Takeovers Panel

Reasons for Decision
Coopers Brewery Limited 03

In the matter of Coopers Brewery Limited 03

[2005] ATP 22

Catchwords:
acting in concert, adequate time for target shareholders to consider additional disclosure, alternative proposal to takeover, associates, assumptions, benefits to directors of retaining office, buy-back, Classes of shares, collateral benefits, comparisons, comparable transactions, control premium, control price, Coopers Constitution, Coopers Brewery Limited, corrective disclosure, directors' consent, EBITDA, effects of buy-back, fair value, forecast, frustrating action, implied price chart, interests of directors differ from those of shareholders, interim order, Lion Nathan Limited, media statements, misleading statements, PE multiples, Pre-Emptive Rights Regime, rival brewer, scattered information, share allocation policy, shareholder consent, synergies, supplementary target's statement, transaction multiples, undertaking, unlisted public company, valuation, voting restriction, withdrawal of transfer notice if bid failed,

Corporations Act 2001 (*Cth*): s606, 657A(2)(a), 657E, 670A,
ASIC Act 2001 s201A
Guidance Note 12 Frustrating Action
Village Roadshow Limited 03 [2004] ATP 22; Coopers Brewery Limited 01 [2005] ATP 18 .

These are the Panel's reasons for concluding proceedings without making a declaration of unacceptable circumstances or final orders. In part the Panel's decision was based on an undertaking by Coopers to give a corrective target's statement to its shareholders correcting a number of misleading statements in Coopers Target's Statement concerning, inter alia the value of Coopers shares. The Panel also noted advice from the Coopers directors concerning a decision to consent to Coopers shareholders withdrawing transfer notices in the event, inter alia, that the Lion Nathan bid lapsed. The Panel declined the part of the application which related to the persons who might vote at the Constitution EGM and the Buy-Back EGM.

SUMMARY

1. These reasons relate to the following:

   (a) the target's statement of Coopers dated 15 November 2005 (**Coopers Target's Statement**);

   (b) the calling of the reconvened Extraordinary General Meeting that was proposed to be held on 29 November 2005 requisitioned by shareholders to consider a resolution to remove all references to Lion Nathan Australia from the Coopers Constitution (**Constitution EGM**);

   (c) the current administration by the Coopers board of the pre-emptive rights regime under the Coopers Constitution;

   (d) recent and prospective acquisitions by the directors of Coopers;

   (e) a proposed equal access buy-back for $260 per share for up to 15% of the shares in Coopers that was announced by Coopers on 7 November 2005 (**Buy-Back**); and

   (f) the calling of an Extraordinary General Meeting that was proposed to be held on 7 December 2005 to approve the Buy Back and to approve a resolution amending the Coopers Constitution to ensure that shares sold under a buy back

are expressly excluded from the operation of the pre-emptive rights regime in the Coopers Constitution (**Buy-Back EGM**).

THE PROCEEDINGS

2. These reasons relate to an application (**Application**) to the Panel from Lion Nathan Limited and Lion Nathan Australia Pty Limited (together **Lion Nathan**) on 21 November 2005 under section 657C of the Corporations Act 2001 (Cth)[1] in relation to the affairs of Coopers Brewery Limited (**Coopers**) 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.

3. Lion Nathan applied for interim orders, a declaration of unacceptable circumstances and final orders.

THE PANEL & PROCESS

4. The President of the Panel appointed Susan Doyle, Marian Micalizzi (sitting Deputy President) and Mark Paganin (sitting President) as the sitting Panel (**Panel**) for the proceedings (**Proceedings**) arising from the Application.

5. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.

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

BACKGROUND

Coopers

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

Lion Nathan

8. Lion Nathan Limited is a company listed on Australian Stock Exchange Limited and New Zealand Stock Exchange Limited. It is an alcohol beverages company with operations in Australia and New Zealand. Lion Nathan Australia is a wholly owned subsidiary of Lion Nathan Limited.

9. On 1 September 2005, Lion Nathan had announced a cash offer of $260 per share for all the shares in Coopers. This followed some discussions earlier in the year which Lion Nathan initiated in relation to a merger or joint-venture proposal, which the Coopers board had rejected.

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

The pre-emptive rights regime

10. The Coopers Constitution contains a complex pre-emptive rights regime (**Pre-Emptive Rights Regime**). The 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

11. At the time of the Proceedings, the Coopers Constitution prohibited a rival brewer from holding shares in Coopers. Article 143 of the Coopers Constitution provided an exception for Lion Nathan Australia and its related bodies corporate, as brewers, to hold shares in Coopers. Lion Nathan's consent was required to remove that provision from the Coopers Constitution, except in the event of a change of control of Lion Nathan. The Supreme Court of South Australia, in September 2005 ruled that a change of control in Lion Nathan had occurred when the Japanese brewer Kirin had acquired 46% of Lion Nathan in 1998.

12. On 21 September 2005 (following a requisition by four shareholders together holding more than 5% of the voting shares in Coopers), Coopers sent a Notice of Meeting and Explanatory Memorandum to Coopers shareholders. The notice was to convene the Constitution EGM, to be held on 20 October 2005, to consider a resolution to change the Coopers Constitution by removing all references to Lion Nathan Australia in the Coopers Constitution. The resolution would remove Lion Nathan Australia's third tier pre-emptive right and delete the exception in article 143 for Lion Nathan Australia and its related bodies corporate.

13. The Constitution EGM had previously been restrained by injunctive proceedings in the Federal Court[2] and following the lifting of that injunction was proposed to be reconvened on 29 November 2005.

14. At the time of the Application, Coopers had convened two other meetings:

    (a) its Annual General Meeting, to be held on 29 November 2005; and

    (b) the Buy-Back EGM, to be held on 7 December 2005, to consider a buy-back of up to 15% of the company at $260 per share.

APPLICATION

Background

15. In the Application, Lion Nathan applied to the Panel for:

    (a) interim orders;

    (b) a declaration of unacceptable circumstances under section 657A; and

    (c) final orders under section 657D,

    in relation to the Coopers Target's Statement, the Constitution EGM, the Buy-Back, the Buy-Back EGM, the management of the pre-emptive rights regime by the Coopers board and recent and prospective acquisitions of the directors of Coopers.

16. In summary, the Application alleged the following:

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[2] *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2005] FCA 1426.

(a) in relation to the Coopers Target's Statement:

(i) that the chart on page 12 of the Coopers Target's Statement (**Implied Price Chart**) was misleading as (amongst other matters):

(A) it was in substance presented as a valuation;

(B) it departed from the range determined by Coopers' independent expert without any disclosure of a reasonable basis for doing so;

(C) it did not clearly disclose that the Implied Price Chart was based on the Coopers directors' forecast EBITDA for the 2005/06 financial year which was inconsistent with normal market practice for the use of historical transaction multiples and did not disclose the risks of achieving the forecasts on which the Implied Price Chart was based;

(D) the Implied Price Chart undertook limited and highly selective comparisons (i.e. the Fosters/Southcorp and San Miguel/James Boags prices) made in circumstances that were qualitatively different to the circumstances applicable to the Lion Nathan Bid for Coopers and no explanation of this was given;

(E) the Implied Price Chart fails to disclose the assumptions underpinning the analysis presented;

(ii) that the statement *"…an Offer Price of more than $360 per Share would be justified"* on page 13 in the Coopers Target's Statement was misleading;

(iii) Coopers had selectively given inappropriate prominence to the Implied Price Chart in various media releases which was misleading as they failed to comment on the independent expert's valuation, which was market practice for a release of this type and appears to have led to the claimed $360 per share value being accepted as a valuation by the press;

(iv) the references to the complicated array of values and prices that may be applicable to Coopers shares in the Coopers Target's Statement were misleading as the Coopers Target's Statement failed to adequately explain the differences between these values and prices and the circumstances in which they might be relevant or applicable to Coopers shares;

(v) the Coopers Target's Statement failed to clearly explain that a "*control value*" will typically incorporate a component of value reflecting synergy benefits and strategic value (that is, these matters are not additional to a "*control value*");

