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# Resisting a hostile takeover: the Lion Nathan bid for Coopers Brewery

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**RESISTING A HOSTILE TAKEOVER:  
THE LION NATHAN BID FOR COOPERS BREWERY**

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The authors feel obliged to acknowledge that they are partial to the occasional beer. However, this has not affected their impartiality as they enjoy beers produced by both Coopers and Lion Nathan.

## **I INTRODUCTION**

Lion Nathan Ltd (Lion Nathan), Australia's second largest brewer, through its subsidiary Lion Nathan Australia Pty Ltd (LNA), on 1 September 2005 launched a hostile takeover of Coopers Brewery Limited (hereafter 'Coopers'). What followed was one of the most fascinating and vigorously contested takeover battles in Australian corporate history. As a case study, it raises a range of corporate law issues including directors' duties, oppression, share buy-backs, experts' reports, use of pre-emption clauses and the interpretation of a company's constitution.

This paper provides an overview of the tactics adopted by both sides during this lengthy battle. It also discusses the corporate law issues raised by the facts and peculiar circumstances – circumstances which led one commentator to state the following:

‘It's hard not to feel that you'd rather be a prisoner at Guantanamo Bay, with daily beatings and forced marches in ankle chains, than a shareholder in Coopers Brewery at the mercy of Bill Cooper, his immediate kin and his accounting firm, KPMG.’<sup>1</sup>

## **II BACKGROUND**

The takeover bid was an off market bid of A\$260 per share in cash for each class of Coopers' shares, with no minimum acceptance conditions. This offer was a 478 per cent premium to the price of Coopers' shares of A\$45.01 determined as fair value price by auditors KPMG at the last share buy back in 2003.

Both parties were determined to win the battle as evidenced through the court cases, the Takeovers Panel applications and the media coverage. This included a South Australian Supreme Court case and appeal in relation to the corporate structure of LNA; Federal Court cases in relation to preventing Coopers' general meeting; other

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<sup>1</sup> Alan Kohler, 'Coopers' own special brew', *The Sydney Morning Herald* (Sydney), 11 November 2005. Also available on the subscription database <<http://www.afr.com>> at 15 May 07.

litigation regarding oppression and misleading and deceptive conduct; Takeovers Panel decisions; an Australian Competition and Consumer Commission (ACCC) inquiry; as well as the suggestion of involvement of the Australian Securities and Investment Commission (ASIC).

### **III THE ONCE PEACEFUL VILLAGE – COOPERS’ DEFENCE STRATEGY**

#### ***A Share Structure***

The share structure of Coopers was arranged so that only certain shares had voting rights in regards to board composition. There were four classes of shares. The A, B and D class shares provided the right to appoint directors to the board of Coopers and were largely held by the family. The C class shares represented approximately 91 per cent of the economic value of Coopers, but had limited rights to appoint directors.<sup>2</sup>

#### ***B Pre-emptive Rights Regime***

Coopers had a three tiered pre-emptive rights regime, with the first tier, that is the first right to purchase available shares, going to current Coopers’ shareholders. The second tier gave rights to AMP, the trustee of Coopers’ superannuation fund. The final tier gave LNA the option to purchase available shares if they were not purchased by the preceding two tier groups, before the shares were offered to the general public.

Under the pre-emptive rights regime, sellers appointed the company as selling agent and nominated a sale price. However, buyers could instead request a ‘fair value’ to be determined by the company’s auditor, KPMG. Once this had been done, the seller was obliged to sell at that price and could not withdraw from the sale unless the directors allowed this.

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<sup>2</sup> Lion Nathan Australia Pty Ltd, ‘Corporate Lion Nathan Announces Offer for Coopers Brewery Ltd Shares’ (Media Release, 1 September 2005).

***C Coopers v LNA - SA Supreme Court Decision***<sup>3</sup>

Coopers in early September 2005 applied for a declaration that there had been a change in control in LNA. If this declaration was granted, Coopers' articles of association could be changed, effectively removing LNA's pre-emptive rights. The question before the court was whether there had been a material change in control in LNA as per Coopers' articles of association. Did Kirin Brewery Company Ltd (Kirin Brewery) acquire a relevant interest in more than 40 per cent of the issued capital share of Lion Nathan the holding company of LNA, within the meaning of article 44 of Coopers' articles of association when Kirin Brewery obtained its interest in Lion Nathan? And if so, had there been a change in control of LNA (as opposed to Lion Nathan) within the meaning of Coopers' articles of association?

