be deemed to be acting as an expert, and not as an arbitrator, and accordingly the Commercial Arbitration Act shall not apply.

43. If in any case the proposing Transferor, after having become bound as aforesaid makes default in transferring the share, the Company may receive the purchase money and shall thereupon cause the name of the Purchasing Member to be entered in the register as the holder of the share and shall hold the purchase money in trust for the proposing Transferor. The receipt of the Company for the purchase money shall be a good discharge to the purchasing member and after the name of the purchasing member has been entered in the register in purported exercise of the aforesaid power the validity of the proceedings shall not be questioned by any person.
44. If there is a Change in Control in any member, that member is deemed to have offered to sell all of its shares to the other members. In such event that member irrevocably authorises and empowers the Directors and for such purposes appoints the Directors as its agent and attorney to serve a Transfer Notice under Article 40 with respect to the shares held by such a member. The price of the shares will be the value as certified by the auditor under Article 42.

For the purposes of this Article, 'Change in Control' means any transfer of any shares or other equity interest in a member or in any entity that directly or indirectly controls or influences the member or any reconstruction, amalgamation or reorganisation of a member or any entity that directly or indirectly controls or influences the member if, after such transaction, there would be a change in the person having the power to direct its management and policies, or if no one person has such power, a change in the majority of such persons who, acting together, have such power or, without limiting the generality of the foregoing, if any person acquires a relevant interest (as that term is defined in the Corporations Law) in 40% or more of the voting shares of the member.

For the purposes of this Article no Change of Control will occur where the person or persons having the power or interest referred to above following the relevant transactions are persons who would be permitted transferees in terms of Article 53 of the person or persons who previously had that power or interest, if such person or persons who previously had that power or interest had been a member or members of the Company.

45. Articles 40 to 46 so far as they give rights to a member to purchase shares in a Transfer Notice, shall not include in relation to a particular Transfer notice a member of the Company that is first registered as a member following the date that such Transfer Notice is given to the Company.
46. If the Company and the Directors do not find a member or a Member's relative willing to purchase all or any of the shares referred to in the Transfer Notice within the 28 day period set out in Article 41 the Company must offer the remaining shares to Australian Mutual Provident Society (ARBN 008 387 371) and to any other trustee of a superannuation fund (of a kind referred to in Regulation 7.12.06 of the Corporations Regulations) in which more than 10% of the employees of the Company are members at that time (the "Institutions") at a price equal to the price at which the shares were offered to the members under Articles 40-43. Such purchase by the Institutions may be made either in their own capacity or as Trustee of the superannuation fund.

47. Within 28 days after notification under Article 46, the Institutions must notify the Company of the number of shares (if any) which it or a wholly owned subsidiary of the Institution desires to purchase. The Company shall give notice thereof to the proposing Transferor, and the proposing Transferor shall be bound upon payment of the price fixed by the Transfer Notice or the fair value as the case may require to transfer the shares to the Institutions or its wholly owned subsidiary.
48. A failure by the Institutions to notify within 28 days is deemed to be notice of an election not to purchase any shares.
49. If the Institutions or a wholly owned subsidiary of the Institutions have not purchased all or any of the shares referred to in the Transfer Notice within the 28 day period referred to in Article 46, the Company must offer the remaining shares to Lion Nathan Australia Pty Limited (ACN 008 596 370) at a price equal to the price at which the shares were offered to the members under Article 40-43.
50. Within 28 days after notification under Article 49, Lion Nathan Australia Pty Limited (ACN 008 596 370) must notify the Company of the number of shares (if any) which it desires to purchase. The Company shall give notice thereof to the proposing Transferor and the proposing Transferor shall be bound upon payment of the price fixed by the Transfer Notice or the fair value as the case may require to transfer the shares to Lion Nathan Australia Pty Limited (ACN 008 596 370).
51. A failure by Lion Nathan Australia Pty Limited (ACN 008 596 370) to notify the Company within 28 days is deemed to be notice of an election not to purchase any shares. The provision of Articles 42 and 43 apply to Articles 49 to 51 and for the purposes of Articles 42 and 43, 'purchasing member' means the Institutions (or its wholly owned subsidiary) or Lion Nathan Australia Pty Limited (ACN 008 596 370) (as the case may be).
52. If the Company shall not within the times set forth in Articles 41, 47 and 50 as the case may require find a person willing to purchase the shares and give notice in the manner aforesaid the proposing transferor shall at any time within three calendar months afterwards be at liberty subject to Article 54 to sell and transfer the shares (or those not placed) to any person at a price no lower and on terms no more advantageous than those offered under Articles 40-51. If there is any inconsistency between Articles 40-51, 54, 125(f), 143 and any other Articles of the Company, the provisions of Articles 40-51, 54, 125(f) and 143 prevail.
53. Any share may be transferred by a member to any Member's relative of that member and any share of a deceased member may be transferred by the executors or administrators of that deceased member to any Member's relative of that deceased member and shares standing in the name of the trustees of the will of any deceased member may be transferred on any change of the trustee to the trustees for the time being of such will and the restrictions in Article 38 shall not apply to any transfer authorised by the Article.

