



**In the matter of Coopers Brewery Limited 04
2005 ATP 21**

Catchwords:

Inadequate disclosure of new policy by target directors – time for shareholders to consider corrective disclosure – declined to commence proceedings – Pre-Emptive Rights Regime – Second Supplementary and Corrective Target’s Statement – complainant passed up the opportunity to remedy the complaint

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

Corporations Act (Cth) 2001 – sections 657A; 657C; 657E

Coopers Brewery Limited 03 [2005] ATP 22; Coopers Brewery Limited 01 [2005] ATP 18; Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd [2005] FCA 1426; Lion Nathan Australia Pty Ltd v Coopers Brewery Limited (No 2) [2005] FCA 1666

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 disclosure in the Second Supplementary and Corrective Target’s Statement of Coopers Brewery Limited (“Coopers”) issued on 1 December 2005 (“Second Supplementary and Corrective Target’s Statement”) regarding Coopers new policy concerning withdrawal of transfer notices from the pre-emptive rights regime in the Coopers’ Constitution.

SUMMARY

Declined proceedings

1. The Panel declined to commence proceedings in relation to an application dated 2 December 2005 from Lion Nathan under section 657C of the Corporations Act 2001 (Cth)¹ (the **Application**) concerning disclosure made by Coopers in the Second Supplementary and Corrective Target’s Statement regarding the new policy of the Coopers directors (**Consent Decision**) concerning withdrawal of transfer notices from the operation of the pre-emptive rights regime contained in the Coopers Constitution (**Pre-Emptive Rights Regime**) during the off-market takeover bid for Coopers by Lion Nathan Australia Pty Limited (**Lion Nathan Australia**), a wholly owned subsidiary of Lion Nathan Limited.
2. The Panel considered that the:
 - (a) Second Supplementary and Corrective Target’s Statement did contain adequate disclosure on the Consent Decision; and
 - (b) Coopers’ shareholders had sufficient time to consider the disclosure in the Second Supplementary and Corrective Target’s Statement prior to closing of proxies for and the holding of the Extraordinary General Meeting which was proposed to be reconvened on 7 December 2005 to consider a resolution to

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

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amend the Coopers Constitution to remove all references to Lion Nathan Australia.

BACKGROUND

Disclosure under the Second Supplementary and Corrective Target's Statement

3. In *Coopers Brewery Limited 03* [2005] ATP 22 (**Coopers 03**), Coopers was required to issue to Coopers' shareholders the Second Supplementary and Corrective Target's Statement to correct misleading statements concerning:
 - (a) increases in value of Coopers shares;
 - (b) the control value of Coopers shares; and
 - (c) the value of synergies available to Lion Nathan under its takeover bid for Coopers.
4. In response to the Panel's advice on Sunday, 27 November 2005, to Coopers that it considered that there were materially misleading statements in the original Coopers Target's Statement, Coopers prepared the Second Supplementary and Corrective Target's Statement to address the issues above. Coopers provided a draft to the Panel on Monday 28 November 2005. The Panel met to consider the first draft of the Second Supplementary and Corrective Target's Statement on the morning of Tuesday 29 November 2005 and provided its comments to Coopers that morning. Coopers provided an amended version to the Panel and parties on the afternoon of Tuesday 29 November 2005 addressing the Panel's initial concerns and its comments on the first draft.
5. The other parties provided comments to the Panel by noon on Wednesday 30 November 2005 on the second draft of the Second Supplementary and Corrective Target's Statement. The Panel agreed with some of the comments provided and advised Coopers on the afternoon of 30 November 2005 of the changes that it required to the second draft of the Second Supplementary and Corrective Target's Statement in light of Lion Nathan's comments on the second draft.
6. Coopers provided the third draft of the Second Supplementary and Corrective Target's Statement to the Panel and parties on the afternoon of Wednesday 30 November 2005.
7. The third draft of the Second Supplementary and Corrective Target's Statement included a section setting out the Consent Decision. That section had not been requested by the Panel and had not been included in any previous drafts of the Second Supplementary and Corrective Target's Statement. However, Coopers had indicated in its submissions to the Panel dated 29 November 2005 that the Second Supplementary and Corrective Target's Statement would indicate that the Coopers directors had made the Consent Decision.
8. The Coopers directors said at page 10 of the third draft of the Second Supplementary and Corrective Target's Statement:

"Withdrawal of Transfer Notices

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The Target's Statement noted that once you accept Lion Nathan's Offer by sending a Transfer Notice and Lion Nathan lodges that notice with Coopers, the Transfer Notice will be irrevocable except with the consent of the Directors.

