



**In the matter of Coopers Brewery Limited 02  
[2005] ATP 19**

**Catchwords:**

*Eggleston principles - communications may confuse target shareholders - misleading statements to shareholders - declined to commence proceedings - Pre-Emptive Rights Regime - "fair value" determined by auditor - Articles of Association - press release - non-public correspondence - premature application - directors' recommendation to reject offer*

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

*Corporations Act (Cth) 2001 - section 657A*

**These are the Panel's reasons for not commencing proceedings following the application by Lion Nathan Limited and Lion Nathan Australia Pty Limited (together "Lion Nathan") for a declaration of unacceptable circumstances in relation to statements made by the Coopers Brewery Limited ("Coopers") board regarding the proposed takeover offer by Lion Nathan Australia Pty Limited for Coopers and its recommendation that Coopers shareholders reject the offer.**

**SUMMARY**

1. The Panel declined to commence proceedings in relation to an application by Lion Nathan (**Application**) concerning statements made by the board of Coopers Brewery Limited regarding the proposed takeover offer for Coopers by Lion Nathan Australia Pty Limited announced on 1 September 2005 (**Lion Nathan Offer**) and the Coopers board's recommendation that Coopers shareholders reject the Lion Nathan Offer.
2. Lion Nathan sought orders requiring corrective disclosure and orders in relation to the operation of the pre-emptive rights regime contained in the Coopers Articles of Association (**Pre-emptive Rights Regime**) and the "fair value" mechanism contained in the Coopers Articles of Association ("**fair value**" mechanism).
3. The Panel considered that:
  - (a) the public statements complained of were not likely to mislead or confuse Coopers shareholders in the way complained of by Lion Nathan;
  - (b) complaints concerning the Coopers board not providing its reasons for its recommendation that Coopers shareholders reject the Lion Nathan Offer were premature; and
  - (c) the Application did not raise any appropriate basis, at the time of the Application at least, for the Panel to pre-emptively set limits on what the "fair value" should be for any shares to be sold by Coopers shareholders under the Pre-Emptive Rights Regime, or on the auditor's determination of the "fair value".
4. The Panel noted that it would be interested in the process under which shares are offered to Coopers shareholders under the Pre-Emptive Rights Regime, as it may affect control of Coopers, or the acquisition of a substantial interest in Coopers.

## THE PROCEEDINGS

### The Panel & Process

5. The President of the Panel appointed Mark Paganin (sitting President), Marian Micalizzi (sitting Deputy President) and Susan Doyle as the sitting Panel (**Panel**) for the proceedings (**Proceedings**) arising from the Application.
6. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
7. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

### Application

8. The Application alleged that the Coopers board had made a number of conflicting statements concerning the Lion Nathan Offer and its interaction with the operation of the Pre-Emptive Rights Regime and the "fair value" mechanism. Lion Nathan submitted that the statements, when considered in combination and prior to the issue of full information in the bidder's statement and target's statement, were misleading and likely to confuse Coopers shareholders as to the value of their shares, or the value which they might receive for their shares.
9. The statements to which Lion Nathan referred included:
  - (a) the press release issued on 6 September 2005 (**6 September Press Release**) in which the Coopers board unanimously recommended that Coopers shareholders reject the Lion Nathan Offer<sup>1</sup>;
  - (b) the 6 September Press Release and a number of statements to the media made by Coopers executives that described the Lion Nathan Offer as "opportunistic";
  - (c) an interview broadcast on the ABC's "Inside Business" programme on 4 September 2005 in which Dr Tim Cooper, Managing Director of Coopers, stated that "some of the directors, if not a majority of the directors would probably be interest in buying" Coopers shares at \$260 per share;
  - (d) a letter from the Coopers board to its shareholders dated 23 August 2005 which states that any purchaser under the Pre-Emptive Rights Regime may purchase Coopers shares at the "fair value" determined by Coopers' auditor, a price which may be different to the price offered under the Lion Nathan Offer<sup>2</sup>; and
  - (e) various letters from the Coopers board to Lion Nathan (**Non-public Correspondence**) in which Coopers responded to the proposals which Lion Nathan had put to Coopers in early August 2005.
10. Furthermore, Lion Nathan also submitted that the 6 September Press Release should have, but did not, disclose the reasons for the recommendation by the Coopers board that Coopers shareholders should reject the Lion Nathan Offer. As a result, Lion Nathan submitted that Coopers shareholders did not have sufficient information to assess the merits of the Lion Nathan Offer.