(vi) the disclosure referring to the increase in the value of Coopers shares in the Chairman's letter and on pages 9 (including as depicted in the Value per Share chart) and page 27 of the Coopers Target's Statement was misleading as the clear inference created by this disclosure was that the increase in the value of Coopers' shares from $16.27 per share in 1999 to the present substantially higher range of values and prices referred to in the target's statement had been created solely by the performance of the current Coopers' management;

(vii) the disclosure made in relation to the proposed buy-back and the capital management policy, including any potential future buy-backs, was deficient as it omitted relevant disclosures relating to the risks and limitations in relation to those proposals;

(viii) the references (for example, on page 13 of the Coopers Target's Statement) to the potential value of synergies that may have been available to Lion Nathan being $20 million per annum, and the inferences that this statement was based on or attributable to information and estimates provided by Lion Nathan, were incorrect and misleading. Furthermore, the statement that these synergies would represent an amount equal to $143 per share was misguided and unsupportable;

(b) in relation to the proposed modifications to the Coopers' Constitution that the decision by Coopers' directors to proceed with the convening of the Constitution EGM on 29 November 2005 constituted frustrating action within the meaning of the Panel's Guidance Note 12, since any amendment to the Coopers' Constitution may have triggered a defeating condition (or pre-condition) to the Lion Nathan Bid;

(c) in relation to the Pre-Emptive Rights Regime:

(i) the present administration by the Coopers board of the Pre-Emptive Rights Regime constituted unacceptable circumstances having regard to the effect of the circumstances on the control, or potential control, of Coopers or the acquisition, or proposed acquisition, by Lion Nathan of a substantial interest in Coopers, and it was not consistent with the obligations of the directors as agents and fiduciaries;

(ii) that the Coopers' Target's Statement (at page 79 and elsewhere) stated that any future share transfers at fair value would need to be subject to a separate fair value determination and that this may result in an outcome other than $260 (Lion Nathan's initial bid price and the price offered by Coopers under the proposed share buy-back) and this was misleading in the absence of an equally prominent statement that while Lion Nathan's offer existed there would be no reasonable basis for KPMG to arrive at a value other than $260 per share initially offered by Lion Nathan. The KPMG fair value assessment of $260 was arrived at having regard to Lion Nathan's initial offer;

(d) that certain transactions by which the Coopers Family Directors acquired (and/or propose to acquire) a relevant interest in Coopers would have contravened (or had contravened) section 606 unless such acquisitions were made under one of the exceptions in section 611; and

(e) in relation to the Buy-Back:

(i) that the Buy-Back constituted unacceptable circumstances having regard to the effect of the circumstances on the control, or potential control, of Coopers or the acquisition, or proposed acquisition, by Lion Nathan of a substantial interest in Coopers;

(ii) that the principles in Village Roadshow Limited 03 [2004] ATP 22 should be applied in relation to the Buy Back.

Interim orders sought

17. Lion Nathan sought the following interim orders:

    (a) an interim order restraining Coopers until further order from holding the Constitution EGM on 29 November 2005 or putting the resolutions for the proposed modifications to the Coopers Constitution to a vote of members at the Constitution EGM on 29 November 2005 (or any meeting of Coopers convened for such purpose); and

    (b) such other interim orders as the Panel considered appropriate.

Declarations sought

18. Pursuant to section 657A, Lion Nathan sought, in summary, a declaration from the Panel that the following constitutes unacceptable circumstances:

    (a) those matters identified by Lion Nathan as misleading disclosures in the Coopers Target's Statement;

    (b) the calling of the Constitution EGM and the proposed modifications to the Coopers Constitution, if passed;

    (c) the present administration by the Coopers board of the pre-emptive rights regime;

    (d) the recent and prospective acquisitions by the directors of Coopers (together with their associates);

    (e) the Buy-Back.

Final orders sought

19. Lion Nathan sought a range of final orders which sought to address each of the elements of the unacceptable circumstances which Lion Nathan alleged had arisen. The orders that Lion Nathan sought are set out in Annexure A to these reasons.

Timing of proceedings

20. The Application being made on 21 November 2005, and the Constitution EGM being due to be held on 29 November 2005, but the Buy-Back EGM not being due to be held until 7 December 2005, Lion Nathan sought urgent consideration of items (a) and (b) of paragraph 16 above, i.e. before 29 November 2005, and consideration of the remainder of the Application before 7 December 2005. The Panel agreed to that request and in its brief dated 22 November 2005 separated the items, seeking submissions on items (a) and (b) by 24 November 2005 and submissions on the remaining items by 29 November 2005.

DISCUSSION

21. The Application was made in relation to the Coopers Target's Statement but also in relation to the Constitution EGM and Buy-Back EGM.

22. Lion Nathan submitted that the three elements (the Coopers Target's Statement, the Constitution EGM and the Buy-Back EGM) were linked to the Lion Nathan Bid.

23. Lion Nathan submitted that the Coopers Target's Statement was clearly directly relevant to its bid and that the statements which it submitted were misleading should be corrected.

24. Lion Nathan submitted that the Buy-Back was being proposed by the Coopers directors as an alternative to the Lion Nathan Bid. Therefore, misleading information in relation to the Buy-Back would have an effect on Lion Nathan's proposal for a substantial acquisition of Coopers if Coopers shareholders were induced to vote for, and later accept, the Buy-Back in opposition to the Lion Nathan Bid. Lion Nathan also submitted that misleading information in the Coopers Target's Statement as to the value of Coopers shares, or the value of Coopers shares to Lion Nathan, would affect Coopers shareholders decisions in relation to the Buy-Back and thus in relation to the Lion Nathan Bid.

25. Lion Nathan submitted that the resolutions proposed for the Constitution EGM would prevent Lion Nathan from holding Coopers shares, thus preventing its bid from proceeding. Lion Nathan submitted that misleading information in the Coopers Target's Statement as to the value of Coopers shares, or the value of Coopers shares to Lion Nathan, would affect Coopers shareholders decisions in relation to the resolutions to be put to the Constitution EGM. On that basis, Lion Nathan submitted that the Panel should ensure that the information in the Coopers Target's Statement was corrected, and that Coopers shareholders had sufficient time to consider the corrective information prior to both the Buy-Back EGM and the Constitution EGM.

26. The Panel accepted Lion Nathan's submissions in relation to the relevance of the information in the Coopers Target's Statement to the Lion Nathan Bid, the Constitution EGM and the Buy-Back EGM. The Panel considered that the value of Coopers shares was material to the decisions facing Coopers shareholders and that decisions facing Coopers shareholders would have an effect on the success of the Lion Nathan Bid, control of Coopers and Lion Nathan's proposed acquisition of a substantial interest in Coopers under the Lion Nathan Bid. Therefore, the Panel decided that it was appropriate to commence proceedings in response to the Application and to consider the effects of the alleged misleading information on the decision of Coopers shareholders at the Constitution EGM and the Buy-Back EGM.

DECISION

Buy-Back EGM Disclosure

27. Lion Nathan submitted that the disclosure by the Coopers directors in the Coopers Target's Statement and in the booklet and notice of meeting for the Buy-Back EGM were misleading.

28. Lion Nathan submitted that Coopers had made inadequate or misleading disclosure concerning:

    (a) the discretion of the Coopers directors to withdraw the Buy-Back at any time, and the basis on which the Coopers directors might do so;

(b) the limited nature of the Buy-Back (and future buy-backs) proposed by the Coopers directors, in that the Buy-Back would be only for 15% of the shares in Coopers and that future buy-backs would be for 5% or less per annum;

(c) the potential constraints on Coopers directors in proceeding with the future buy-backs which were held out by the Coopers directors as virtually certain;

(d) the effect of the Buy-Back, and future buy-backs, on the financial position of Coopers; and

(e) the tax consequences to Coopers shareholders of accepting the Buy-Back.

29. The Panel considered each of the complaints which Lion Nathan directed at the disclosure concerning the Buy-Back. The Panel looked at the disclosure concerning the Buy-Back in the Coopers Target's Statement, the Buy-Back booklet, the notice of meeting for the Buy-Back EGM and the Buy-Back acceptance form (**Buy-Back disclosure material**). The information about the Buy-Back in the Coopers Target's Statement was adequately cross-referred to the more extensive disclosure in the Buy-Back booklet.