This could result in Shareholders being forced to sell their Shares at a price less than Lion Nathan's Offer Price in circumstances where the Offer does not proceed or if any future determination of Fair Value is less than Lion Nathan's Offer Price.

To eliminate this risk, your Directors now confirm that they will exercise their discretion to allow Shareholders to withdraw any Transfer Notices submitted by them in connection with Lion Nathan's Offer in the event that the Offer lapses or is withdrawn or Fair Value is determined to be less than the Offer Price."

9. Prior to this disclosure in the Second Supplementary and Corrective Target's Statement, the directors of Coopers had emphasised (in the Coopers Target's Statement dated 15 November 2005 and various other statements) the risks of accepting Lion Nathan's offer by reference to the risk that accepting shareholders might be compelled to sell their shares to other members at a price below the Lion Nathan offer price because the directors of Coopers could not guarantee that they would exercise their discretion to allow the accepting shareholders to withdraw from the Pre-Emptive Rights Regime in the event that the Lion Nathan bid lapsed or the "Fair Value" of the sale shares was determined by the Coopers auditor to be less than the Lion Nathan offer price.
10. This risk arose because of the nature of the Pre-Emptive Rights Regime and because the Lion Nathan bid is subject to the Pre-Emptive Rights Regime.
11. In summary, accepting shareholders provide Lion Nathan with a transfer notice. Lion Nathan lodges the transfer notice with Coopers. Once a transfer notice is lodged with Coopers it is subject to the Pre-Emptive Rights Regime and it is irrevocable except with the consent of the directors of Coopers. The decision to give such consent is discretionary. The sale price of the shares that are the subject of the transfer notice may be less than the price asked by the seller because pursuant to the Pre-Emptive Rights Regime the potential buyers may request that "Fair Value" be determined by Coopers' auditor. In the event that the Lion Nathan bid lapsed or was withdrawn, there was an indication that the "Fair Value" would be determined to be lower than the Lion Nathan offer price. Further details of the Pre-emptive Rights Regime are set out in [Coopers Brewery Limited 01 \[2005\] ATP 18](#).

The Constitution EGM and the proposed amendments to the Coopers Constitution

12. On 21 September 2005 (following a requisition by certain shareholders), Coopers sent a Notice of Meeting and Explanatory Memorandum to Coopers shareholders to convene a general meeting of Coopers shareholders to be held on 20 October 2005 to consider a resolution to change Coopers Constitution by removing all references to Lion Nathan Australia in the Coopers Constitution (the **Constitution EGM**). In summary, the resolution would remove a third tier pre-emptive right in favour of Lion Nathan Australia and an exemption from a prohibition on competitors holding shares in Coopers, also in favour of Lion Nathan Australia.

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13. The holding of the Constitution EGM has been restrained by injunctive proceedings² and an interim order in Coopers 03. At the time the decision was made in respect of this Application, the Constitution EGM was proposed to be reconvened for 7 December 2005³.

THE PROCEEDINGS

The Panel & Process

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

Application

17. The Application alleged that the Second Supplementary and Corrective Target's Statement contained inadequate disclosure in respect of the Consent Decision. In that context, Lion Nathan submitted that the:
 - (a) Coopers shareholders required urgent supplementary disclosure to rectify the inadequacy of the disclosure; and
 - (b) Constitution EGM proposed to be held on 7 December 2005 should be postponed for 7 days from the date on which Coopers shareholders receive that supplementary disclosure so that Coopers' shareholders have adequate time to properly consider the supplementary disclosure in the context of the Lion Nathan bid and the Constitution EGM.

Request for interim orders

18. Lion Nathan sought interim orders under section 657E requiring Coopers to be restrained from:
 - (a) holding the Constitution EGM on 7 December 2005; or
 - (b) putting the resolution for the proposed constitutional amendments to the Coopers Constitution to a vote of members at the Constitution EGM on 7 December 2005 (or any meeting of Coopers convened for such purpose),at any time prior to the date which is 7 days after Coopers shareholders receive the supplementary disclosure sought by Lion Nathan in the Application.
19. The Panel did not make the interim orders.

² *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2005] FCA 1426 and *Lion Nathan Australia Pty Ltd v Coopers Brewery Limited (No 2)* [2005] FCA 1666.

³ The Panel in Coopers 03 made interim orders such that the Constitution EGM could not be held on a date occurring prior to 7 December 2005.