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<sup>1</sup> A copy of the 6 September Press Release is attached as Annexure A of the reasons.

<sup>2</sup> A copy of this letter is attached as Annexure B of the reasons.

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#### Declaration and orders sought in the Application

11. The Lion Nathan application submitted that the above circumstances constituted unacceptable circumstances. The Application sought a declaration under section 657A of the Corporations Act (*Cth*) 2001<sup>3</sup>.
12. Lion Nathan sought a number of orders, some of which addressed the disclosure issues raised in the Application and some of which addressed the operation of the Pre-emptive Rights Regime and the “fair value” mechanism.
13. The orders Lion Nathan sought were as follows:
  - (a) The “fair value” mechanism in Coopers’ Articles of Association be set aside in the context of the Lion Nathan Offer or, alternatively, that “fair value” as determined under that mechanism may not be less than the offer price in the context of the Lion Nathan Offer.
  - (b) Any offer of shares to Coopers shareholders under the Pre-emptive Rights Regime be undertaken in a manner that was transparent to all members and that provided all members with a reasonable and equal opportunity to participate in any benefits accruing to the members through the proposal, and specifically including the following:
    - (i) the Board of Coopers promptly notify all members of the receipt of any transfer notice under the Pre-emptive Rights Regime and full details of that transfer notice;
    - (ii) priority be given to the members or members’ relatives that were offering to pay the highest price for the shares that were subject of the transfer notice;
    - (iii) where members sought to acquire shares under the Pre-emptive Rights Regime, the shares were allocated pro-rata to those shareholders;
    - (iv) the members were given sufficient time within the 28 day period provided for under the Pre-emptive Rights Regime to properly assess the offer of shares and whether or not to acquire those shares;
    - (v) if any director or officer of Coopers sought to acquire shares under the Pre-emptive Rights Regime the relevant director or officer provide written confirmation that he or she was not in possession of any material price sensitive information relating to Coopers which was not generally available to the public.
  - (c) If the Panel did not order that the “fair value” mechanism be set aside in the context of the Lion Nathan Offer under paragraph 13(a) above, KPMG was required to conclude that “fair value” in the context of the Lion Nathan Offer could not be less than the offer price if KPMG was required to determine fair value for the purposes of the Coopers Articles of Association in the context of the Lion Nathan Offer.
  - (d) Coopers prepare and send a letter of correction as soon as practicable to every shareholder which included the following:

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<sup>3</sup> Statutory references in these reasons, unless otherwise noted, are to provisions of the Corporations Act.

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- (i) a clear explanation of how the Board's recommendation to reject the Lion Nathan Offer was consistent with the statements made that, as a result of the Pre-emptive Rights Regime and the determination of fair value, shareholders who accept the Lion Nathan Offer may not receive the \$260 per share under the Lion Nathan Offer, and may in fact receive significantly less than that amount for their shares;
  - (ii) the intentions of each of the Board members with respect to accepting the Lion Nathan Offer;
  - (iii) whether any or all of the directors intended to acquire further shares under the Pre-emptive Rights Regime if shares are made available under those provisions; and
  - (iv) whether, if any of the directors were offered shares under the Pre-emptive Rights Regime, they intended to invoke the fair value determination.
- (e) Such other orders as the Panel considered appropriate.

#### Request for interim orders

14. On 12 September 2005, Lion Nathan sought interim orders under section 657E of the Corporations Act requiring Coopers to provide to the Panel certain material in the possession of Coopers. The Panel did not make the interim orders as it considered that it did not need the documents to make its decision on commencing proceedings in relation to the primary concerns raised in the Application.