**Annexure B - Undertaking given by Lion Nathan in relation to
Proceedings No: 17/2005**

The Takeovers Panel has discussed with Lion Nathan and Coopers the operation of the Pre-emptive Rights Regime, including the “fair value” mechanism, under the Cooper's Articles of Association.

To ensure that no Coopers shareholder is confused or misled as to the operation of the Pre-emptive Rights Regime and their application to any proposal by a Coopers’ shareholder to transfer any of their Coopers shares, whether pursuant to a takeover offer or otherwise, Lion Nathan has agreed, in consultation with the Takeovers Panel:

1. to deliver to each Coopers shareholders (by whatever means in Lion Nathan’s discretion, including by post, hand delivery and/or electronic means) the attached letter (“Letter”); and
2. not to contact a Coopers shareholder in relation to a matter that is directly related to Lion Nathan Australia’s takeover offer and/or the transfer of shares from that shareholder (including under the Pre-emptive Rights Regime) and the “fair value” mechanism unless and until that Coopers shareholder has received a copy of the Letter. However Lion Nathan (and/or its agent) may contact a Coopers’ shareholder, using a script that has been prepared by Lion Nathan and approved by the Panel, to arrange a meeting at which Lion Nathan (or its agent) will deliver, and/or to deliver, a copy of the Letter to that shareholder.

Once a Cooper’s shareholder has received a copy of the Letter, Lion Nathan may contact that Coopers’ shareholder in relation to Lion Nathan Australia’s takeover offer and/or the transfer of shares from that shareholder (including under the Pre-emptive Rights Regime) and the “fair value” mechanism.

For the avoidance of doubt, Lion Nathan is not precluded by this undertaking from communicating with a Coopers shareholder in relation to a matter that is not related to Lion Nathan Australia’s takeover offer and/or the transfer of shares from that shareholder (including under the Pre-emptive Rights Regime) and the “fair value” mechanism.

Annexure C - Letter sent by Lion Nathan to Coopers shareholder

Proceedings No: 17/2005

[Insert Name]

[Insert Address]

21 September 2005

Dear *[Insert Name]*

Letter from Lion Nathan - Pre-emptive rights regime in Coopers' Articles

We are writing to you with important information for shareholders of Coopers Brewery Limited (“**Coopers**”) relating to the pre-emptive rights provisions (“**Pre-Emptive Rights Regime**”) in Coopers' Articles of Association (“**Coopers' Articles**”) and the “fair value” mechanism under those pre-emptive rights provisions (“**fair value mechanism**”).

The Panel requested that Coopers and Lion Nathan Limited (“**Lion Nathan**”) prepare this letter jointly. Lion Nathan has agreed to the Panel's request. However, Coopers declined the request by the Takeovers Panel for the parties to co-operate and to provide Coopers shareholders with an agreed description of the Pre-Emptive Rights Regime. Coopers advised the Takeovers Panel that it declined because it believed it was inappropriate for it to send a joint letter to its shareholders with a bidder whose bid the Coopers Board is not recommending and it did not think it could agree a form of words as to how the Pre-Emptive Rights Regime may operate in relation to the Lion Nathan Offer.

A copy of the Takeover Panel's media release relating to this matter is enclosed for your information.

You should note that the Lion Nathan Offer may be varied and you should ensure you are aware of its terms from time to time.