The court case focused on whether there was a change in control with respect to an acquisition of a relevant interest as defined in the *Corporations Law*, the applicable law at the time of the acquisition by Kirin Brewery.

In April 1998, Bankers Trust of New Zealand on behalf of Kirin Brewery of Japan acquired 'an interest' in the shares of Lion Nathan. The shares that the interest was acquired in were voting shares and made up approximately 45 per cent of the issued share capital of Lion Nathan. As a consequence of this acquisition, Kirin Brewery appointed four new directors, as nominees of Kirin Brewery, to the Lion Nathan board that consisted of 10 directors in total.

LNA was, and at all times had been, a wholly owned subsidiary of Lion Nathan. It was agreed that before and after Lion Nathan moved registration to NSW from New Zealand in 2000, Lion Nathan had the power to direct the management and policies of LNA and that therefore Lion Nathan directly or indirectly controlled LNA. It should be noted that Kirin Brewery purchased shares in Lion Nathan and the Coopers' constitution referred to LNA.

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<sup>3</sup> *Coopers Brewery Ltd v Lion Nathan Australia Pty Ltd* [2005] SASC 334 (2 September 2005).

Perry J found that Kirin Brewery acquired a relevant interest in more than 40 per cent of the issued share capital of Lion Nathan within the meaning of article 44. Further, there was a change in control of LNA within the meaning of Coopers' constitution.<sup>4</sup>

**D *Coopers v LNA – South Australia Supreme Court Appeal***<sup>5</sup>

The decision of Perry J was taken on appeal by LNA to the full court of the Supreme Court of South Australia. The issue on appeal was the effect of the importation into the constitution of the definition of relevant interest in the Corporations Law.<sup>6</sup> An examination was conducted by the full court into incorporation of a term into a constitution. The incorporated term must be read as if the term was written out in full into the article and the article needs to be interpreted in the context of the constitution.<sup>7</sup> If, when incorporated, the term does not make sense, some parts or wording need to be rejected.<sup>8</sup> Following other similar decisions in relation to importing terms into a pre-emptive rights clause, the full court dismissed the appeal.<sup>9</sup>

The outcome of this case entitled Coopers to remove LNA's pre-emptive right. However, in order to do this Coopers was obliged to hold an EGM and put this action to a vote by the shareholders. For the rights to be removed there needed to be a 75 per cent majority vote in favour. Initially, the EGM was set to take place on the 20<sup>th</sup> of October 2005. However, if the resolution was passed, this would effectively end LNA's takeover bid. Therefore, LNA instigated a number of tactics to prevent the EGM taking place.

**IV SOMETHING TO FEAR? - LION NATHAN AUSTRALIA'S TACTICS**

**A *LNA v Coopers – Federal Court Decision***<sup>10</sup>

LNA took Coopers to the Federal Court seeking orders that a subsidiary be registered as the holder of 500 shares of Coopers which had been transferred to the subsidiary by

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<sup>4</sup> Above n 3, 171.

<sup>5</sup> *Coopers Brewery Ltd v Lion Nathan Australia Pty Ltd* [2005] SASC 400.

<sup>6</sup> *Ibid* 17.

<sup>7</sup> *Tradigrain SA v King Diamond Shipping SA* [2000] 2 Lloyd's Rep 319,335-6.

<sup>8</sup> *Porteus v Watney* (1878) 3 Q.B.D. 534, 542.

<sup>9</sup> LNA attempted to appeal to the High Court but special leave to appeal was refused on 2 June 2006.

<sup>10</sup> *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2005] FCA 1426.



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Mr Barry Schrapel, a current member of Coopers. LNA sought an injunction restraining the EGM until the proceeding was determined.

Additionally, LNA sought an injunction to prevent the EGM taking place until Coopers had fully informed its shareholders by giving greater disclosure of relevant information to enable them to consider the resolution which had been placed before them. LNA claimed that Coopers had not given full and fair disclosure to its shareholders about the consequence of the resolution to remove LNA's third tier rights, including that this would not allow Coopers' shareholders to sell shares to LNA at the bid price of A\$260.

In relation to the transfer of 500 shares, LNA in a complex legal manoeuvre established two companies, a trustee company ACN 116 149 510 Pty Ltd and a Lion Nathan ACN company. The Lion Nathan ACN company had an issued share capital of two ordinary shares that were owned by the trustee company ACN 116 149 510 Pty Ltd. These shares were held in trust for Coopers' member Barry Schrapel, the sole beneficial owner. In return Mr Schrapel had sold and transferred 500 Coopers' shares to the Lion Nathan ACN company.