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Declaration and orders sought in the Application

20. Lion Nathan submitted that the circumstances described above constituted unacceptable circumstances. The Application sought a declaration under section 657A.
21. Lion Nathan sought a number of orders directed at ensuring that Coopers' shareholders were given adequate disclosure on the Consent Decision and implications for Coopers' shareholders of the Consent Decision and adequate time to consider the significance of the Consent Decision.
22. The orders Lion Nathan sought were as follows:
 - (a) That Coopers prepare a supplementary target's statement which contains a separate and prominent section that:
 - (i) clearly states that the statement is prepared and circulated (and, if considered appropriate by the Panel, that the offer period has been extended) as a result of findings of unacceptable circumstances made by the Panel requiring the correction of statements made by Coopers in the original target's statement;
 - (ii) identifies the statements found by the Panel to be deficient;
 - (iii) states clearly and prominently the deficiencies found by the Panel in those statements;
 - (iv) sets out clearly the accurate information, based on the findings of the Panel; and
 - (v) contains a section setting out the material required by section 650D in order to comply with any order made by the Panel effecting an extension to the offer period.
 - (b) That Coopers give the Panel and Lion Nathan a printer's proof of the supplementary target's statement, showing all art work and design features as well as the relevant text, not less than two business days before it is lodged with ASIC in accordance with section 647 and despatched to shareholders, and may not lodge or send the supplementary target's statement until the Panel has informed Coopers that the form of the supplementary target's statement is considered by the Panel to be appropriate and to comply with this order.
 - (c) Such other orders as the Panel considers appropriate.

DISCUSSION

23. Under Regulation 20 of the Australian Securities and Investments Commission Regulations 2001, the Panel declined to commence proceedings in response to the Application.
24. In reaching its decision, the Panel considered that it had, when contemplating the Coopers 03 proceedings, considered the issues relating to the Consent Decision which Lion Nathan was raising in the Coopers 04 proceedings, namely timing and adequacy of disclosure of the information being provided to Coopers shareholders in

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the Second Supplementary and Corrective Target's Statement. That information included the advice concerning the Consent Decision.

25. On the basis that the cut-off time for proxies for the Constitution EGM was 10.15 a.m. on Tuesday 6 December 2005, and the Constitution EGM was to be held in Adelaide at 10.15 a.m. on Wednesday 7 December 2005, the Panel considered, consistent with its decision in the Coopers 03 proceedings, that the time for shareholders to receive and assess the information would be adequate if:
 - (a) the Second Supplementary and Corrective Target's Statement was dispatched, by Express Post, to Coopers shareholders on Thursday 1 December 2005; and
 - (b) Coopers shareholders received a fresh proxy form with the Second Supplementary and Corrective Target's Statement.
26. Coopers advised the Panel that the Second Supplementary and Corrective Target's Statement and fresh proxy form had been so dispatched. The Panel considered that its considerations in the Coopers 03 proceedings, as to the adequacy of time for Coopers shareholders to consider the information contained in the Second Supplementary and Corrective Target's Statement, were still relevant, and applied to the Coopers 04 Application.
27. In reaching its decision, the Panel also considered that Coopers shareholders would recognise the significance of the Consent Decision in the Second Supplementary and Corrective Target's Statement because:
 - (a) the Second Supplementary and Corrective Target's Statement, in describing the Consent Decision stated that it eliminated the risk of Coopers shareholders being forced to sell their shares at a price less than the Lion Nathan offer price;
 - (b) of the heavy emphasis that the Coopers directors had placed on this risk in their previous statements to Coopers shareholders, prior to the Coopers 03 proceedings and the Second Supplementary and Corrective Target's Statement required by the Panel; and
 - (c) in the covering letter to the Second Supplementary and Corrective Target's Statement, Coopers shareholders were told by the Coopers directors that the Coopers directors acknowledged that the concerns which had been raised by the Panel were serious and that the Coopers directors encouraged their shareholders to read the document carefully.
28. The Panel noted that Lion Nathan had been informed of the intention of Coopers to make the statement concerning the Consent Decision in the Second Supplementary and Corrective Target's Statement in the Coopers 03 proceedings on 29 November 2005. The Panel considered that it had been open to Lion Nathan to prepare a letter to Coopers' shareholders, setting out its views on the implications of the Consent Decision, and to send it on confirmation of the dispatch of the Second Supplementary and Corrective Target's Statement.

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DECISION

Decline to commence proceedings

29. 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

30. As the Panel made no declaration of unacceptable circumstances, it made no orders for costs or otherwise.

Mark Paganin

President of the Sitting Panel

Decision dated 2 December 2005

Reasons published 14 March 2006