30. The Panel considered that the discretion of the Coopers directors not to proceed with the Buy-Back, and other possible reasons for the Buy-Back and future buy-backs, not proceeding had been adequately disclosed in the Buy-Back disclosure material. In addition, Coopers stated to the Panel that it had no intention to rely on the discretion not to proceed with the Buy-Back and that the Coopers directors intended to proceed with the Buy-Back unless it was voted down at the Buy-Back EGM.

31. The Panel considered that the Buy-Back disclosure material made the limited nature of the Buy-Back and any future buy-backs, and the possibility of scale backs in the event of over-applications for the Buy-Back, perfectly clear.

32. The Panel considered that the Buy-Back disclosure material made it clear that any future buy-backs may be constrained by future capital requirements of Coopers, its financial performance etc. In addition, Coopers affirmed to the Panel that future buy-backs **would** be based on the current Buy-Back price of $260 per share, varied proportionally to changes in Coopers future EBITDA and that there are no circumstances where the price of future buy-backs announced would not be based on $260 and EBITDA changes.

33. The Panel considered that the disclosure by Coopers of the effect of the Buy-Back and any future buy-backs did reach the standard of adequate, when assessed against current market standards for such disclosure.

34. However, the Panel considered that Coopers shareholders would have been assisted by more fulsome disclosure on the cash flow and profit and loss effects of the Buy-Back and any future buy-backs.

35. The Panel noted that the Coopers directors made some bald assertions in the Buy-Back disclosure material concerning the effect of the Buy-Back and any future buy-backs on:

(a) key financial indicators;

(b) normalized earnings per share; and

(c) Coopers' ability to frank any future dividends fully.

36. The Panel considered that it would have been preferable for the Coopers directors to provide some evidence of their bases for making these statements, including any material assumptions which they had used in coming to the conclusions as to future financial performance of Coopers which they represented to their shareholders in the Buy-Back disclosure material.

37. The issue of the quality of disclosure by companies concerning the financial effect of buy-backs may be an area which the Panel raises with ASIC and the market in the future.

38. The Panel considered that the taxation advice provided in the Buy-Back disclosure material was adequate, especially when there were prominent statements for Coopers shareholders to seek individual advice from their taxation advisers as to their particular circumstances.

39. Overall, the Panel did not consider that the issues raised by Lion Nathan in relation to the Buy-Back disclosure material were material, and it declined to make any declaration of unacceptable circumstances in relation to them.

Preliminary Decision on the Coopers Target's Statement and the Constitution EGM

40. On 25 November 2005, having read and considered the submissions and rebuttals to the Panel's brief in relation to the disclosure issues, the Panel advised parties that it had made a preliminary decision in relation to those parts of the Application. It published a Media Release announcing its decision immediately after advising parties.

41. The Panel considered that there were a number of statements in the Coopers Target's Statement each of which was sufficiently misleading or confusing to give rise to unacceptable circumstances. The Panel considered that those misleading statements could have an adverse effect on the ability of Coopers shareholders to make informed decisions at the Constitution EGM, and that that would likely have an effect on the future of the Lion Nathan Bid.

42. On that basis the Panel made an interim order restraining the holding of the Constitution EGM.

43. The Panel advised that although it had ordered that the Constitution EGM not be held on 29 November 2005, it would have no objection to the Constitution EGM being held in conjunction with the Buy-Back EGM proposed for 7 December 2005 provided Coopers issued a corrective statement, approved by the Panel, giving Coopers shareholders sufficient time to consider the corrective statement before the Constitution EGM.

44. The Panel advised that the corrective statement should set out the issues and statements with which the Panel had concerns. The Panel did not seek to prescribe how Coopers should address the issues. However, the Panel advised that consistent with other decisions by the Panel, any corrective statement should be in a similar format (colour, layout quality of production etc) to the Coopers Target's Statement so that Coopers shareholders take adequate notice of it. The Panel advised Coopers that

it considered that Coopers should take note of the current draft revisions to the Panel's Guidance Note on corrective statements in preparing any draft statement.

The Implied Price Chart and $360 references

45. The Panel considered that the Implied Price Chart, and the references in the chart to possible control prices for Coopers shares of over $360 per share, were misleading on a number of points.

Comparable Transactions

46. The chart clearly inferred that the transactions to which it referred were "comparable" transactions but did not state this to Coopers shareholders. Coopers stated that the transactions selected were "comparable transactions" in its submissions to the Panel and the Panel considered that if it so believed it should make this assertion clear in any corrective statement, or not use the transactions in the Coopers Target Statement.

47. The text accompanying the chart should explain why the two transactions selected were comparable to the Lion Nathan Bid for Coopers, and any cautions as to their lack of comparability. In this regard, the Panel was concerned that Coopers made no clear and comprehensible mention in the text accompanying the chart of:

    (a) the references to, and cautions in relation to, the San Miguel/Boags transaction in the report of the Independent Expert Grant Samuel (the **Grant Samuel Report**) which accompanied the Coopers Target Statement;

    (b) the comments in the Grant Samuel Report as to the higher multiples used in valuing companies with wine as well as beer operations;

    (c) the decision by Grant Samuel not to use the Southcorp transaction at all as a comparable transaction in its valuation;

    (d) the full details of the transactions; and

    (e) the mechanism, and the values, by which the quoted multiples were calculated.

    The Panel advised that this additional information would assist Coopers shareholders assess how much weight to give to each comparable transaction (in this regard, the Panel suggested that Coopers might be well advised to consider the format and information used by Goodman Fielder in a corrective supplementary target statement issued by Goodman Fielder in response to the Goodman Fielder 02 decision).

48. The Panel also advised that the text accompanying the chart should also explain why Coopers had chosen these particular transactions as being comparable and not other transactions which may be potentially significant and relevant.

Consistent EBITDA/multiple use

49. The use of EBITDAs from different time periods for the two transactions on the one hand and the 19.4 multiple implied price on the other, was confusing and misleading. The Panel advised that all bars in the chart should use the same EBITDA and, if they were to be used must use similar EBITDA and multiple bases (i.e. forecast or historical) to the multiple derived from the relevant transaction.

Misleading statements

50. The statement in large type at the bottom of page 13 of the Coopers Target's Statement:
"**If Lion Nathan were to pay the same multiple as has been paid in other similar transactions in the beer and wine industries, then an offer Price of more than $360 would be justified"**
referring to an Offer Price of more than $360 was misleading in the light of the Panel's concerns with the Implied Price Chart on the previous page.

51. The term "Control price" in the heading to the Implied Price Chart was misleading when it appeared clear that Coopers was intending Coopers shareholders to believe that the chart represented that a proper value of their shares would be at least the "control price" presented in the chart. Coopers was required to make it plainly clear what conclusion it intended Coopers shareholders to reach as to the value of their Coopers shares from the information which Coopers presented in the chart.

Misrepresenting Lion Nathan's statement

52. The statement at the top of page 13 representing that Lion Nathan claimed its offer was demonstrably fair on the basis that it represented 19.4 times historic Coopers EBITDA was both materially false and misleading. The Panel required that Coopers retract the statement made in the Coopers Target Statement and not make use of the Lion Nathan statement unless Coopers represented Lion Nathan's statement correctly, accurately and in proper context. On that basis, the bottom bar on the Implied Price Chart, and the text beside it, was also false and misleading and required retraction. The Panel advised Coopers that it would assess any proposed correction to determine whether the 19.4 multiple could be used in a way which was not misleading.

Grant Samuel

53. It was misleading for Coopers not to include any reference to the Grant Samuel Report, the report's conclusions regarding control premium, or the report's conclusions regarding the value of Coopers shares in the text relating to the Implied Price Chart.

54. The Panel considered it would be appropriate for Coopers to include the Grant Samuel valuation of Coopers shares as a bar in any revision of the Implied Price Chart to give proper context to the control prices which Coopers asserted were implied by the relevant transactions.