The pivotal term was that of 'member's relative', as LNA was claiming that the Lion Nathan ACN company was a relative of Mr Schrapel, and therefore entitled to have the shares registered to it. If this was accepted, LNA would effectively become a first tier pre-emptive rights member and therefore, would not have to worry about the EGM or the removal of LNA's third tier rights, as LNA would be eligible to purchase any shares that came up for sale through its subsidiary. The expression 'member's relative' was defined in the articles and included the following:

a company which acts as trustee of a trust of which such member is the sole beneficiary or of a discretionary trust which in the opinion of the Directors was created wholly for the benefit of that person or a family group of which that person is a member;

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Goldberg J found that there was a serious question to be tried whether the Lion Nathan ACN company was entitled to be registered as a holder of the 500 shares.<sup>11</sup> However, Goldberg J further considered the balance of convenience to indicate that this matter should not restrain the EGM until the shares were registered. Instead, Goldberg J sought an undertaking from Coopers to keep a record of the votes at the EGM and, in the situation where the votes of those 500 shares would have made a difference to the outcome of the resolution, then the validity of the meeting could be challenged.<sup>12</sup>

In relation to the proceeding held in conjunction, LNA claimed that Coopers engaged in conduct in relation to a financial product, being the shares in Coopers, that was misleading and deceptive in contravention of s 1041H(1) of the *Corporations Act 2001* (Cth) and/or s 52 of the *Trade Practices Act 1974* (Cth).<sup>13</sup>

The conduct was allegedly to be found in the statements made to shareholders and in information omitted in the explanatory memorandum addressed to the shareholders by Coopers' board to explain the reason for the EGM and the resolution to be voted on. LNA put forward a number of issues with the original memorandum. Coopers then issued an additional letter. LNA professed that this additional letter still did not clarify or satisfy the disclosure requirements.

The level of disclosure was a contentious issue between the parties, as LNA believed that there needed to be sufficient information as required in a target's statement. Coopers on the other hand, believed that the purpose of the EGM was to remove LNA's pre-emptive rights and that the takeover offer was a different issue to be dealt with at a later date, or not at all if the resolution was passed. Goldberg J considered that the issue before the shareholders was whether or not they wanted to keep the opportunity to receive LNA's offer.<sup>14</sup>

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<sup>11</sup> *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2005] FCA 1426, 81.

<sup>12</sup> *Ibid* 82, 83.

<sup>13</sup> *Ibid* 25. Justice Goldberg did not give great attention to these statutory provisions and seemed to rely more on the general law fiduciary duty.

<sup>14</sup> *Ibid* 35.

In deciding the relevant level of disclosure required, Goldberg J considered a number of cases including *Fraser v NRMA Holding Ltd*<sup>15</sup> and *Gambotto v WCP Ltd*.<sup>16</sup> The directors of Coopers had a duty to issue material that was not misleading and at the same time should not omit any matters within their knowledge that were important and relevant to the decision the shareholders had to make.

After the further explanatory memorandum was issued, Goldberg J still considered that Coopers had not addressed the issue of the alternative values of shares open to the shareholders, including the current fair value price and the ability for the fair value price to override the offer presented by LNA. Further, there were still some inconsistencies between the two documents, which could be confusing to the shareholders. Goldberg J granted the injunction against the EGM taking place unless Coopers issued a consolidated memorandum which incorporated all relevant material and eliminated the inconsistencies.

### ***B Takeovers Panel Application***<sup>17</sup>

Another tactic used by LNA was to make an application to the Panel alleging that Coopers' board had made a number of conflicting statements prior to the issue of the bidder's or target's statements. These statements included press statements and particularly that Coopers had not given reasons for its initial statement rejecting LNA's bid. These statements were alleged to be misleading. LNA sought a declaration of unacceptable circumstances and orders to set aside the fair value provisions in Coopers' constitution, as well as orders to conduct the pre-emptive rights regime in a transparent manner.

The Panel declined to commence proceedings as the public statements were not likely to mislead or confuse Coopers' shareholders. Also the complaints in relation to the reasons not being given were deemed to be premature. In relation to the fair value

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<sup>15</sup> (1994) 55 FCR 452.

