



In the matter of Coopers Brewery Limited 03R and 04R

2005 ATP 23 & ATP 24

Catchwords:

misleading statements – comparable transactions – frustrating action – disclosure of new policy by target directors – adequate time for shareholders to consider corrective disclosure – Pre-Emptive Rights Regime – Corrective Target’s Statement – association

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

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

Village Roadshow Limited 03 [2004] ATP 22; Coopers Brewery Limited 01 [2005] ATP 18;

Coopers Brewery Limited (03) [2005] ATP 22; Coopers Brewery Limited (04) [2005] ATP 21;

Pinnacle VRB Ltd (No 8) [2001] ATP 17

These are the Panel’s reasons for concluding these review proceedings and affirming the decision of the Coopers 03 Panel and the Coopers 04 Panel. In part the Panel's decision was based on an undertaking by Lion Nathan to give a supplementary bidder’s statement to Coopers shareholders to provide a counterbalancing view to some of the opinions expressed by the Coopers directors on value and pricing of Coopers shares in the Second Supplementary and Corrective Target’s Statement issued in response to the Coopers 03 proceedings.

SUMMARY

1. These reasons relate to the following:

- (a) the Second Supplementary and Corrective Target’s Statement issued by Coopers Brewery Limited (**Coopers**) on 1 December 2005 at the request of the Coopers 03 Panel to correct misleading statements which the Coopers 03 Panel found in 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 7 December 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; and
- (e) 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.

Takeovers Panel

Reasons for Decision – Coopers Brewery Limited 03R & 04R

THE PROCEEDINGS

2. These reasons relate to two review applications (**Applications**) to the Panel from Lion Nathan Limited and Lion Nathan Australia Pty Limited (together **Lion Nathan**) on 2 December 2005 and 7 December 2005 under section 657EA of the Corporations Act 2001 (Cth)¹.

Coopers 03R

3. Lion Nathan made its application for review of the Coopers 03 decision in two parts. This was consistent with the way the Coopers 03 Panel divided the application from Lion Nathan on the basis of the urgency which part of the application required.

First part of the Coopers 03R application

4. On 2 December 2005, Lion Nathan sought review of the first part of the decision which the Coopers 03 Panel made on or about 30 November 2005 that the Second Supplementary and Corrective Target's Statement adequately addressed the misleading statements that the Coopers 03 Panel found existed in the Coopers Target's Statement. Lion Nathan submitted that the amended Implied Price Chart and related disclosure in the Second Supplementary and Corrective Target's Statement was misleading and compounded, rather than corrected, the misleading impression created by the Implied Price Chart and related disclosure set out at pages 12 and 13 of the Coopers Target's Statement.
5. Lion Nathan applied for interim orders restraining the holding of the Constitution EGM pending the determination of the proceedings, a declaration of unacceptable circumstances concerning the adequacy of the disclosure in the Second Supplementary and Corrective Target's Statement (in not correcting the misleading statements in the Coopers Target's Statement and in relation to the statements in the Second Supplementary and Corrective Target's Statement) and final orders requiring that Coopers issue a further Supplementary and Corrective Target's Statement and that Coopers shareholders have an adequate time to consider the further Supplementary and Corrective Target's Statement both before the Constitution EGM and before the close of the Lion Nathan Bid.

Second part of the Coopers 03R application

6. On 7 December 2005, Lion Nathan sought review of the second part of the decision by the Coopers 03 Panel on 5 December that:
 - (a) the Constitution EGM did not constitute frustrating action;
 - (b) the Coopers directors were not associates of each other;
 - (c) three particular groups of Coopers shareholders were not associates of the Coopers directors; and
 - (d) the Panel would not prevent any Coopers shareholders from voting on the Constitution EGM resolution.