KPMG

55. The Panel considered it would have been helpful, but did not require it, for Coopers to include the KPMG $212.50 mid-point valuation (without a liquidity discount) of individual Coopers shares as at 28 September 2005 as a bar in the Implied Price Chart to give a benchmark against which Coopers shareholders can compare the control prices which Coopers asserts are implied by the relevant transactions i.e. to indicate what KPMG considered was a proper price for Coopers shares without any control premium.

56. In providing these comments on the Implied Price Chart, the Panel was not warranting that it believes that the Implied Price Chart can be properly reconstructed so as to not be misleading. The Panel considered that even with the changes requested by the Panel the Implied Price Chart might still be sufficiently misleading to Coopers shareholders that it should not be included in the Second Supplementary and Corrective Target's Statement.

57. The Panel noted that any amended chart would need to use the amended Lion Nathan offer price of $310.

No clear explanation of relevance and application of different values

58. The Panel considered that the Coopers Target's Statement was confusing and misleading in that it failed to bring together, in one clear and connected place, the range of values and prices scattered, in piece-meal fashion, through the Coopers Target's Statement. The Panel considered that such an explanation was required bringing together and explaining the relationship and context of the different prices and values which Coopers had presented to its shareholders in the Coopers Target's Statement. In saying this, the Panel does not suggest that Coopers was required to reconcile the different values on any numerical or accounting basis.

59. The Panel considered that such explanation could fit usefully with the text accompanying the amended and corrected Implied Price Chart (if the chart was to be amended and reissued).

Increase in value in Coopers shares

60. The Panel considered that the "Value per Share" chart on page 9 of the Coopers Target's Statement was misleading in:

    (a) not including the KPMG $190 valuation;

    (b) comparing portfolio valuations (i.e. the 1999 and 2003 valuations) with a control offer valuation (i.e. the 2005 $260 valuation) without explaining the differences;

    (c) comparing valuations expressly discounted for liquidity (i.e. the 1999 and 2003 valuations) with a valuation that was not expressly discounted for liquidity (i.e. the 2005 $260 valuation), without explaining the differences;

    (d) giving the impression that the $284 - $320 valuation of Coopers shares in the Grant Samuel Report constituted a further increase, both in value and in a temporal sense, of the value of Coopers shares; and

    (e) giving the impression, in the footnote to the "Value per Share" chart, that the 1999 and 2005 KPMG assessment of fair value were calculated on the same basis.

Value of Synergies

61. The Panel considered that the following statements in, or issues in relation to, the Coopers Target's Statement were either sufficiently misleading or confusing as to give rise to unacceptable circumstances:

    (a) the statements that "Value of synergies not fully reflected", in that the Coopers Target's Statement gave no explanation of the degree to which the value of

some or any synergies was already included in the Lion Nathan offer price and therefore no explanation to Coopers shareholders of what "not fully" meant;

(b) the statement that the board of Coopers believed that synergy benefits of up to $20 million per annum, at an EBITDA level may have been available to Lion Nathan without clear explanation that Grant Samuel had taken that precise figure and analysis (provided by Coopers directors) into consideration when deriving its valuation of Coopers shares;

(c) the statement that the synergy benefits represented an additional value to Lion Nathan of approximately $194 million or an additional $143 per Coopers share with no explanation as to what number or value the sums were additional to;

(d) alternatively to paragraph (c) above, the statement that the synergy benefits represented an additional value to Lion Nathan of approximately $194 million or an additional $143 per Coopers share with no explanation as to what part of those synergy values should be added to the Lion Nathan offer price to achieve a fair value for Coopers shares;

(e) the inconsistency between the second and third bullet points under the heading "Value of synergies not fully reflected" – the value for synergies quoted in the second bullet point were uncertain and were referred to as "up to $20 million per annum" whereas the value for synergies quoted in the third bullet point appeared to be certain stating that "these estimated synergy benefits represent additional value to Lion Nathan of approximately $194 million";

(f) the statements under the heading "Value of synergies not fully reflected" made no reference to the synergy benefits which Grant Samuel had included in its valuation of Coopers shares;

(g) the statements under the heading "Value of synergies not fully reflected" did not give the reasons why the Coopers board considered that any higher value for Coopers shares which the claimed additional synergies would give was reasonable if it was higher than the Grant Samuel valuation; and

(h) the statements under the heading "Value of synergies not fully reflected" made no reference to limitations as to the availability of synergies to target shareholders as discussed in the Grant Samuel Report at pages 28 and 29.

Corrective action by Coopers

62. The Panel invited Coopers to provide the Panel with draft corrective statements to address the issues above.

63. The Panel advised Coopers that it was currently minded to make a declaration of unacceptable circumstances in relation to the affairs of Coopers and the Coopers Target's Statement and consequential orders remedying the issues set out above. The Panel advised that it would be prepared to consider any appropriate undertaking which Coopers wished to offer to the Panel in lieu of such declaration and orders.

<u>Process</u>

64. The Panel advised that if Coopers wished to offer a draft corrective statement to the Panel it may do so solely to the Panel for the Panel's consideration and agreement.

Once the Panel considered the draft was close to final, it asked Coopers to provide the draft corrective statement to other parties for a short period of comment prior to the Panel settling the final document.

65. Coopers dispatched the Second Supplementary and Corrective Target's Statement to its shareholders on Thursday 1 December 2005, by Express Post. Most Coopers shareholders would receive the Second Supplementary and Corrective Target's Statement the following day with four clear days[3] to read and consider it if Coopers were to hold the Constitution EGM in conjunction with the Buy-Back EGM on 7 December 2005. The Panel considered that that would be adequate time to consider the additional and corrective information. The Panel considered that the disclosure made by Coopers in the Second Supplementary and Corrective Target's Statement addressed the Panel's concerns with the Coopers Target's Statement but noted that the disclosure was only just adequate.

Consent Decision

66. Under the Pre-Emptive Rights Regime, a Coopers shareholder seeking to accept the Lion Nathan Bid was required first to give a transfer notice to the Coopers directors, who would then seek to find Coopers shareholders willing to purchase the shares. Once lodged with the Coopers directors, the Coopers shareholder could not withdraw that notice without the Coopers directors' consent. If the Lion Nathan Bid lapsed, or the Coopers auditor found that "fair value" was less than the Lion Nathan Bid price, the Coopers shareholder seeking to accept the Lion Nathan Bid might be forced to sell their shares under the Pre-Emptive Rights Regime at a lower price than the Lion Nathan Bid price.

67. Coopers directors had made much of this risk in various statements to Coopers shareholders, including in the Coopers Target's Statement as late as 15 November 2005.

68. Coopers directors had consistently refused to advise Coopers shareholders that they would consent to Coopers shareholders withdrawing their transfer notices in the event of the Lion Nathan Bid lapsing or "fair value" being determined to be less than the Lion Nathan Bid price. Coopers directors had consistently said that they could only make such decisions on a case by case basis, at the time of each request to withdraw and taking into account the precise circumstances of the request and at the time the request was made.

69. In the Panel's brief to parties the Panel asked :

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[3] The four clear days would apply if the Second Supplementary and Corrective Target's Statement was indeed delivered the next day after Express Post dispatch and the Coopers shareholders wished to attend the meeting physically, or send a proxy to attend in person. The Panel recognised that postal proxies were required to be received by Coopers no less than 24 hours prior to the time of the meeting, and that if a Coopers shareholder wished to send their proxy by post they would be required to post it by Express Post on the Monday afternoon, giving them only two clear days to read and consider the information. However, the Panel recognised that most Coopers shareholders lived in Adelaide or environs and that personal attendance was the most likely. On that basis, the Panel did not consider that further postponing the Constitution EGM was desirable.

"Will the Share Allocation Policy, as set out in the Coopers Target's Statement, inhibit an efficient competitive and informed market for Coopers shares by causing Coopers shareholders to fear that they may receive a lower price than the Lion Nathan bid price?"