<sup>16</sup> (1995) 182 CLR 432.

<sup>17</sup> Coopers Brewery Limited 02 [2005] ATP 19.

provision, there was no appropriate basis for the Panel to set limits on the provision. However, in relation to the pre-emptive rights regime, although the Panel would not take action at that stage, it did state that it would be interested in the process under which shares were offered to Coopers' shareholders under the pre-emptive rights regime, as it may affect the control of Coopers or the acquisition of a substantial interest in Coopers.<sup>18</sup> The Panel also noted that the Coopers' directors were under a fiduciary duty to act in good faith and in the best interest of the company as a whole and not to use their powers to advantage some shareholders as against others.

## **V TAMING THE LION – COOPERS' RESPONSE**

From the outset, Coopers' board rejected the offer and advised the shareholders to do so as well. Additionally, Coopers instigated a number of legal moves to thwart the takeover, including a Panel application and accusing LNA of anti-competitive conduct before the ACCC.

### ***A Takeovers Panel Application***<sup>19</sup>

LNA had sent a letter to Coopers' shareholders informing them of the offer. The letter did not mention that the acceptance of the offer was subject to the pre-emptive rights regime and that accepting the offer could lead to someone else receiving the shares at a different price to what LNA was offering. Coopers alleged that this letter was misleading. Coopers sought orders for LNA to issue a corrective letter without giving any recommendations to the shareholders in the process.

The Panel was concerned about the information being distributed before the formal process of the offer had begun. The Panel wished to ensure that any agreements entered into before the lodgement of the bidder's and target's statements took place in an efficient, competitive and informed market.<sup>20</sup> The Panel advised that the best method of resolving this matter was for both parties to prepare a letter which clearly

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<sup>18</sup> Ibid 20.

<sup>19</sup> Coopers Brewery Limited 01 [2005] ATP 18.

<sup>20</sup> Ibid 19.

explained the pre-emptive rights regime to the shareholders. LNA agreed to an undertaking to do so, Coopers declined. LNA's letter was sent to shareholders after it was reviewed by Coopers and the Panel.

### **B *Australian Competition and Consumer Commission (ACCC)***

The *Trade Practices Act 1974* (Cth) prohibits mergers and acquisitions that substantially lessen competition in a market place, or are likely to do so. On 26 September 2005, the ACCC commenced investigations into the LNA takeover attempt under the ACCC's Guidelines for Informal Merger Reviews. A statement of issues was published on 15 November 2005. The identified issues included: the potential barrier to entry for other beer producers that do not have their own distribution network; that LNA may limit the growth of competing products; and concerns about removing an independent distributor from the market.

After seeking further information from interested parties in response to the barriers to market and the removal of a competitor, the ACCC announced on 5 December 2005 that the proposed acquisition of Coopers by LNA would not have the effect or be likely to have the effect of substantially lessening competition in the national market for beer.<sup>21</sup>

### **C *Coopers' Share Buy-back***

On 7 November 2005, Coopers announced a planned share buy-back subject to shareholder approval. Coopers was willing to buy back up to 15 per cent of the company's existing share capital at A\$260 per share. This would equate to a A\$258 dividend.

The shareholder approval required only a simple majority and would be a fait accompli if the directors were allowed to vote.<sup>22</sup> Preventing them from voting however, was arguably possible due to the Takeovers Panel decision in *Village*

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<sup>21</sup> ACCC, *Public Competition Assessment Lion Nathan Limited's proposed acquisition of Coopers Brewery Limited* (2005).

<sup>22</sup> Bryan Frith, 'Buyback Offer May Be Coopers Ruse To Keep It All In The Family', *The Australian* (Sydney), 9 November 2005.

*Roadshow Limited 03*<sup>23</sup> in which the Panel decided that it was unacceptable for a shareholder to vote for a resolution to authorise a transaction which could increase that shareholder's control. This was despite the provision in s 611(19) which exempts the requirement for a takeover offer where the bid threshold is exceeded as a result of a buy-back.

#### **D *Coopers' Target's Statement***

On 15 November 2005 Coopers' board released its target's statement and, with no surprises, strongly recommended that Coopers' shareholders reject the LNA offer. The reasons given included that Coopers' performance had been outstanding under the current management and that Coopers was offering its shareholders an alternative path to liquidity through share buy-backs.<sup>24</sup>

#### **E *EGM to Proceed***

The Federal Court lifted the injunction on 18 November 2005, so Coopers could proceed with the EGM to vote on the resolution to remove LNA's third tier preemptive rights. However, LNA was not about to give up.