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

Takeovers Panel

Reasons for Decision – Coopers Brewery Limited 03R & 04R

7. Lion Nathan applied for a declaration of unacceptable circumstances concerning the Constitution EGM and final orders:
 - (a) restraining Coopers from putting the Constitution EGM resolution to Coopers shareholders at any time prior to the end of the Lion Nathan Bid; or
 - (b) restraining Coopers from counting the votes cast by the Coopers directors or their associates (as Lion Nathan submitted they were) at the Constitution EGM; and
 - (c) restraining the Coopers directors and their associates from voting more than 20% of Coopers shares; or
 - (d) ordering that the Constitution EGM resolution be required to be passed by separate classes of the Coopers directors and their associates in one class, and all other Coopers shareholders in another class; and
 - (e) restraining the Coopers directors from acquiring further Coopers shares prior to the close of the Lion Nathan Bid.

Coopers 04R

8. On the evening of Friday 2 December 2005, Lion Nathan also sought review of the Coopers 04 Panel's decision on 2 December 2005 not to commence proceedings in response to Lion Nathan's application of that day. Lion Nathan had applied in the Coopers 04 proceedings for a declaration of unacceptable circumstances and orders restraining the Constitution EGM.
9. The Coopers 04 application related to the Consent Decision. The Coopers directors said at page 10 of the Second Supplementary and Corrective Target's Statement that they would consent to the withdrawal of transfer notices by Coopers shareholders who had sought to accept the Lion Nathan Bid in the event that the Lion Nathan Bid lapsed or the Coopers auditor found that "fair value" was less than the Lion Nathan Bid price. This was the first time the Coopers shareholders were advised of the Consent Decision.
10. The Coopers 03 Panel had decided that the Second Supplementary and Corrective Target's Statement had made adequate disclosure to Coopers shareholders concerning both the fact of the Consent Decision, and its importance to the Lion Nathan Bid and thus to Coopers shareholders' decision on the Constitution EGM. The Coopers 03 Panel decided that posting the Second Supplementary and Corrective Target's Statement to Coopers shareholders by Express Post on Thursday 1 December 2005, would give adequate time to Coopers shareholders to consider it prior to the Constitution EGM which was due to be held on Wednesday, 7 December 2005.
11. In the Coopers 04 application, Lion Nathan submitted that:
 - (a) the Second Supplementary and Corrective Target's Statement contained inadequate information concerning the effect of the Consent Decision on Coopers shareholders and on the Lion Nathan Bid; and

Takeovers Panel

Reasons for Decision – Coopers Brewery Limited 03R & 04R

- (b) the Constitution EGM should be postponed to ensure that Coopers shareholders had adequate time to consider the further disclosure which Lion Nathan submitted that the Coopers 04 Panel should require.
12. Lion Nathan applied for an interim order restraining the holding of the Constitution EGM, a declaration of unacceptable circumstances and final orders requiring further disclosure concerning the effect of the Consent Decision on Coopers shareholders and their decisions in relation to the Lion Nathan Bid and the Constitution EGM.

Relationship of the proceedings to the Lion Nathan Bid and control of Coopers

13. Lion Nathan submitted that the three elements (the Coopers Target's Statement, the Second Supplementary and Corrective Target's Statement and the Constitution EGM) were linked to the Lion Nathan Bid.
14. Lion Nathan submitted that the Coopers Target's Statement and the Second Supplementary and Corrective Target's Statement were clearly directly relevant to its bid and that the statements which it submitted were misleading should be corrected.
15. Lion Nathan submitted that the resolution 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 Second Supplementary and Corrective Target's Statement as to the value, or comparative price, of Coopers shares would affect Coopers shareholders' decisions in relation to the resolution to be put to the Constitution EGM. On that basis, Lion Nathan submitted that the Panel should ensure that the information in the Second Supplementary and Corrective Target's Statement was corrected, and that Coopers shareholders had sufficient time to consider the corrective information prior to the Constitution EGM.
16. The Panel accepted Lion Nathan's submissions in relation to the relevance of the information in the Coopers Target's Statement and the Second Supplementary and Corrective Target's Statement to the Lion Nathan Bid and the Constitution EGM. The Panel considered that the value of Coopers shares was central to all of the decisions facing Coopers shareholders and that all of the 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 to consider the effects of the alleged misleading information on the decision of Coopers shareholders in relation to the Lion Nathan Bid and at the Constitution EGM.