70. In its submissions to the Panel on 29 November 2005, Coopers advised the Panel that the Second Supplementary and Corrective Target's Statement would advise that the Coopers directors had agreed to exercise their discretion to allow Coopers shareholders to withdraw transfer notices in circumstances where the Lion Nathan Bid did not proceed or the "fair value" is determined by the Coopers auditor to be less than the Lion Nathan Bid price (**Consent Decision**). Coopers inserted this decision, and a brief description of its implications for Coopers shareholders at the end of a final draft of the Second Supplementary and Corrective Target's Statement.

71. The Panel considered that the Consent Decision adequately addressed the concerns that it had had over the previous statements by Coopers directors as to their stated policy that Coopers shareholders who sought to accept the Lion Nathan Bid may be trapped into selling their shares for less than the Lion Nathan Bid price i.e. that the Coopers directors may refuse to consent to any withdrawal and force Coopers shareholders to sell for a lesser price.

72. The Panel considers that the Coopers directors should not, at any time, have put the threat of being trapped into selling their shares before Coopers' shareholders as a reason for not accepting the Lion Nathan Bid.

Second part of the Panel's decision

73. As discussed above, the Panel separated the Application into two sections. The first related to the disclosure issues in the Coopers Target's Statement and Buy-Back disclosure material, and their relationship to the Constitution EGM.

74. The second related to:

(a) whether the Buy-Back EGM constituted frustrating action as described in the Panel's Guidance Note 12 Frustrating Action;

(b) whether the Coopers directors and their associates should be allowed to vote at the Buy-Back EGM;

(c) whether the Constitution EGM constituted frustrating action;

(d) whether the Coopers directors and their associates should be allowed to vote at the Constitution EGM;

(e) previous acquisitions of Coopers shares by the Coopers directors; and

(f) the share allocation policy and related aspects of the Coopers directors' administration of the Pre-Emptive Rights Regime.

Buy-Back EGM

75. The primary case against the Buy-Back EGM was that the circumstances were analogous to those addressed in the Village Roadshow Limited 03 [2004] ATP 22 decision by the Takeovers Panel in that the board of Coopers constituted a block of shareholders who would, by virtue of voting through the Buy-Back and then not selling shares into it, both approve, and benefit from, a Buy-Back which increased or

consolidated their control of Coopers. Lion Nathan argued that the Coopers directors were part of a group which would benefit disproportionately and differently to the other shareholders, in that it was the only group whose control would be effectively consolidated by the passage of the Buy-Back EGM resolutions and the conduct of the Buy-Back. On that basis, Lion Nathan asserted that the Buy-Back EGM should not proceed, or that the Coopers directors should not be allowed to vote on the Buy-Back EGM resolutions or the Coopers directors and the other shareholders should be separated into classes and the Buy Back should only be able to proceed if approved by the requisite majority in both classes. The Panel noted the stated intention of the Coopers directors not to sell any of their shares into the Buy-Back.

76. The secondary case, which was not as firmly advanced by Lion Nathan, was that the Buy-Back was an unacceptable attempt by the Coopers directors to frustrate the success of the Lion Nathan Bid by siphoning off acceptances for the Lion Nathan Bid by instituting the Buy-Back. Lion Nathan submitted that the Coopers directors did this for the improper purpose of consolidating or protecting the benefits they held and received as directors and senior management of Coopers. The Coopers directors would improperly benefit from the Buy-Back, if approved, because the Buy-Back would inhibit the potential for success of the Lion Nathan Bid by attracting Coopers shareholders to the increased certainty of the company financed buy-back and thus reduce the chance of those directors and senior managers from losing their positions, power and benefits if the Lion Nathan Bid was successful.

77. Lion Nathan contended that all of these arguments indicated that the passage of the Buy-Back EGM resolutions, and especially if passage was dependent on the votes of the Coopers directors, would have an effect on the control or potential control of Coopers, or an effect on the proposed acquisition of a substantial interest in Coopers by Lion Nathan. Lion Nathan submitted that this would give rise to unacceptable circumstances by adversely affecting the prospects of the Lion Nathan Bid and by entrenching the control of Coopers held by the Coopers directors.

78. Lion Nathan also noted the fact that if the Coopers shareholders approved, and Coopers conducted, the Buy-Back it would frustrate the Lion Nathan Bid by triggering a defeating condition in the Lion Nathan Bid (thus depriving all Coopers shareholders of the benefit of the opportunity to participate in the benefits of the Lion Nathan Bid). The Panel discounted this as a material issue. The Panel considered that Lion Nathan could declare its bid free of this condition if it chose.

Increase in Control of Coopers caused by the Buy-Back EGM

79. The Panel considered the arguments put forward that the control of Coopers directors would be increased (assuming for argument's sake, without finding that it was the case, that the Coopers directors constituted a single voting block). The Panel considered primarily that control, in the particular circumstances of Coopers, should be considered in light of the ability to control the board of Coopers, or at least the election of directors. Secondarily, the Panel considered that control should be considered in light of the ability to influence the passage of the relevant resolutions.

80. To consider these issues, the Panel first considered the mechanisms set out in the Coopers Constitution for the election of directors, the current status and the effect of the Buy-Back EGM and Constitution EGM on these issues.

81. Relevantly:

    (a) the holders of A Class shares may elect two directors to the board of Coopers (**A Class directors**);

    (b) the holders of B Class shares may elect two directors to the board of Coopers (**B Class directors**);

    (c) the holders of C Class shares, with the holders of Classes A, B and D shares may elect one director to the board of Coopers if that director is nominated by a unanimous resolution of all directors appointed by the holders of A, B and D shares (**C Class director**); and

    (d) the holders of D Class shares may elect one director to the board of Coopers (**D Class director**).

A Class shares

82. At the time of the Panel's decision, Mr. Glenn Cooper AM and Mr. James Cooper, or interests closely associated with them, controlled 4,834 A Class shares or approximately 31% of the A Class shares. None of the other Coopers' directors or persons closely associated with them owned A Class shares. Therefore, neither Mr. Glenn Cooper AM nor Mr. James Cooper had the ability to control the appointment of A Class directors. A buy-back of 15% of the A Class shares would not materially increase the ability of Mr. Glenn Cooper AM or Mr. James Cooper to appoint A Class directors, and it would take a very significantly disproportionate acceptance of A Class shares into the Buy-Back to affect materially the ability of the existing Coopers directors to appoint A Class directors.

83. The Panel considered that a disproportionate acceptance of A Class shares into the Buy-Back was unlikely as the power to elect A Class directors makes them more valuable than C Class shares and no A Class shareholder holds only A Class shares, all A Class shareholders hold considerably more C Class shares than A class shares, therefore there was no basis for considering that any shareholder would accept preferentially for A Class shares.

84. Acceptance into the Buy-Back, and therefore changes in relative voting power, of any other classes of shares would not affect the ability of the Coopers directors to appoint A Class directors.

85. No convincing evidence was provided of any association between the existing Coopers directors and other A Class shareholders.

86. On that basis, the Panel considered that the Buy-Back was unlikely to affect the ability of any person to influence or control the election of A Class directors.

B Class shares

87. At the time of the Panel's decision, Mr. William Cooper OAM, or interests closely associated with him, controlled 9,456 B Class shares or approximately 59% of the B Class shares. None of the other Coopers directors or persons closely associated with

them owned B Class shares. Therefore, Mr. William Cooper OAM had the ability to control the appointment of B Class directors. A buy-back of 15% of the B Class shares would not affect the ability of Mr. William Cooper OAM to appoint B Class directors therefore it could not be said to have an effect on control of Coopers from that aspect. For similar reasons to those cited in relation to the A Class shares, the Panel did not consider it likely that there would be a disproportionate acceptance of B Class shares into the Buy-Back.

C Class shares

88. The appointment of a C Class director requires unanimous nomination by all A, B and D Class directors. At the time of the Panel's decision, Mr. William Cooper OAM, or interests closely associated with him, controlled the appointment of B Class directors. Therefore, at the time of the Panel's decision, he had negative control over the appointment of C Class directors. For reasons given above, the Buy-Back was unlikely to affect the ability of Mr. William Cooper OAM to appoint B Class directors, and therefore negatively controlled the appointment of C Class directors. Therefore the Buy-Back cannot have been said to have an effect on control of Coopers from that aspect.