## DISCUSSION

15. Under Regulation 20 of the Australian Securities and Investments Commission Regulations 2001, the Panel declined to commence proceedings in response to the Application.
16. The Panel considered there was no real likelihood made out by Lion Nathan in its Application that the public statements by the Coopers board of which Lion Nathan complained had caused unacceptable circumstances, having regard to the effect of those statements on:
- (a) the control or potential control of Coopers; or
  - (b) the acquisition, or proposed acquisition, of a substantial interest in Coopers.
17. In reaching its determination, the Panel took into account the correspondence complained of which had been received by Coopers shareholders, and media reports which may have been received by them.
18. The Panel did not take into account any of the Non-public Correspondence as it considered that this information (not having been given to Coopers shareholders) could not mislead or confuse Coopers shareholders as to the value of their shares.
19. The reasons for declining to commence proceedings are:
- (a) the public statements that Lion Nathan complained of were not likely to mislead or confuse Coopers shareholders in the way complained of by Lion Nathan;

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- (b) the Panel considered that the Application, in relation to the Coopers board's rejection statement, was premature. The Panel believed that the Coopers board was entitled to reject the Lion Nathan Offer, in its initial statement, without disclosing its reasons for doing so. The Panel considered that the Coopers board was entitled to wait until the Coopers target's statement to detail the reasons for its recommendation of rejection of the Lion Nathan Offer. If Lion Nathan considered that there were matters which needed to be clarified, it was entitled to do so in its bidder's statement, or other communications to Coopers shareholders. If Lion Nathan disagrees with the Coopers board's reasons for recommending rejection of the Lion Nathan Offer it is entitled to communicate this to Coopers shareholders after the Coopers target's statement is given to them. By that time, there would still be at least two weeks or more in which to raise such issues.
  - (c) the Coopers board was entitled to alert Coopers shareholders that the Lion Nathan Offer would be subject to the Pre-emptive Rights Regime and that there was the possibility that under that regime, the auditor may be requested to determine the "fair value" of any shares to be sold and that the auditor's determination of "fair value" may be different to the Offer price; and
  - (d) the Application did not raise any appropriate basis, at the time of the Application at least, for the Panel to pre-emptively set limits on what the "fair value" should be for any shares to be sold by Coopers shareholders under the Pre-Emptive Rights Regime, or on the auditor's determination of the "fair value". This was a matter for the auditor to determine if and when it was required to do so under the Coopers Articles of Association.
20. However, the Panel advised the parties that it would remain interested in the manner in which the Coopers board conducts the Pre-emptive Rights Regime. The Panel considered that the operation of the Pre-Emptive Rights Regime may affect the proposed acquisition of a substantial interest in Coopers and may affect the control or potential control of Coopers. Therefore the Panel considered that the operation of the Pre-Emptive Rights Regime may, in future, come within the Panel's jurisdiction.
21. The Panel noted that Lion Nathan had advised the Panel that it had lodged a Transfer Notice with Coopers on 1 September 2005 on behalf of a Coopers shareholder. On that basis, the time period under the first tier of the Pre-Emptive Rights Regime had been running for three weeks at the time the decision letter was sent to the parties and the Panel was not aware of any advice that the Coopers board had given to Coopers shareholders on the manner in which the Coopers board was proposing to implement the Pre-Emptive Rights Regime in relation to those shares, or shares tendered into the Lion Nathan Offer. The Panel considered it highly likely that Coopers shareholders may currently be interested in receiving from the Coopers board correspondence which described the process under which the Coopers board would seek to find a "Purchasing Member or Members" for those shares under the Pre-emptive Rights Regime.
22. In the orders which it sought under the Application, Lion Nathan asked the Panel to make orders concerning the manner in which the Coopers board implements the Pre-Emptive Rights Regime in relation to the Lion Nathan Offer. The Panel noted that Coopers directors were subject to a fiduciary duty to act in good faith in the best

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interests of the company as a whole and not to use their powers to advantage some shareholders as against others. There was no evidence before the Panel to support the view that the Coopers directors had or may have breached their fiduciary duties in this regard.

## **DECISION**

### **Decline to commence proceedings**

23. For the reasons set out above, the Panel, under Regulation 20 of the Australian Securities and Investments Commission Regulations 2001, declined to commence proceedings in response to the Application.