BACKGROUND

On 2 September 2005, Coopers made an application to the Takeovers Panel regarding the letter sent by Lion Nathan to Coopers shareholders on 1 September 2005 announcing its intention to make a takeover offer for Coopers (“**Lion Nathan Offer**”). In its application, Coopers complained that that letter was misleading on the basis that it did not adequately explain the effect of the pre-emptive rights provisions in Coopers' Articles and the “fair value” mechanism in the context of the Lion Nathan Offer.

Following its consideration of some of these issues, the Takeovers Panel was concerned that Coopers shareholders may have been confused by communications they had received and wished to ensure that all Coopers shareholders have access to the following information regarding the Pre-Emptive Rights Regime to ensure that Coopers shareholders are fully informed in relation to those provisions in the context of the Lion Nathan Offer.

Lion Nathan will shortly make you an offer and send you a bidder's statement explaining the offer. Coopers will then send you a target's statement which will respond to the matters in Lion Nathan's bidder's statement.

Coopers shareholders should also note that the operation of the Pre-Emptive Rights Regime described in this letter is subject to the outcome of an application by Lion Nathan to the Takeovers Panel dated 9 September 2005 which is challenging the application and operation of the Pre-

Emptive Rights Regime, including the ability of Coopers' auditor to determine that the "fair value" per share is less than \$260 per share under the "fair value" mechanism, in the context of the Lion Nathan Offer. Coopers has opposed the making of the application by Lion Nathan.

PRE-BID AGREEMENTS

Lion Nathan Australia Pty Ltd ("**LNA**") has entered into agreements with certain Coopers shareholders in respect of their Coopers shares. Under these agreements:

- (a) the shareholder agrees to give LNA the right to submit a notice to Coopers, on behalf of that shareholder, informing Coopers of the shareholder's intention to sell their Coopers shares in accordance with the Pre-Emptive Rights Regime (a "**Transfer Notice**");
- (b) LNA agrees unconditionally to pay the relevant shareholder \$260 per share immediately on execution of the agreement with LNA; and
- (c) the shareholder in turn agrees to refund to LNA an amount equal to any amount paid to them for the sale of their Coopers shares (up to \$260 per share).

Those pre-bid agreements are subject to the Pre-Emptive Rights Regime, which is discussed below. Lion Nathan may enter into agreements with other Coopers shareholders who are interested in entering into any such arrangement to give Lion Nathan the opportunity to acquire shares in accordance with Coopers' Articles. This is subject to Lion Nathan:

- (a) not acquiring a relevant interest in 20% or more of Coopers shares; and
- (b) receiving confirmation from the Treasurer that there is no objection to Lion Nathan acquiring more than 14.9% of Coopers.

PRE-EMPTIVE RIGHTS REGIME

Coopers' Articles contain provisions which provide for three tiers of pre-emptive rights. Subject to the terms of Coopers' Articles, any Coopers shareholder proposing to sell or transfer their shares (**Seller**) must give Coopers a Transfer Notice. The Transfer Notice must specify the price at which the Seller proposes to sell⁴ those shares. On receipt of a Transfer Notice, Coopers becomes the agent of the Seller for the purpose of selling the shares. The Seller may not withdraw a Transfer Notice unless the directors of Coopers agree.

First tier pre-emptive rights

Under the "first tier" pre-emptive rights, the directors of Coopers have 28 days after receiving a Transfer Notice to find another Coopers shareholder, or a relative of a Coopers shareholder, willing to purchase the shares ("**Purchasing Member**"). If the directors find a Purchasing Member, the directors will give notice to the Seller, and the Seller must then transfer the relevant shares to the Purchasing Member once the Purchasing Member pays for them. (See the note below regarding "fair value" determination which explains the pricing mechanism)

Second tier pre-emptive rights

If the directors of Coopers do not find a Purchasing Member within 28 days after receiving a Transfer Notice, then under the "second tier" pre-emptive rights, Coopers must offer any remaining shares to:

- (a) Australian Mutual Provident Society, now AMP Limited ("**AMP**"); and
- (b) any other trustee of a superannuation fund in which more than 10% of Coopers' employees are members ("**Superannuation Fund**"),

⁴ In the Coopers Articles, this selling, or asking price, is referred to as the "fair value" which the Seller fixes for the shares, which must be distinguished from the "fair value" which the auditor of Coopers may be required to fix.

at the same price at which those shares were offered to Coopers shareholders under the “first tier” pre-emptive rights. If AMP or the Superannuation Funds offer to buy some or all of those shares within 28 days, the directors will give notice to the Seller, and the Seller must then sell the relevant shares to AMP or the Superannuation Funds.