D Class shares

89. At the time of the Panel's decision, M. Cooper Nominees Pty. Ltd., a company associated with Mr. Max Cooper, controlled 49,271 D Class shares or approximately 57% of the D Class shares. The Coopers directors or persons closely associated with them owned 10,420 or approximately 11.7% of the D Class shares. Therefore, Mr. Max Cooper had the ability to control the appointment of the D Class director and the Coopers directors did not have any such ability. The Buy-Back was unlikely to affect the ability of Mr. Max Cooper, or the Coopers directors, to appoint the D Class director, and therefore cannot have been said to have an effect on control of Coopers from that aspect.

Resolutions

90. At the time of the Panel's decision, the Coopers directors, and entities closely associated with them, held 381,249 shares, or 28.2% of the voting power in Coopers. If the full 15% of Coopers shares were bought back under the Buy-Back, and none of the Coopers directors sold shares into the Buy-Back (which was their then stated intention) that voting power would increase to 33.1%. Therefore, at the time of the Panel's decision, the Coopers directors held the power to:

    (a) block compulsory acquisition; and

    (b) block a special resolution.

91. Neither of those powers would be affected by the Buy-Back.

92. At the time of the Panel's decision, the Coopers directors did not, by themselves, have the power to approve or prevent an ordinary resolution of Coopers. That would not change if the Buy-Back proceeded.

Conclusion on control

93. On the basis that the Buy-Back would not materially affect the ability of the Coopers directors to control the composition of the board of Coopers, nor their ability to block or pass resolutions, the Panel considered that the Buy-Back was unlikely to have an effect on the control by the Coopers directors over Coopers and was similarly unlikely to give rise to unacceptable circumstances on that basis.

94. The Panel notes that this decision is based very specifically on the particular circumstances of the proceedings before it and the particular form of the Coopers Constitution. It is not likely to be useful as a basis for persons considering issues of control in future circumstances. The Panel has previously stated that the progression towards control, or "a step control", may constitute an effect on control that gives rise to unacceptable circumstances. The Panel distinguishes the circumstances in this application from other proceedings where it has adopted the "step along the path to control" concept for the following reasons:

    (a) there is no indication, or logical reason, why the Buy-Back or the Constitution EGM resolutions would be likely to affect the A Class voting power of the Coopers directors;

    (b) the Coopers directors already controlled the appointment of B Class directors and there was no degree of control in this i.e. there was no further increase possible, unlike the ability to block compulsory acquisition etc by further increasing voting power above 50% in other companies;

    (c) the Coopers directors already had absolute negative control over the appointment of C Class directors and there was no further increase in that negative control open to them;

    (d) the Coopers directors already had absolute power to block compulsory acquisition or a special resolution and there was no further increase in that negative control open to them; and

    (e) the possible increase in overall voting power for an ordinary resolution was materially less important in the case of Coopers because the provisions for election of directors makes the power to pass an ordinary resolution materially less relevant to control of Coopers than to most public companies.

Conclusion on effect on an acquisition of a substantial interest by the Buy-Back EGM

95. The Panel considered that it was possible that the Buy-Back could "soak up" some of the shares of Coopers shareholders interested in selling their shares. On that basis, the Buy-Back could affect the outcome of the Lion Nathan Bid i.e. the acquisition or proposed acquisition of a substantial interest in Coopers. However, the Panel considered that that effect was unlikely to give rise to unacceptable circumstances because the acceptances for the Buy-Back, or the Lion Nathan Bid, under those circumstances would take place in a reasonably competitive market (such as is possible for Coopers shares given the Pre-Emptive Rights Regime in the Coopers Constitution).

96. The Panel considered that Coopers shareholders would (disregarding the Constitution EGM resolutions for the moment) be free to accept either the Buy-Back

or the Lion Nathan Bid[4] and the passage of the Buy-Back EGM resolutions would not adversely affect that choice. The Panel considered that Coopers shareholders had adequate information before them on the value of Coopers shares, the Lion Nathan Bid and the consequences of the Buy-Back. The Panel acknowledged that the acceptance by a shareholder of the Buy-Back would affect the success of the Lion Nathan Bid by reducing the number of available shares for Lion Nathan, but that that was properly the choice of Coopers shareholders, and absent the type of circumstances found in Village 03, would be unlikely to give rise to unacceptable circumstances.

97. The Panel noted that the Buy-Back would be made by an offer, and no Coopers shareholder would be compelled to accept the Buy-Back. At the same time, the Panel noted that the acceptance of the accepting shareholders would have an effect on remaining shareholders, as the cancellation of the bought back shares would have consequential changes in voting power of the shareholders who remained in Coopers. However, this change was not, for reasons discussed above, sufficient to make the Panel consider that the Buy-Back or the Buy-Back EGM would give rise to unacceptable circumstances.

98. On that basis, if the Buy-Back resolutions were passed, the market for Coopers shares would be as efficient, competitive and informed as it could feasibly be. Therefore, the passage of the Buy-Back resolutions would not give rise to unacceptable circumstances because of its effect on the success of Lion Nathan's proposal to acquire a substantial interest in Coopers, whether passed on the votes of the Coopers directors or not.

99. The Panel acknowledged Lion Nathan's submission that it considered that the Buy-Back would not have been proposed if not for the Lion Nathan Bid, and that Lion Nathan considered that the Buy-Back was proposed for the purpose of defeating the Lion Nathan bid.

100. "Similarly, the Panel noted that given KPMG's fair value determination of $190 per share "without regard to the Lion Nathan offer", the Buy-Back price, if the Buy-Back had been proposed at all, would likely have been no higher than $190 in the absence of the Lion Nathan Bid.

101. However, the Panel considered that the appropriate issue for it to consider was the effect of the circumstances before it on control or potential control of Coopers or the acquisition, or proposed acquisition, of a substantial interest in Coopers. In that context, the intentions of the Coopers directors were of marginal relevance in considering the effect of the Buy-Back, and that the higher price of the Buy-Back did not, of itself, give rise to unacceptable circumstances.

Constitution EGM

Frustrating Action

102. Lion Nathan submitted that the fact of holding the Constitution EGM, and the resolutions proposed for the Constitution EGM, would constitute frustrating action.

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[4] Potentially Coopers shareholders could even accept both the Buy-Back and then accept the Lion Nathan Bid for the remainder of their shares if they wished.

Lion Nathan submitted that Coopers shareholders voting on the special resolution to remove the exception in the Coopers Constitution allowing Lion Nathan, as a rival brewer, to hold shares in Coopers, would frustrate its bid, would deprive those Coopers shareholders who wished to sell their shares to Lion Nathan the opportunity to do so, and would deprive those Coopers shareholders the opportunity to sell their shares for a fair market price of $310.

103. Lion Nathan also submitted that the passage of the Constitution EGM resolutions, if passage was dependent on the votes of the Coopers directors, would have an effect on the control or potential control of Coopers, or an effect on the proposed acquisition of a substantial interest in Coopers by Lion Nathan by unacceptably preventing the Lion Nathan bid and by unacceptably entrenching the control, position, power and benefits held by the Coopers directors.

104. Lion Nathan submitted that any passage of the Constitution EGM resolutions, by itself, constituted unacceptable circumstances, and in the alternative, the passage of the Constitution EGM resolutions on the vote of the Coopers directors constituted unacceptable circumstances.

105. Subject to two provisos, the Panel considered that Coopers shareholders voting on the Constitution EGM resolutions could not reasonably be considered to constitute frustrating action. Rather, the Panel considered that Coopers shareholders had the right to decide, collectively, the future of control of their company.

106. The Panel drew two analogies when considering this aspect of the Application. The first was the analogy of a takeover conducted by way of a scheme of arrangement in which the majority of shareholders will decide whether or not the takeover proceeds. If the scheme is voted down, those shareholders who wished to sell their shares to the bidder under the scheme will not be able to. Their wish will be frustrated by the wishes of the majority, and that is normal shareholder democracy, and an unavoidable consequence of dispersed ownership in the modern company.