THE PANEL & PROCESS

17. Given that neither of the Coopers 03 or 04 Panels made a declaration of unacceptable circumstances, Lion Nathan was required to gain the consent of the President of the Panel under section 657EA(2) to make the Applications. The President consented in both cases.
18. The President of the Panel appointed Graham Bradley, Kevin McCann (sitting Deputy President) and Simon McKeon (sitting President) as the sitting Panel (**Panel**) for all of the proceedings (**Proceedings**) arising from the Applications.

Takeovers Panel

Reasons for Decision – Coopers Brewery Limited 03R & 04R

19. The Panel adopted the Panel's published procedural rules for the purposes of all of the Proceedings.
20. The Panel consented to the parties being legally represented by their commercial lawyers in all of the Proceedings.

BACKGROUND

Coopers

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

Lion Nathan

22. 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.
23. 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.

The pre-emptive rights regime

24. 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

25. 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 Australia'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, and subsequently on appeal the South Australian Court of Appeal, ruled that a change of control in Lion Nathan had occurred when the Japanese brewer Kirin Brewery Company Limited had acquired 46% of Lion Nathan in 1998.
26. 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 on 20 October 2005, to consider a resolution to amend the Coopers Constitution by removing all references to Lion Nathan Australia in the Coopers Constitution. The effect of the resolution would be to 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.

Takeovers Panel

Reasons for Decision – Coopers Brewery Limited 03R & 04R

27. The Constitution EGM had previously been restrained:
- (a) by injunctive proceedings in the Federal Court² and following the lifting of that injunction was proposed to be reconvened on 29 November 2005; and
 - (b) by interim order of the Coopers 03 Panel on 25 November 2005 and following the lifting of that interim order was proposed to be reconvened on 7 December, with the Buy-Back EGM which had been convened to consider a proposed buy-back of up to 15% of Coopers at \$260 per share (**Buy-Back** and **Buy-Back EGM**).

DISCUSSION

28. At the time of the Applications, the Panel had the two decision letters of the Coopers 03 Panel and the two Media Releases the Coopers 03 Panel published, but not the Coopers 03 Panel's published reasons for decision.

Coopers 03R, first part

29. As set out above, in its application on 2 December 2005 in relation to the first part of the Coopers 03 decision, Lion Nathan submitted that the amended Implied Price Chart on page 6 of the Second Supplementary and Corrective Target's Statement dated 1 December 2005 was inadequate to address the misleading disclosure which the Coopers 03 Panel had found relating to the Implied Price Chart in the Coopers Target's Statement.

Argumentative Content of the Second Supplementary and Corrective Target's Statement

30. Lion Nathan submitted that the amended Implied Price Chart and related disclosure was misleading and compounded, rather than corrected, the misleading impression created by the Implied Price Chart and related disclosure set out at pages 12 and 13 of the Coopers Target's Statement.
31. Lion Nathan set out its reasons for submitting that the Second Supplementary and Corrective Target's Statement did not address the issues found by the Coopers 03 Panel to be misleading and in fact compounded them.
32. The Panel accepted that the Second Supplementary and Corrective Target's Statement presented only Coopers' arguments as to the comparability of, and conclusions to be drawn from, the two transactions to which it referred in the Second Supplementary and Corrective Target's Statement i.e. San Miguel Corporation's acquisition of J. Boag & Sons Limited (**Boags**) in 2000 and the acquisition by Foster's Group Limited of Southcorp Limited in 2005.
33. The Panel considered that while those arguments were open to Coopers to hold and put forward, they were subjective assessments and capable of valid dispute and disagreement. The Panel considered that in a complex area of valuation, or comparable price, Coopers shareholders would be better placed to make an informed decision if they received the benefit of the countervailing view as to the inferences which could or could not be drawn from the Boags and Southcorp transactions.