### **Orders**

24. As the Panel has made no declaration of unacceptable circumstances, it makes no orders as to costs or otherwise.

**Mark Paganin**

**President of the Sitting Panel**

**Decision dated 23 September 2005**

**Reasons published 5 October 2005**

## Annexure A – 6 September Press Release



FOR IMMEDIATE RELEASE

Tuesday September 6, 2005

### **COOPERS REJECTS LION NATHAN OFFER**

The Board of Coopers Brewery Limited (“Coopers”) has unanimously recommended that shareholders reject the opportunistic takeover offer from Lion Nathan.

The Board strongly advises shareholders to take no action in relation to Lion Nathan’s announcement.

A statement from the Coopers Board said the detailed reasons for their recommendation to reject will be set out in the Company’s target’s statement.

For further information contact:

Coopers Brewery Limited

Tim Cooper  
Managing Director  
Tel: (08) 8440 1800

N M Rothschild & Sons (Australia) Limited

Tony Ferguson  
Managing Director  
Tel: 0416 123 678

Tim Russell  
Director  
Tel: 0410 431 001

Strategic Public Relations  
Peter Haynes  
Tel: 0431 862 422

## Annexure B – Coopers Letter to Shareholders dated 23 August 2005



23 August 2005

### **Private & Confidential**

<<salutation>> <<First\_Name>> <<Surname>>  
<<Address\_1>>  
<<Address\_2>>  
<<Suburb>> <<State>> <<PCode>>

Dear <<Dear>>

### **RE: LION NATHAN**

As most of you will be aware Lion Nathan has recently approached Coopers and proposed Coopers enter into a joint venture with Lion Nathan under which all of the Coopers' brands and Lion Nathan's South Australian brands would be combined in a 50/50 joint venture.

For a number of good commercial reasons your Board has rejected Lion Nathan's joint venture proposal. One of the principal reasons is your Board considers a joint venture with Lion Nathan, one of Coopers' main competitors, doesn't make business sense for Coopers.

As an alternative, Lion Nathan indicated it would be willing to acquire shares in Coopers, on the assumption of an agreed transaction fully supported and unanimously recommended by the Board of Coopers at a total price of \$360 million if it obtained 100% ownership of Coopers or \$305 million if less than 100% ownership was obtained. These prices translate into pro-rata share prices of \$260 and \$220 respectively. As a result of discussions with the major shareholders it became clear to the Board that the 100% condition would not be satisfied. As part of the Board's consideration of the lower price proposal, as many shareholders as possible were consulted as to their inclination to sell their shares.

Your Board advises that the overwhelming response from your fellow shareholders has been that they are not considering selling their shares, particularly to Lion Nathan.

Accordingly your Board has rejected Lion Nathan's proposals and has indicated to Lion Nathan that it does not wish to continue any further dialogue on the matter.

However, Lion Nathan may decide to correspond directly with shareholders, either in writing or verbally, and seek to acquire your shares. If this occurs, the Board strongly urges you to do the following:

- Contact Haydn Duffield, Coopers' Company Secretary, on (08) 8440 1860; and

Coopers Brewery Limited  
ABN 13 007 871 409 Incorporating Coopers Fine Foods  
Postal Address PO Box 46 Regency Park SA 5942  
Head Office 461 South Road Regency Park SA 5010  
Telephone 8440 1800 Facsimile 8440 1888 Website [www.coopers.com.au](http://www.coopers.com.au)

Australian Made, Australian Owned  
Coopers Ale, Stout & Lagers – Coopers Home Brew Products – Coopers Malt Extract



- Take no action and make no decision in respect of your shares (until such time as the Board has had an opportunity to give due consideration to any further proposal or offer).

It should also be noted that any shareholder accepting any offer made by Lion Nathan will still be subject to the pre-emptive rights in Cooper's articles such that your Board must endeavour to find a purchaser or purchasers from your fellow shareholders first. Any such purchaser may require that the price of your shares be a fair value as determined by our auditors. This may be different to the price offered to you by Lion Nathan. Should you be interested in acquiring further shares in Coopers, we request that you also contact Haydn Duffield as indicated above to express your interest.

As indicated in our letter of 15 August 2005, your Company's recent performance has been very pleasing and your Board is giving ongoing consideration to dividend levels and capital management alternatives.

We thank you for your continuing support. Should you have any comments or queries, we would welcome a call from you.

Yours sincerely

Tim Cooper  
Managing Director  
Coopers Brewery Ltd