107. The second analogy which the Panel considered in deciding that the Constitution EGM would not constitute frustrating action, was that of a rival course of corporate action being put forward to shareholders as an alternative to a takeover bid, that would prevent or defeat the proposed takeover if accepted by the shareholders. The Takeovers Panel's Guidance Note 12 expressly states that shareholders have the right to choose, via an adequately informed meeting, whether or not to accept the rival course which might prevent or frustrate the proposed takeover bid and prevent those shareholders who wished to accept the takeover bid from selling their shares into the bid.

108. The two provisos that the Panel expressed were:

    (a) the Coopers shareholders were provided with adequate information on:

        (i) the merits of the Lion Nathan Bid;

        (ii) the value of Coopers shares; and

        (iii) the implications of approving or disapproving the resolutions at the EGMs;

    and had had adequate time to consider the information before them; and

(b) the resolutions were passed by the Coopers shareholders where the correct Coopers shareholders' votes were taken into account.

109. Following the dispatch of the Second Supplementary and Corrective Target's Statement on 1 December 2005, the Panel considered that the first proviso had been met.

110. The second part of the Panel's decision largely related to determining the second proviso.

111. The question before the Panel was whether passage of the Constitution EGM resolutions, dependent on the votes of the Coopers directors and their associates, would, as submitted by Lion Nathan, give rise to unacceptable circumstances.

112. While the Buy-Back could potentially affect the relative voting power of the Coopers directors (if they did not participate in the Buy-Back and other shareholders did), passage of the Constitution EGM resolutions would not directly affect the control, if any, of the Coopers directors. Therefore, the issues before the Panel when considering the Constitution EGM were slightly different to those before it when considering the Buy-Back EGM.

113. The Panel considered that the fundamental question in relation to the passage of the Constitution EGM resolutions, if dependant on the votes of the Coopers directors, was whether the interests of the Coopers directors which might influence their decision on how to vote at either or both of the EGMs were sufficiently different to that of shareholders whose only interests were as shareholders of Coopers. If the interests of the Coopers directors were materially different to the non-director Coopers shareholders, and the Coopers directors would gain unequally from the threat of the Lion Nathan Bid being removed, at the expense of the non-director Coopers shareholders losing the opportunity to consider and accept the Lion Nathan Bid if they wished, it would give rise to unacceptable circumstances.

114. The Panel did not consider that the preservation of the position, power and benefits of the Coopers directors was likely to be a sufficiently material effect to warrant the Panel depriving the Coopers directors of their rights, as shareholders, to vote on the Constitution EGM resolutions. While the Panel noted the potential for there to be a conflict of interests between the Coopers directors as directors, and in some cases senior management, and the interests of Coopers shareholders as shareholders, it did not consider that the magnitude of the differing interests, and therefore the magnitude of the conflict, was sufficient to warrant depriving the Coopers directors of their right to vote their shares.

115. The Panel noted that the Constitution EGM resolutions required approval by 75% of the shares of the Coopers shareholders voting on the resolutions. As mentioned above, the directors' interests were insufficient to force through the resolution.

116. Therefore, the Panel declined to make any declaration of unacceptable circumstances in relation to the Constitution EGM and declined to make any orders as to the persons who could vote at the Constitution EGM.

Pattern of conduct

117. In its arguments in relation to both the Buy-Back EGM and the Constitution EGM, and the entitlement of the Coopers directors to vote at either of the meetings, Lion Nathan submitted that the Panel should look to various patterns of conduct by the Coopers directors and find that:

    (a) the Coopers directors were associates;

    (b) the Coopers directors were acting in concert to defeat the Lion Nathan Bid;

    (c) there were a range of other shareholders with whom the Coopers directors were associates, with whom the Coopers directors were acting in concert or who were influenced or controlled by the Coopers directors; and

    (d) the share allocation policy that the Coopers directors adopted in administering the Pre-Emptive Rights Regime under the Coopers Constitution was intended and administered to increase the control of the Coopers directors over Coopers.

Coopers directors associated together

118. The Panel's conclusions on the effects of the Buy-Back EGM and Constitution EGM meant that the question of whether the Coopers directors were associates, or acting in concert was not relevant, because the Panel made its assessment assuming the worst case i.e. that the Coopers directors were associates and were acting in concert, and still decided that the circumstances before it do not give rise to unacceptable circumstances (although the Panel did not actually make such a finding as to association between the Coopers directors).

Coopers directors associated with other groups of shareholders

119. The Panel considered the submissions from Lion Nathan that various other shareholders were associates of, or acting in concert with, the Coopers directors and found no material evidence to support Lion Nathan's submissions, nor even a reasonable circumstantial case to make such an inference. On that basis, in testing the propositions before it, the Panel operated on the assumption that the Coopers directors were associates (while not determining that they were) but that the voting power of the Coopers directors was as set out in the Coopers Target Statement i.e. 28.2%, rather than any higher figure which Lion Nathan submitted the Panel should use.

Share allocation policy

120. As noted above in relation to the Second Supplementary and Corrective Target's Statement, the Panel did have some concerns initially about the share allocation policy, and especially the repeated statements over a long period of time by the Coopers directors that Coopers shareholders should have cause for fear that if they accepted the Lion Nathan Bid they would not be able to withdraw the transfer notices they provided to the Coopers directors under the Pre-Emptive Rights Regime, in the event that the Lion Nathan Bid lapsed or the Coopers auditor found that "fair value" was less than the Lion Nathan Bid. Those statements raised some concerns that the Coopers directors were in fact acting in concert, with an intention of preventing the Lion Nathan Bid from proceeding in as efficient, informed and competitive market as possible.

121. However, the share allocation policy announced in the Coopers Target Statement, and the Consent Decision announced in the Second Supplementary and Corrective Target Statement went a long way to alleviating the Panel's concerns in this area. Otherwise, the Panel may well have made a declaration that the share allocation policy did give rise to unacceptable circumstances.

122. Specifically, the Panel does not consider that the following aspects of the share allocation policy are likely to give rise to unacceptable circumstances:

    (a) the policy of offering A Class shares under the Pre-Emptive Rights Regime first to A class shareholders and then to all other classes of shareholders;

    (b) the policy of offering shares under the Pre-Emptive Rights Regime first to shareholders and then to "Members' Relatives"; and

    (c) the policy of allocating shares under the Pre-Emptive Rights Regime pro-rata without regard to whether the shareholders nominating for shares are prepared to pay the fair value nominated by the selling member or the "fair value" determined by the Coopers auditor.

123. Although such policies might appear peculiar in a listed public entity, they are not inconsistent with the intent or letter of the Coopers Constitution and do not appear to deprive Coopers shareholders of reasonable opportunities to share in the benefits of any person acquiring a substantial interest in Coopers.

124. The Panel considers that administration of the share allocation policy in relation to parcels of shares months and years in the past is not something which the Panel should consider in these proceedings. The Panel decided this because one of the primary submissions was that the Coopers directors' administration of the share allocation policy was evidence of the Coopers directors acting in concert, and the Panel has proceeded on the basis that the Coopers directors were acting in concert (as the worst case scenario without deciding that that was indeed the case).

Section 606

125. Lion Nathan submitted that the Coopers directors had acquired shares in Coopers between 1995 and 2005 in breach of section 606. The Coopers directors' voting power in 1995 was 19.2%, and at the time of this decision was 28.2%.

126. The Panel did not consider that the increase in voting power by Coopers directors from 19.2% in 1995 to 28.2% in 2005 now was, if it ever had been, likely to give rise to unacceptable circumstances.

127. The Panel noted that some of the increase was caused by the 2003 Buy-Back and that the rest of the increases occurred because of appointments to the board, and from acquisitions over a period in which the Coopers directors, if they were associates, could have legally acquired a significantly greater increase in percentage voting power than that complained of.