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

Takeovers Panel

Reasons for Decision – Coopers Brewery Limited 03R & 04R

34. The Panel did not consider it appropriate in the circumstances for it to dictate to Coopers how to present opposing or countervailing disclosure to the views that it, Coopers, held in relation to the two transactions. In particular, the Panel did not want to engage in its own drafting exercise, and Coopers had produced a document in response to the Coopers 03 Panel's decision which the Coopers 03R Panel considered was unbalanced. Therefore, the Panel considered that the countervailing case would be more appropriately prepared by Lion Nathan, subject to any comments from Coopers and approval by the Panel.

Timing

35. The Panel was also concerned that the timing of delivery of the Second Supplementary and Corrective Target's Statement may mean that some Coopers shareholders had received very little time in which to consider the Second Supplementary and Corrective Target's Statement prior to the Constitution EGM. The Panel was concerned that although the Second Supplementary and Corrective Target's Statement was posted by Express Post on Thursday 1 December 2005, if it had not been delivered the next day (which was possible for a number of the more remote Coopers shareholders) it would not be delivered until Monday 5 December 2005. That date would be after the time a shareholder would be required to post back any proxy and would leave less than 24 hours before proxies were due to be received by the company for the Constitution EGM due to be held at 10.00 a.m. on Wednesday 7 December 2005.
36. The Panel considered that given the potentially unacceptably short time period for Coopers shareholders to consider the Second Supplementary and Corrective Target's Statement, a further delay, while inconvenient for Coopers shareholders, would not cause material harm. The Panel was concerned that any delay not post-pone the Constitution EGM beyond the start of the Christmas period.

Interim order

37. In light of the above, the Panel decided to make an interim order restraining the holding of the Constitution EGM to give Lion Nathan sufficient time to prepare and dispatch a supplementary bidder's statement which gave the Coopers shareholders the benefit of Lion Nathan's views on the two transactions.
38. The Panel was concerned to ensure that the shareholders of Coopers were adequately informed in relation to:
- (a) assertions Coopers had made in a Second Supplementary and Corrective Target's Statement concerning the amended Implied Price Chart which Coopers presented to indicate "what a theoretical offer price" by Lion Nathan "would be if Lion Nathan was paying a current year EBITDA multiple equivalent to the two selected comparable transactions"; and
 - (b) the implications of the Consent Decision announced in the Second Supplementary and Corrective Target's Statement.
39. The Panel's decision to make an interim order was made after Lion Nathan provided an undertaking to the Panel to provide a document to Coopers shareholders setting

Takeovers Panel

Reasons for Decision – Coopers Brewery Limited 03R & 04R

out the issues it raised in the application in relation to the amended Implied Price Chart and the Consent Decision.

40. The Panel made the interim order on Monday, 5 December 2005. Lion Nathan provided the supplementary bidder's statement to the Panel for consideration, and to Coopers for comment to the Panel, on Tuesday 6 December 2005. After the Panel approved the final form, Lion Nathan delivered the supplementary bidder's statement to Coopers shareholders (either by courier, fax or email) on Thursday 8 December, in preparation for the post-poned Constitution EGM which the Panel approved to be held on Wednesday, 14 December 2005.

Coopers 03R, second part

41. Lion Nathan submitted that the Coopers directors controlled and ran Coopers for the benefit of the Coopers directors and those Coopers shareholders who were closely aligned with or supported the incumbent Coopers directors, to the detriment of those Coopers shareholders who wished to realize the fair market value of their Coopers shares, in the current case by selling into the Lion Nathan Bid.
42. In support of this contention, Lion Nathan submitted that:
- (a) the Coopers directors were associates of each other and had entered into a relevant agreement with each other for the purposes of:
 - (i) controlling the affairs of Coopers;
 - (ii) removing the threat to their control over the affairs of Coopers, by frustrating the Lion Nathan Bid;
 - (iii) frustrating the ready and efficient market in Coopers shares;
 - (iv) continuing to concentrate ownership and control of Coopers in the hands of the Coopers directors (and their supporters) by controlling and allocating the purchases of shares under the Pre-Emptive Rights Regime; and
 - (v) to make Coopers takeover-proof;
 - (b) three groups of Coopers shareholders were each associates of the Coopers directors in pursuit of the purposes set out above;
 - (c) the past conduct and statements of the Coopers directors demonstrated the Coopers directors' pursuit of the purposes set out above;
 - (d) the amendment of Coopers' Constitution would frustrate its bid and stifle the market in Coopers shares by making it impossible to register transfers resulting from acceptances;
 - (e) the Constitution EGM resolution, if passed, should only be passed on the votes of the disinterested Coopers shareholders and that the Coopers directors (and their associates) were persons who were interested in the proposed resolution because the resolution would entrench their control and increase their substantial holdings in Coopers to the detriment of the other Coopers shareholders; and