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<sup>23</sup> [2004] ATP 22.

<sup>24</sup> As Frith, above n 22, points out, although the buy-back was at the same price as the LNA offer, many shareholders would have to pay more tax on it as the majority of Coopers' shareholders acquired their shares before the introduction of capital gains tax. If they sold at LNA's offering price they would receive the entire amount tax free. Alternatively, if they accepted Cooper's buy-back and future buy-backs, only A\$2 was capital and the A\$258 dividend, which would be franked. So, anyone over the tax rate of 30 per cent would face an increased tax bill. They could not even claim much tax loss on the A\$2 selling price as the share price had increased so quickly.

## **VI LION AGAIN ON THE PROWL – LNA FIGHTS BACK**

### ***A Increase of Offer Price***

LNA increased its offer price from A\$260 to A\$310 per share on 21 November 2005. This represented a 589 per cent increase on the last traded sale price of A\$45.01. This was also 63 per cent above KPMG's 'fair value' of Coopers' shares and 19 per cent above Coopers' buy-back offering. Rob Murray, CEO of LNA, stated that the Coopers' board should now unanimously recommend the takeover offer.<sup>25</sup> However, they declined to do so.

### ***B Takeovers Panel Application***<sup>26</sup>

On 21 November 2005, LNA made a further application to the Panel. LNA contended that Coopers' target's statement contained misleading or confusing information. Further, it suggested that if the EGM was to take place on 29 November 2005 for the purpose of amending Coopers' articles to remove LNA's pre-emptive rights, this would constitute frustrating action as it would, in effect, prevent the LNA offer from proceeding. Finally, LNA again questioned the administration of the pre-emptive rights regime by Coopers' board.

The application also submitted that in relation to the Coopers' share buy-back the principles set out in *Village Roadshow* should be applied. This would not allow Coopers' directors to vote on the resolution to approve the share buy-back. LNA sought orders to restrain the EGM to allow corrective disclosure to be put before the Coopers' shareholders.

On 25 November 2005, the Panel delivered an interim order restraining the EGM. The Panel advised that there would be no objection to the EGM being held in conjunction with the other EGM for the share buy-back to be held on the 7 December, provided that Coopers delivered a corrective statement to shareholders concerning the statements made in the target's statement in relation to the increase in value of

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<sup>25</sup> Lion Nathan Australia Pty Ltd, 'Lion Nathan Increases Offer Price for Coopers Shares to \$310 per Share' (Media Release, 21 November 2005).

<sup>26</sup> Takeover Panel 'TP05/82 Coopers Brewery Limited 03- Panel Restrains EGM' (Media Release, 25 November 2005).

Coopers' shares, the control value of Coopers' shares and the value of synergies available to LNA under the bid.

***C Federal Court Decision in relation to Restraint of Trade***<sup>27</sup>

LNA made a further interlocutory application on 22 November 2005 to the Federal Court in relation to Coopers' alleged restraint of trade. This was heard on 24 November 2005 in conjunction with Barry Schrapel's hearing (discussed below). LNA sought a declaration that amending Coopers' constitution at the EGM amounted to a restraint of trade in accordance with ss 45(2)(a)(i) and 45(2)(b)(i) of the *Trade Practices Act 1974* (Cth), as well as the common law doctrine of restraint of trade. It was claimed that the change to Coopers' constitution would result in an exclusionary provision. Due to this potential outcome, LNA sought injunctive relief against the EGM being held to remove LNA's third tier rights.

Finn J described the application as 'a somewhat adventurous one' and concluded that LNA did not advance any significantly compelling case on the balance of convenience.

***D Federal Court Decision in Relation to Claims of Oppression***<sup>28</sup>

Simultaneously considered at the Federal Court hearing was shareholder Barry Schrapel's interlocutory application – also for an injunction to restrain the meeting but on different grounds. Mr Schrapel complained that Coopers, by seeking an EGM to vote on the resolution to remove LNA's third tier pre-emptive rights, was acting unfairly prejudicial to, or unfairly discriminatory against, shareholders who wished to sell to LNA. Mr Schrapel claimed oppression by the Coopers' directors and sought an injunction against the EGM.

Although these issues raised serious questions regarding the conduct of affairs of the Coopers' board over the preceding five years, the questions that Finn J constrained himself to were in relation to the holding of the EGM on 29 November 2005. The

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<sup>27</sup> *Schrapel v Coopers Brewery Ltd* [2005] FCA 1714.

