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Friday, 23 September 2005

**Coopers Brewery Limited 02 – Panel Declines to Commence Proceedings**

The Takeovers Panel advises that it has today declined to commence proceedings in response to an application from Lion Nathan Limited and Lion Nathan Australia Pty Limited (a wholly owned subsidiary of Lion Nathan Limited) (together **Lion Nathan**) dated 9 September 2005 in relation to the proposed takeover offer for Coopers Brewery Limited (**Coopers**) by Lion Nathan announced on 1 September 2005 ("**Lion Nathan Offer**").

**Summary**

The Panel declined to commence proceedings in relation to an application by Lion Nathan concerning statements made by the Coopers board regarding the Lion Nathan Offer and its recommendation that Coopers shareholders reject the Lion Nathan Offer.

Lion Nathan sought orders requiring corrective disclosure and orders in relation to the operation of the pre-emptive rights regime contained in the Coopers Articles of Association (**Pre-emptive Rights Regime**) and the "fair value" mechanism contained in the Coopers Articles of Association ("**fair value**" **mechanism**).

The Panel considered that:

- (a) the public statements complained of were not likely to mislead or confuse Coopers shareholders;
- (b) complaints concerning the Coopers board not providing its reasons for its recommendation that Coopers shareholders reject the Lion Nathan Offer were premature; and
- (c) the Application did not raise any appropriate basis, at this stage at least, for the Panel to pre-emptively set limits on what the "fair value" should be for any shares to be sold by Coopers shareholders under the Pre-Emptive Rights Regime, or on the auditor's determination of the "fair value" .

The Panel noted that it will be interested in the process under which shares are offered to Coopers shareholders under the Pre-Emptive Rights Regime, as it may affect control of Coopers, or the acquisition of a substantial interest in Coopers.

**Background**

The Application alleged that the Coopers board has made a number of conflicting statements concerning the Lion Nathan Offer and its interaction with the operation of the Pre-Emptive Rights Regime and the "fair value" mechanism. Lion Nathan submitted that the statements, when considered in combination, and prior to the

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issue of full information in the bidder's statement and target's statement, were misleading and likely to confuse Coopers shareholders as to the value of their shares, or the value which they might receive for their shares. Lion Nathan also sought a number of orders, some of which addressed the disclosure issues raised in the Application and some of which addressed the operation of the Pre-Emptive Rights Regime and the "fair value" mechanism.

The statements to which Lion Nathan referred included:

- the press release issued on 6 September 2005 (**6 September Press Release**) in which the Coopers board unanimously recommended that Coopers shareholders reject the Lion Nathan Offer;
- the 6 September Press Release and a number of statements to the media made by Coopers that described the Lion Nathan Offer as "opportunistic";
- a letter from the Coopers board to its shareholders dated 23 August 2005 which states that any purchaser under the Pre-Emptive Rights Regime may purchase Coopers shares at the "fair value" determined by Coopers' auditor, a price which may be different to the price offered under the Lion Nathan Offer and
- various letters from the Coopers board to Lion Nathan (**Non-public Correspondence**) in which Coopers responded to the proposals which Lion Nathan had put to Coopers in early August 2005.

Furthermore, Lion Nathan also submitted that the 6 September Press Release should have, but did not, disclose the reasons for the recommendation by the Coopers board that Coopers shareholders should reject the Lion Nathan Offer. As a result, Lion Nathan submitted that Coopers shareholders did not have sufficient information to assess the merits of the Lion Nathan Offer.

The Lion Nathan application submitted that the above circumstances constituted unacceptable circumstances.

### Decision

The Panel advises that under Regulation 20 of the Australian Securities and Investments Commission Regulations 2001 it has declined to commence proceedings in response to the Application.

The Panel considered there was no real likelihood made out by Lion Nathan in its Application that the public statements by the Coopers board of which Lion Nathan complained, had caused unacceptable circumstances having regard to the effect of those statements, on:

- (a) the control or potential control of Coopers; or
- (b) the acquisition, or proposed acquisition, of a substantial interest in Coopers.

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In reaching its determination, the Panel took into account correspondence which had been received by Coopers shareholders and media reports which may have been received by them.

The Panel did not take into account any of the Non-public Correspondence as it considered that this information could not mislead or confuse Coopers shareholders as to the value of their shares.

The reasons for declining to commence proceedings are:

- (a) the public statements that Lion Nathan complained of were not likely to mislead or confuse Coopers shareholders;
- (b) the Panel considers that Lion Nathan's application, in relation to the Coopers board's rejection statement, was premature. The Panel believes that the Coopers board was entitled to reject the Offer, in its initial statement, without disclosing its reasons for doing so. The Panel considers that the Coopers board is entitled to wait until the Coopers target's statement to detail the reasons for its recommendation of rejection of the Lion Nathan Offer. If Lion Nathan considers that there are matters which need to be clarified, it is entitled to do so in its bidder's statement, or other communications to Coopers shareholders. If Lion Nathan disagrees with the Coopers board's reasons for recommending rejection of the Lion Nathan Offer it is entitled to communicate this to Coopers shareholders after the Coopers target's statement is given to them. By that time, there will still be at least two weeks in which to raise such issues;
- (c) the Coopers board was entitled to alert Coopers shareholders that the Lion Nathan Offer will be subject to the Pre-emptive Rights Regime and that there is the possibility that under that regime, the auditor may be requested to determine the "fair value" of any shares to be sold and that the auditor's determination of "fair value" may be different to the Offer price; and
- (d) the Application did not raise any appropriate basis, at this stage at least, for the Panel to pre-emptively set limits on what the "fair value" should be for any shares to be sold by Coopers shareholders under the Pre-Emptive Rights Regime, or on the auditor's determination of the "fair value". This is a matter for the auditor to determine if and when it is required to do so under the Coopers Articles of Association.

However, the Panel advised parties that it will remain interested in the manner in which the Coopers board conducts the Pre-emptive Rights Regime. The Panel considers that the operation of the Pre-Emptive Rights Regime may affect the proposed acquisition of a substantial interest in Coopers and may affect the control or potential control of Coopers. Therefore the Panel considers that the operation of the Pre-Emptive Rights Regime may, in future, come within the Panel's jurisdiction.

The Panel notes that Lion Nathan lodged a Transfer Notice with Coopers on 1 September 2005 on behalf of a Coopers shareholder. On that basis, the time under

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the first tier of the Pre-Emptive Rights Regime has been running for three weeks and the Panel is not aware of any advice that the Coopers board has given to Coopers shareholders on the manner in which the Coopers board is proposing to implement the Pre-Emptive Rights Regime in relation to those shares, or shares tendered into the Lion Nathan Offer. The Panel considers it highly likely that Coopers shareholders may currently be interested in receiving from the Coopers board correspondence which describes the process under which the board will seek to find a “Purchasing Member or Members” for those shares under the Pre-emptive Rights Regime.

In the orders which it sought under the Application, Lion Nathan asked the Panel to make orders concerning the manner in which the Coopers board implemented the Pre-Emptive Rights Regime in relation to the Lion Nathan Offer. The Panel notes that Coopers’ directors are subject to fiduciary duties to act in good faith in the best interests of the company as a whole, and not to use their powers to advantage some shareholders as against others. There was no evidence before the Panel to support the view that the Coopers board has or may breach their fiduciary duties in this regard.

The sitting Panel which considered the application was Susan Doyle, Marian Micalizzi and Mark Paganin (sitting President).

The Panel will publish its reasons for its decision in these proceedings on its website.

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