Takeovers Panel

Reasons for Decision – Coopers Brewery Limited 03R & 04R

- (f) it was unacceptable for the non-associated Coopers shareholders to be denied reasonable and equal opportunities to participate in benefits which would accrue to them under the Lion Nathan Bid.

Association of Coopers directors

- 43. Lion Nathan submitted that circumstances, history and recent conduct all pointed to association between:
 - (a) the Coopers directors and their immediate families; and
 - (b) the Coopers directors and:
 - (i) the four shareholders who requisitioned the Constitution EGM;
 - (ii) shareholders who were reported in the media as having declared their support for the resolution and opposition to the Lion Nathan Bid; and
 - (iii) shareholders who had recently been allotted shares under the Pre-Emptive Rights Regime(collectively **Associates**).

Association between the Coopers directors

- 44. Lion Nathan submitted that the evidence supporting its contention that the Coopers directors were associates included:
 - (a) public statements of the Coopers directors who were also shareholders in Coopers;
 - (b) the previous administration by the Coopers directors of the Pre-Emptive Rights Regime and the “*fair value*” determination;
 - (c) the close family relationships between the Coopers directors; and
 - (d) the conduct of the Coopers directors in promoting the Constitution EGM amendments to the Coopers Constitution and the Buy-Back.

Association between the Associates and the Coopers directors

- 45. Lion Nathan submitted that the evidence supporting the association between the Associates and the Coopers directors included:
 - (a) the fact that some of the Associates responded to a notice from the Coopers directors to all Coopers shareholders and indicated a willingness to acquire further Coopers shares under the Pre-Emptive Rights Regime, and the Coopers directors subsequently allocated shares to those persons who had so indicated;
 - (b) media reported statements of support for the current board of Coopers and rejection of the Lion Nathan Bid; and
 - (c) an allegation that the Coopers directors had instigated, and paid the expenses of, the requisitionists in requisitioning the Constitution EGM.
- 46. Lion Nathan submitted that the Coopers directors’ and the Associates’ control over Coopers would be enhanced by purchases under the Pre-Emptive Rights Regime and by the Buy-Back. Lion Nathan submitted that the associations which it submitted existed, gave the Coopers directors **power to control** the shares of all of the Coopers

Takeovers Panel

Reasons for Decision – Coopers Brewery Limited 03R & 04R

directors and of the Associates. Lion Nathan submitted that on that basis the Coopers directors had power to control at least 28.2%, probably 48.4%, and likely 73.2% of the voting shares in Coopers.

47. The Panel considered that Lion Nathan did not provide a reasonable basis for supporting the associations which it submitted existed.
48. Lion Nathan submitted that the Panel decisions in [Pinnacle VRB Ltd \(No 8\) \[2001\] ATP 17](#) and [Village Roadshow Ltd 03 \[2004\] ATP 22](#) and the Panel's Guidance Note 7 – Lock-Up Devices were analogous to the circumstances of its application and provided a basis for the Panel to make the declaration and orders requested in these proceedings.
49. By the time the Panel considered the Coopers 03R applications, a general meeting of Coopers had approved the Buy-Back under section 257C, with 95% of Coopers shares being voted for the resolutions and no dissenting votes.