Third tier pre-emptive rights

If AMP or the Superannuation Funds have not purchased all of the shares within 28 days of being offered them, Coopers must offer the remaining shares to LNA under the “third tier” pre-emptive rights at the same price at which those shares were offered to Coopers shareholders under the “first tier” pre-emptive rights. LNA then has 28 days to offer to buy some or all of those shares. If LNA offers to buy some or all of those shares, the directors will give notice to the Seller, and the Seller must sell the relevant shares to LNA.

If Coopers does not find a person willing to purchase all of the shares referred to in the Transfer Notice under the Pre-Emptive Rights Regime, the Seller will be free, within 3 months and subject to Coopers’ Articles, to sell and transfer the relevant unsold shares to any person at a price no lower, and on terms no better, than those offered under the three tiers of pre-emptive rights.

“Fair Value”

As noted above, the pre-emptive rights provisions in the Coopers' Articles are subject to a “fair value” mechanism. If the Seller and the Purchasing Member disagree as to the “fair value” of a share, either of them may request that Coopers’ auditor (presently KPMG) decides, as an expert, what is the fair value of the shares. While there may be room for different views, Lion Nathan’s view is that the Coopers’ Articles provide that the “fair value” will, at the option of the purchaser of the shares, then become the sale price for the shares.

On 1 September 2005, a Transfer Notice was lodged by Lion Nathan on behalf of a Coopers shareholder. If a purchaser seeks a “fair value” determination in relation to that Transfer Notice any member, whether as a prospective seller or purchaser, should take into account the outcome of this “fair value” determination.

HOW THE PRE-EMPTIVE RIGHTS PROVISIONS WILL WORK IN THE CONTEXT OF THE LION NATHAN OFFER - QUESTIONS AND ANSWERS

1. What price do I get paid?

If you accept the Lion Nathan Offer, LNA will lodge with Coopers a Transfer Notice in respect of your shares on your behalf. The sum that will be set as the selling price, or “fair value”, for your shares in the Transfer Notice will be the Offer Price of \$260 per share.

If your shares are acquired under the “first tier” or “second tier” pre-emptive rights, you may not receive \$260 for your shares if the Purchasing Member does not agree to pay \$260 per share, instead requests a “fair value” determination and Coopers’ auditor then determines a higher or lower “fair value”.

However, as stated above, on receipt of a Transfer Notice, Coopers becomes the agent of the Seller for the purposes of finding a purchaser willing to buy the shares referred to in that Transfer Notice. If a Purchasing Member is willing to pay \$260 per share for your shares, Lion Nathan considers that the Board of Coopers, as agent for the Seller, should choose that Purchasing Member as the purchaser of the shares over another Coopers shareholder or relative of a Coopers shareholder who is not willing to pay \$260 per share.

Coopers has advised the Panel that it considers that the Board of Coopers has a discretion as to whom it seeks to have the shares sold to under the Pre-Emptive Rights Regime and that that discretion does not require it to have the shares sold to a purchasing member who is willing to pay \$260.

If Coopers' auditor is asked to determine the "fair value" of any shares during the period of the Lion Nathan Offer, Lion Nathan would expect that that "fair value" determination would be used for the purpose of any other proposed transfer of Coopers shares during the period of the Lion Nathan Offer. This should also assist in compressing the timetable for any other proposed transfer of Coopers shares.

If your shares are not acquired by anyone with "first tier" or "second tier" pre-emptive rights and accordingly are offered to LNA under the "third tier" pre-emptive rights, LNA will pay you \$260 per share for your shares.