Press statements by the Coopers directors

128. The Panel noted that over the weekend of 26 and 27 November 2005, prior to when Coopers shareholders would be considering the corrective information in the Second Supplementary and Corrective Target's Statement, a series of unfortunate statements

were credited in the media to either Coopers directors or spokespersons for Coopers which had a distinct tendency to denigrate or discount the seriousness of the Panel's concerns in relation to misleading statements in the Coopers Target's Statement. The Panel was initially very concerned at the apparent attempt to affect the weight which the Coopers shareholders would give to the corrective information in the Second Supplementary and Corrective Target's Statement. However, it decided that much of the harm caused by the statements was eventually remedied by statements by the Coopers chairman in the covering letter which accompanied the Second Supplementary and Corrective Target's Statement. In that letter, the Coopers directors acknowledged the seriousness of the Panel's concerns over the misleading statements and urged Coopers shareholders to read the Second Supplementary and Corrective Target's Statement carefully and fully. On that basis, the Panel decided not to take any further action in relation to the statements.

Declaration

129. Given that:

    (a) the Second Supplementary and Corrective Target's Statement remedied the issues of misleading statements in the Coopers Target's Statement;

    (b) the Coopers directors issued the Consent Decision in the Second Supplementary and Corrective Target's Statement; and

    (c) the Panel found no unacceptable circumstances in relation to the Buy-Back EGM or the Constitution EGM,

    the Panel declined to make any declaration of unacceptable circumstances.

Orders

130. On 25 November 2005, the Panel made an interim order restraining the holding of the Constitution EGM until Coopers shareholders had received adequate corrective information and had had sufficient time to consider the information prior to the Constitution EGM. Given the Panel made no declaration of unacceptable circumstances it made no final orders.

131. The Panel did not receive any application for an award of costs, and made no order for costs.

Undertakings

132. During the Proceedings, Coopers undertook to the Panel to prepare and dispatch a Second Supplementary and Corrective Target's Statement which met the Panel's approval. The Panel accepted the undertaking.

Mark Paganin
President of the Sitting Panel
Decision dated 25 November, and 5 December, 2005.
Reasons published 14 March 2006

Annexure A - Orders Sought by Lion Nathan

Lion Nathan sought the following final orders in the Application. They reflect the bases of unacceptable circumstances which Lion Nathan alleged in the Application.

(a) **Supplementary target's statement**: That Coopers prepare a supplementary target's statement which contains a separate and prominent section that:

(i) states clearly 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 Coopers 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) **Provide copy of supplementary target's statement**: 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 of the Act 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) **Corrective advertising:** That:

(i) Coopers publish an advertisement (the **Advertisement**) in the following newspapers on two successive business days in accordance with the order:

(A) The Australian;

(B) The Australian Financial Review;

(C) The Sydney Morning Herald (Sydney);

(D) The Daily Telegraph (Sydney);

(E) The Age (Melbourne);

(F) The Herald-Sun (Melbourne);

(G) The Advertiser (Adelaide);

(H) The West Australian (Perth);

(I) The Courier Mail (Brisbane);

(J) The Mercury (Hobart).

(ii) the Advertisement must:

(A) not be smaller than one tabloid page;

(B) state clearly and prominently that the Advertisement is published because the Takeovers Panel has found that unacceptable circumstances exist requiring Coopers to correct statements made by it;

(C) identify the statements found by the Panel to be deficient;

(D) set out clearly and prominently the deficiencies found by the Panel;

(E) set out clearly the accurate information, based on the Panel's findings; and

(F) state that, in accordance with the Panel's requirements, everyone to whom offers were made under the bid will be sent a supplementary target's statement and that the offer period under the bid will be extended so that it ends not less than 14 days after the supplementary target's statement is sent to offerees.

(iii) Coopers give to the Panel a printer's proof of the proposed Advertisement, showing all art work and design features as well as the relevant text, not less than two business days before the last time at which changes to the Advertisement may be notified to the publisher. Coopers must not issue an advertisement in purported compliance with the order above until the Panel has informed it that the form of the Advertisement is considered by the Panel to be appropriate and to comply with this order.

(d) **Restraining Constitution EGM:**

(i) requiring Coopers to be restrained from putting the resolution for the proposed modifications to the Coopers Constitution to a vote of members at the Constitution EGM on 29 November 2005 or any meeting of Coopers convened for such purpose at any time prior to the end of the bid period for the Lion Nathan Bid; or

(ii) in the alternative to the above, an order of the type set out in paragraphs (i) and (j) below.

(e) **Fair value:** pending the final resolution of Lion Nathan's takeover offer, that the "fair value" as determined under the "fair value" mechanism in the Coopers' Constitution be not less than Lion Nathan's offer price (of $310 per share).

(f) **Pre-emptive rights administration:** requiring that any offer of Coopers' shares to Coopers' shareholders under the pre-emptive rights regime be undertaken in a manner that is transparent to all members and provides all members with a reasonable and equal opportunity to participate in any benefits accruing to the members under the Lion Nathan Bid.

(g) **Further pre-emptive rights administration:** requiring that:

(i) the Board of Coopers promptly notify all Coopers shareholders 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 Coopers members or members relatives that are offering to pay the highest price for the shares that are the subject of the Transfer Notice;

(iii) where members seek to acquire shares under the pre-emptive rights regime, the shares are allocated pro-rata to those shareholders; and

(iv) members are given sufficient time within the 28 day period provided for under the pre-emptive rights regime in order properly to assess the offer of shares and whether or not to acquire those shares.

(h) **Corrective letter:** that Coopers prepare and send a letter of correction as soon as practicable to every Coopers' shareholder which includes the following:

(i) a clear explanation of how the Coopers board's recommendation to reject the Lion Nathan Offer is consistent with the statements made that, as a result of the pre-emptive provisions in Coopers' Constitution and the determination of fair value, shareholders who accept the Lion Nathan offer (in its initial form) may not receive the price offered by Lion Nathan, and may in fact receive significantly less than that amount for their shares;

(ii) the intentions of each of the Coopers board members with respect to accepting the Lion Nathan offer and why each of the Coopers board members consider rejection of the offer is in the best interests of Coopers as a whole;

(iii) whether any or all of the directors intend 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 are offered shares under the pre-emptive rights regime, they intend to invoke the fair value determination.

(i) **Restraining voting power:** restraining each of the Coopers Family Directors and their associates from exercising, at any time prior to the end of the bid period for the Lion Nathan bid, the voting power acquired by any of them after the date on which their combined voting power in Coopers exceeded 20%.

(j) **Class separation:** in the alternative to the order above, that:

(i) the Coopers Family Directors and their associates, on the one hand, and all other Coopers shareholders, on the other, each be constituted as two separate classes for the purpose of exercising any voting power at any time prior to the end of the bid period for the Lion Nathan Bid, including voting on the proposed modifications to the Coopers' Constitution at the Constitution EGM on 29 November 2005 (or any meeting of Coopers convened for such purpose); and

(ii) a resolution to effect the proposed modifications to the Coopers' Constitution at the Constitution EGM on 29 November 2005 (or any

meeting of Coopers convened for such purpose) be deemed not to have been passed unless supported by a special resolution of 75% of the votes cast by members entitled to vote on the resolution in each of those separate classes.

(k) **Share acquisition prohibition:** prohibiting the Coopers Family Directors and their associates from acquiring any further shares in Coopers at any time prior to the end of the bid period for the Lion Nathan bid.

(l) **Restraining buy back vote:** that the Coopers Family Directors and their associates not vote on any resolution for a buy-back of Coopers shares at any time prior to the end of the bid period for the Lion Nathan bid.

(m) **Counting of buy back votes:** in the alternative to the order above, an order restraining Coopers from counting any votes cast by the Coopers Family Directors or their associates on any resolution for a buy-back of Coopers shares at any time prior to the end of the bid period for the Lion Nathan Bid.

(n) **Other buy back restraints:** in the alternative to the orders in paragraphs (l) and (m) above, an order restraining Coopers from buying-back any shares under any buy-back at any time prior to the end of the bid period for the Lion Nathan Bid if the resolution supporting such buy-back would not have been passed but for the Coopers Family Directors and their associates voting in favour of it.

(o) **Further orders:** such further or other orders as the Panel considers appropriate.