Frustrating Action

50. Lion Nathan submitted that the resolution to be put to the Constitution EGM would further limit the already narrow market in Coopers shares. The resolution, if passed, would effectively defeat the current Lion Nathan Bid and any future Lion Nathan Bid (unless Lion Nathan had procured an appropriate amendment to the Coopers Constitution reversing the current proposals). Rival brewers were already ineligible to hold Coopers shares. Although Coopers would not be entirely takeover-proof, any future bid by a brewer could only succeed if the bidder obtained an amendment of the Coopers Constitution.
51. The principle underlying the Panel's Guidance Note on frustrating action is that "while it is the responsibility of a company's directors to make company decisions, decisions about control and ownership of the company are properly made by its shareholders". The Panel's guidance is that it would constitute unacceptable circumstances for the directors of a company to take action not approved or ratified by shareholders which defeated or frustrated a bid, once initiated. However, the Panel's guidance does not suggest that a properly constituted and properly informed body of shareholders may not choose to forego a takeover or other control opportunity.
52. On that basis, the Panel affirmed the Coopers 03 Panel's decision that the Constitution EGM would not, of itself, constitute frustrating action, or give rise to unacceptable circumstances. The Panel came to this decision with the same two provisos which the Coopers 03 Panel had made to its decision, i.e. it was on the basis that:
 - (a) Coopers shareholders had adequate information and time to consider their decision; and
 - (b) the resolution was passed by a properly constituted body of Coopers shareholders i.e. the Coopers shareholders who were interested in the outcome only as shareholders.

Takeovers Panel

Reasons for Decision – Coopers Brewery Limited 03R & 04R

Voting Exclusions

53. A shareholder's right to vote is an important property right. The Panel considered it should be slow to deprive individuals of such rights. The Panel therefore considered that it should only deprive the Coopers shareholder directors of the right to vote with other shareholders where their interests were so different to those of the other shareholders that it would have given rise to unacceptable circumstances to allow the Coopers directors' votes to be cast, either at all, or only as a separate class.
54. The differences between the "interests" of the Coopers directors and the Coopers shareholders that Lion Nathan submitted that the Panel should consider were the benefits which may continue to flow to the Coopers directors, as directors, if the Lion Nathan Bid was prevented, or cease if it was facilitated. The benefits fell into two categories, monetary (i.e. the directors' and executives' fees currently paid to Coopers directors) and non-monetary (i.e. the personal interest and satisfaction in exercising control over the company and its operations).
55. In considering whether the Coopers' directors had a materially different interest to that of other Coopers shareholders, the Panel noted that the six Coopers' directors (including the 2 executive directors) held shares to the value of \$118 million³ (valued at the Lion Nathan offer price of \$310.00 per share). According to Coopers' annual report for the financial year ending on 30 June 2005, total payments to directors and their controlled entities for the consolidated group for that year were \$1.89 million (including fulltime salaries to the executive chairman and managing director). The Panel was unconvinced that the directors have interests so different from those of other shareholders in Coopers that their participation would give rise to unacceptable circumstances.
56. The Panel did not consider that the interests of the Coopers directors, at least in the circumstances before it, were such that they should be prevented from voting with the other Coopers shareholders.
57. Although the Constitution EGM would defeat the Lion Nathan Bid, the Panel did not consider that was of itself a reason to prevent adequately informed Coopers shareholders from voting in favour of amending the Coopers Constitution in a way which appeared to inhibit an efficient, competitive and informed market in the company's shares and effectively defeat the Lion Nathan Bid. If Coopers shareholders chose to reject the Lion Nathan Bid or preferred a constitution which inhibited the market in Coopers shares, neither Chapter 6 nor the policy underlying it, inhibited them from doing so and neither should the Panel. The Panel notes the fact that Coopers is an unlisted company means that many of the issues which arose in this takeover are unlikely to arise in the context of a bid for a listed company which is unlikely to have similar ownership restrictions in its constitution.
58. The Panel considered that the issue of association, either between the Coopers directors themselves, or between the Coopers directors and the Associates, would only become relevant if the Panel considered that there was a basis for preventing the Coopers directors (or any other person) from voting at the Constitution EGM with

³ \$118 million being \$310.00 times 381249 shares which is the number of shares in which the 2005 Coopers annual report states Coopers directors have relevant interests.