2 When do I get paid?

Pre-bid agreements

LNA has agreed to pay some shareholders \$260 per share immediately on execution of pre-bid agreements with those shareholders as described above. Each agreement gives LNA the right to submit a Transfer Notice on behalf of that shareholder, and gives LNA the opportunity to acquire shares in accordance with Coopers' Articles and the terms of that pre-bid agreement if they are not acquired by another person under the first or second tier pre-emptive rights.

Those shares will then be offered for sale under the Pre-Emptive Rights Regime. Shareholders who enter into a pre-bid agreement with LNA as described above are required to refund to LNA an amount equal to the amount paid to them for their shares up to \$260 per share (whether by LNA or another person) when they receive that payment. However, the relevant shareholders will receive \$260 per share from LNA regardless of the effect of the Pre-Emptive Rights Regime in respect of the proposed transfer of their shares.

Acceptance under the Lion Nathan Offer

If you agree to accept the Lion Nathan Offer the Pre-Emptive Rights Regime will be triggered. If no other person purchases your shares under the first and second tier pre-emptive rights and LNA is offered your shares under the Pre-Emptive Rights Regime, Lion Nathan will send you transfer documents in respect of your shares in accordance with the terms of the Offer.

LNA will pay you, under the Lion Nathan Offer, either:

- (i) within 1 month of LNA receiving your transfer documents, if the Lion Nathan Offer is open and unconditional at the time LNA receives those transfer documents;
- (ii) within 1 month of the Lion Nathan Offer becoming unconditional if LNA receives your transfer documents while the Lion Nathan Offer is still subject to a defeating condition; or
- (iii) within 21 days of LNA receiving your transfer documents, if LNA receives your transfer documents after the end of the Offer Period.

The Pre-emptive Rights Regime means that it may take approximately 56 days from the date that your Transfer Notice is lodged with Coopers for your shares to be offered to Lion Nathan.

The time period could be shorter if all persons entitled to "first tier" or "second tier" pre-emptive rights waive those rights and the Board of Coopers elects to make that offer to Lion Nathan sooner. However, if the person who elects to purchase your shares calls for a fair value determination by the auditor of Coopers, the time period may be longer.

Lion Nathan notes that a Coopers shareholder submitted a Transfer Notice to Coopers on 1 September 2005 and that the 28 day period under the “first tier” pre-emptive rights for those shares will expire on 29 September 2005.

Shares acquired under “first tier” or “second tier” pre-emptive rights

You may receive consideration for your shares earlier than you would otherwise receive that consideration under the Lion Nathan Offer if your shares are bought by someone under the “first tier” or “second tier” pre-emptive rights (i.e. before your shares are offered to LNA under the “third tier” pre-emptive rights). Coopers' Articles are not clear on the timetable for payment where shares are transferred under the “first tier” or “second tier” pre-emptive rights, however, payment is likely to be required within a reasonable period after a purchaser has been identified. This time period may be extended by the need to obtain a “fair value” determination.

3 What effect do the pre-emptive rights have if I enter into a pre-bid agreement with:

(a) Lion Nathan

The pre-emptive rights provisions apply to any pre-bid agreement (as described above) that you may enter into with LNA. Before LNA is entitled to acquire any shares under a pre-bid agreement, a Transfer Notice in respect of those shares will need to be given to Coopers and the Pre-Emptive Rights Regime will operate.

(b) a Coopers shareholder or any other person who is not my relative

The Pre-Emptive Rights Regime will apply to any agreement that you may enter into with another Coopers shareholder or other person who is not your “relative” (as defined in Coopers' Articles) for the transfer of your shares. You will therefore need to lodge a Transfer Notice in respect of those shares that are the subject of that agreement with that other Coopers shareholder or other person and the Pre-emptive Rights Regime will operate before the transfer can take effect.

4. Once I have entered into a pre-bid agreement or accepted the Lion Nathan Offer, can I withdraw from either transaction?

No. The Pre-emptive Rights Regime provides that once a Transfer Notice has been lodged with Coopers on your behalf it is irrevocable except with the consent of the directors of Coopers.

Lion Nathan hopes that the matters set out in this letter have been of assistance to you.

You should await further information as to the operation of the Pre-emptive Rights Regime, including the information that will be set out in Lion Nathan's Bidder's Statement and Coopers' Target's Statement, if you have an interest in accepting the Lion Nathan Offer.

Yours faithfully