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Monday, 5 December 2005

**Coopers Brewery Limited 03 – Second Part of Panel Decision**

The Takeovers Panel advises that it has declined to make a declaration of unacceptable circumstances in relation to an application dated 21 November 2005 from Lion Nathan Limited and Lion Nathan Australia Pty Limited (together **Lion Nathan**) for a declaration of unacceptable circumstances and orders in relation to the Second Supplementary and Corrective Target's Statement, issued by Coopers Brewery Limited on 15 November 2005.

The Panel had previously announced its preliminary decision that the Coopers Target's Statement contained misleading statements and that the Panel required corrective disclosure by Coopers, which Coopers sent to its shareholders in the Second Supplementary and Corrective Target's Statement on 1 December 2005.

This second part of the Panel's decision relates primarily to the question of who may vote at the forthcoming EGMs proposed to be held by Coopers on 7 December 2005. The Panel declined to make a declaration of unacceptable circumstances and declined to make any orders restraining any person from voting at the meetings.

**IMPLICATIONS OF THE TWO EGMS**

The Panel considers that the resolutions to be considered at the two different EGMs proposed to be held on 7 December 2005, while different in nature and subject, required similar thinking by the Panel because the allegations against them essentially extended to the same concept i.e. that the resolutions at the two EGMs would adversely, and unacceptably:

- (a) affect the prospects of the Lion Nathan Bid;
- (b) prevent those Coopers shareholders who wished to accept the bid from having an opportunity to accept the bid and share in the benefits flowing from the Lion Nathan Bid;
- (c) entrench the current board and management of Coopers.

The Panel considered that neither of the two EGMs could be considered to constitute frustrating action (as discussed in the Panel's Guidance Note 16 on Frustrating Action) provided:

- (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 EGM resolutions;

- (b) the Coopers shareholders had adequate time to consider that information; and
- (c) the resolutions were passed by the Coopers shareholders where the correct Coopers shareholders' votes were taken into account.

### **THE BUY-BACK EGM**

The primary case against the Buy-Back EGM was that the circumstances were analogous to those addressed in the *Village 03* 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. The Panel noted the stated intention of the Coopers directors not to sell any of their shares into the Buy-Back.

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 managers from losing their positions, power and benefits if the Lion Nathan Bid was successful.

The Panel has previously stated that the progression towards control, or "a step along the path to 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 reasons including the following:

- (a) there is no indication that the Buy-Back or the Constitution EGM resolutions would be likely to affect the power of the Coopers directors to elect directors, as shareholders of the different classes of Coopers shares which can elect directors (this is very specific to the circumstances of the Coopers Constitution); and
- (b) the possible increase in overall voting power of the Coopers directors for an ordinary resolution following the Buy-back is 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.

## THE CONSTITUTION EGM

The Panel did not accept that the mere passage of the Constitution EGM resolutions, by an informed and properly formed majority of Coopers shareholders would constitute frustrating action or give rise to unacceptable circumstances. Rather, the Panel considered it would be the proper exercise of shareholder democracy and would be consistent with the principles of the takeovers chapters for the type of unlisted public company which Coopers is.

The Panel had determined in its preliminary decision that it considered that Coopers shareholders, once they received the Second Supplementary and Corrective Target's Statement, would be adequately informed of:

- (a) the value of Coopers shares;
- (b) the nature of the Lion Nathan Bid; and
- (c) the consequences for this bid, and any future Lion Nathan bid, of passing the Constitution EGM resolutions.

Therefore, 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.

The Panel considers that the fundamental question in relation to Constitution EGM resolutions, if passed in reliance 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 materially 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.

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 was sufficient to warrant depriving the Coopers directors of their right to vote their shares.

## PATTERN OF CONDUCT

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 (**Pre-Emptive Rights Regime**) under the Coopers Constitution was intended and administered to increase the control of the Coopers directors over Coopers.

The Panel did not consider the first three issues either were proven, or were material.

The Panel did have some concerns initially about the share allocation policy, and especially the repeated statements over a 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 may have been acting in concert, with an intention of preventing the Lion Nathan Bid from proceeding in as efficient, informed and competitive market as possible.

However, the share allocation policy announced in the Coopers Target Statement, and the decision by Coopers directors to consent to withdrawal of transfer notices in the event of the Lion Nathan bid lapsing announced in the Second Supplementary and Corrective Target Statement, addressed the Panel's material concerns in this area. Otherwise, the Panel may well have made a declaration that the share allocation policy, and the Coopers directors' administration of it, did give rise to unacceptable circumstances.

## RECENT STATEMENTS BY THE COOPERS DIRECTORS

The Panel notes the unfortunate statements 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 Statement. The Panel accepts that much of the harm caused by the statements has been remedied by the covering letter which accompanied the second supplementary corrective target statement. On that basis, the Panel does not intend to take any further action in relation to the statements.

The Panel will publish its reasons for this decision in due course on its website [www.takeovers.gov.au](http://www.takeovers.gov.au)

The sitting Panel in these proceedings is: Susan Doyle, Marian Micalizzi and Mark Paganin (sitting President).

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