Takeovers Panel

Reasons for Decision – Coopers Brewery Limited 03R & 04R

the other shareholders. As the Panel decided that there was no basis to overturn the Coopers 03 Panel's decision on this issue, it was unnecessary for it to determine whether or not the Coopers directors were associates of each other, nor whether the Associates were in fact associates of the Coopers directors.

Relevance of Association

59. Lion Nathan submitted that:
 - (a) the Coopers directors were each associated with the others; and
 - (b) the three groups of other shareholders listed in paragraph 1(b) above were associated with, or controlled by, the Coopers directors.
60. Lion Nathan submitted that the Panel should take this into account in considering:
 - (a) whether the Associates should also be prohibited from voting on the Constitution EGM resolution, or whether they should vote in a class with the Coopers directors, apart from the "non-Associated" Coopers shareholders;
 - (b) the size of acquisitions which Lion Nathan submitted had been made by the Coopers directors and their associates in the recent past; and
 - (c) whether the principle which was applied in the Village 03 decision should be applied in these proceedings.
61. Coopers submitted that the Coopers directors had relevant interests in 28.2% of the shares between them, but disagreed that any one of them had relevant interests in all of these shares, or that the directors were associates of each other.
62. Association, of itself, is neither a breach of the Corporations Act nor unacceptable. Association is simply the basis for aggregating relevant interests held by different people to determine voting power. However, an acquisition of a relevant interest may be a breach, and the formation of an association may be unacceptable if such an acquisition, or formation of association, causes a person's voting power, or control of a company, to increase either in breach of section 606, or gives rise to unacceptable circumstances.
63. As set out below, the Panel decided that there was no basis for prohibiting the Coopers directors from voting at the Constitution EGM, so the relevance of association set out in paragraph 1(a) above fell away.
64. The Panel considered the evidence that Lion Nathan presented in relation to:
 - (a) association between the Coopers directors themselves;
 - (b) association between the Coopers directors and the Associates; and
 - (c) control by the Coopers directors over the shares of the Associates.
65. The Panel considered that the evidence did not support Lion Nathan's submissions as to association or control by the Coopers directors over the voting by any of the Associates.
66. Therefore, the Panel considered that the relevance of association set out in paragraphs 1(b) and 1(c) above fell away.

Takeovers Panel

Reasons for Decision – Coopers Brewery Limited 03R & 04R

Relevance of Improper Purpose

67. Lion Nathan also submitted that the conduct of the Coopers directors (and some of the Associates) indicated that they were acting for improper purposes. However, whether or not the purposes to which Lion Nathan pointed were real or improper, those purposes would only be relevant to the Panel if they indicated that unacceptable circumstances existed or were likely to come about. The Panel considered that the submissions on improper purpose failed to provide any further or better evidence of unacceptable circumstances, in relation to the affairs or shareholders of Coopers.

Coopers 04R

68. The Panel considered the concerns raised in the Coopers 04R application. It also considered the disclosure in the Second Supplementary and Corrective Target's Statement concerning the nature and implications of the Consent Decision.
69. The Panel accepted Lion Nathan's submissions that the Consent Decision was a significant and material event in the life of the Lion Nathan Bid and in Coopers shareholders' consideration of the Lion Nathan Bid (and therefore their decision in relation to the Constitution EGM).
70. However the Panel did not accept Lion Nathan's submission that the way that the Coopers directors had disclosed the Consent Decision and its implications in the Second Supplementary and Corrective Target's Statement:
- "understates and masks to such a degree the significance of the Withdrawal Rights Decision as to be misleading by omission and highly confusing for Coopers shareholders."*
71. By the time that the Coopers 04R Panel came to consider the Coopers 04R application, it had already decided to make an interim order in the Coopers 03R proceedings postponing the convening of the Constitution EGM for 7 days.
72. The Panel considered that as a consequence of the interim order made in the Coopers 03R proceedings, the Coopers shareholders would have adequate time to consider the importance of the Consent Decision as disclosed in the Second Supplementary and Corrective Target's Statement. Therefore, it did not see any reason to vary the Coopers 04 decision on the basis of Coopers shareholders requiring any further time to consider the Consent Decision.
73. The Coopers 04R Panel considered that the Second Supplementary and Corrective Target's Statement did clearly disclose the fact of the Consent Decision and that the Consent Decision removed the possibility of Coopers shareholders who accepted the Lion Nathan Bid being locked into receiving a lower price. Although Lion Nathan may have wished the significance of the Consent Decision to have been emphasised more than the Coopers directors had done in the Second Supplementary and Corrective Target's Statement, the fact and the implications were clearly and unambiguously stated. If Lion Nathan had wished to increase the emphasis which Coopers shareholders had placed on the Consent Decision and its implications, the Coopers 04R Panel considered that Lion Nathan had adequate time and opportunity to do so.

Takeovers Panel

Reasons for Decision – Coopers Brewery Limited 03R & 04R

74. On that basis, the Panel affirmed the decision of the Coopers 04 Panel to decline to commence proceedings in relation to the Coopers 04 application.

Declaration

75. Given that:

- (a) the Lion Nathan Supplementary Bidder's Statement remedied the issues in the Second Supplementary and Corrective Target's Statement identified by the Panel;
- (b) the Coopers shareholders had sufficient time to consider the implications of the Consent Decision as set out in the Second Supplementary and Corrective Target's Statement; and
- (c) the Panel found no unacceptable circumstances in relation to the Constitution EGM,

the Panel decided to affirm the decision of the Coopers 03 Panel and the Coopers 04 Panel.

Orders

76. On 5 December 2005, the Panel made an interim order restraining the holding of the Constitution EGM until Coopers shareholders had received appropriate information providing Lion Nathan's views on the comparable transactions used in the Second Supplementary and Corrective Target's Statement and had had sufficient time to consider the information prior to the Constitution EGM.
77. Given the Panel made no declaration of unacceptable circumstances it made no final orders.
78. The Panel did not receive any application for an award of costs, and made no order for costs.

Undertakings

79. During the Proceedings, Lion Nathan undertook to the Panel to prepare and dispatch a supplementary bidder's statement which met the Panel's approval. The Panel accepted the undertaking and Lion Nathan prepared and dispatched the Supplementary Bidder's Statement.

Simon McKeon

President of the Sitting Panel

Decision dated 5 and 12 December 2005

Reasons published 14 March 2006

Takeovers Panel
Reasons for Decision - Coopers Brewery Limited 03R & 04R

Annexure A - Interim Orders Made by Coopers 03R Panel

Corporations Act
Section 657E
Interim Order

In the matters of Coopers Brewery Ltd 03(R) and 04(R)

Upon Lion Nathan Limited (**Lion Nathan**) undertaking to the Takeovers Panel (**Panel**) to provide to the Panel by 5pm AEDT on Tuesday 6 December 2005, a document which addresses the concerns that Lion Nathan has identified in its applications in these matters and to dispatch that document, in a form approved by the Panel, to shareholders in Coopers Brewery Limited (**Coopers**) with a view to it being received by them on Thursday 8 December 2005,

Pursuant to section 657E of the Corporations Act 2001, the Panel orders Coopers not to proceed with the conduct of an extraordinary general meeting to consider a resolution to amend articles 49, 50, 51 and 143 of the constitution of Coopers (and other matters) which was convened by notice given on 21 September 2005 and is currently scheduled to be held on 7 December 2005 (the **Requisitioned Meeting**) before 14 December 2005, other than to adjourn the Requisitioned Meeting to a date not earlier than 14 December 2005. This order continues in effect until 14 December 2005 or earlier order of the Panel.

Dated 6 December 2005

Simon McKeon
President of the Panel