<sup>28</sup> *Schrapel v Coopers Brewery Ltd* [2005] FCA 1714. Mr Schrapel's application was funded by LNA.



particular issues considered involved Mr Schrapel's claim of oppression and fraud on the minority. It was alleged that if the resolution was passed at the EGM it would not be valid as it would constitute fraud on the minority or not be in the best interest of the company as a whole. Additionally it would be unfairly discriminatory to those members who wished to sell to LNA. The key issue in relation to fraud on the minority was the exercise of power beyond the intention of the constitution. Finn J concluded that this was a weak argument as it was difficult to see the proposed alteration as anything other than what was contemplated at the time of the initial agreement between Coopers and LNA.

In relation to oppression, Finn J stated that the grounds that might find the resolution as unfairly discriminatory were slight. This was predominantly due to the history of the company and the reasons for the original decision, combined with LNA's change in control. Finn J also mentioned that any detriment suffered by Mr Schrapel may be adequately remedied by damages.<sup>29</sup> On the balance of convenience, the application for an injunction was dismissed.

#### ***E Federal Court Case in relation to Coopers' 2003 Share Buy-back***

Since June 2005, LNA had conducted proceedings in the Federal Court questioning the validity of the 2003 share buy-back. LNA claimed that it was misleading of Coopers not to inform shareholders that the buy-back was subject to the pre-emptive rights regime. It argued that the shares that were bought back by Coopers should first have been offered to LNA as a pre-emptive rights holder before being offered to anyone else, including the Coopers' company. LNA contended that the articles expressly precluded the utilisation of the buy-back scheme of the *Corporations Act 2001* (Cth).

Despite Coopers attempting to have this case dismissed,<sup>30</sup> Finn J found that the issues raised should be dealt with in the context of a hearing rather than disposed of in a summary manner. The case was heard in the Federal Court on 13 December 2005

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<sup>29</sup> *Schrapel v Coopers Brewery Ltd* [2005] FCA 1714, 29.

<sup>30</sup> *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2005] FCA 1531.

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with J Finn dismissing LNA's contention that the pre-emptive rights regime acted as an express prohibition on the power of Coopers to instigate a share buy back or that the 2003 share buy-back should have triggered the three tiered rights regime.<sup>31</sup> This left the path clear for a new share buy-back offer by Coopers to negate LNA's takeover offer by offering current shareholders an alternative route in which to liquidate their shares without accepting LNA's takeover offer.

***F Removal of Conditions on Takeover Offer***

On 30 November 2005, LNA announced that it had now waived all conditions for the takeover offer. LNA's CEO, Rob Murray, said the offer was now only subject to conditions which were regulatory. Murray said it was now in the best interest of Coopers' shareholders that their board recommend acceptance of the offer.<sup>32</sup>

**VII FURTHER TAKEOVERS PANEL APPLICATIONS**

Coopers dispatched its second supplementary corrective target's statement as per the Panel's requirements in application 03, on 1 December 2005.<sup>33</sup> LNA proceeded to lodge another application on 2 December<sup>34</sup> relating to Coopers' decision, set out in the corrective statement, to allow shareholders to withdraw their transfer notice if the LNA share offer lapsed or was withdrawn. This eliminated the risk of shareholders having to sell their shares at a lower premium if LNA did not succeed, an issue LNA felt was restricting some shareholders lodging transfer notices in the first place. LNA believed that this change in decision needed to be made clearer to the shareholders but the Panel declined this application.<sup>35</sup> LNA then also lodged applications for review of

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<sup>31</sup> *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2005] FCA 1812. Confirmed on appeal in *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2006] FCAFC 144. The full court held that it was permissible to consider surrounding circumstances when construing articles in a corporate constitution.

<sup>32</sup> AFX Limited, 'Australia's Lion Nathan Waives Key Conditions On Bid For Coopers Brewery' (2005) <<http://www.forbes.com/markets/feeds/afx/2005/11/30/afx2361932.html>> at 29 March 2007.

<sup>33</sup> Takeover Panel 'TP05/85 Coopers Brewery Limited 03- Second Part of Panel Decision Panel' (Media Release, 5 December 2005).

<sup>34</sup> Takeover Panel 'TP05/83 Coopers Brewery Limited 04- Panel Declines Application' (Media Release, 2 December 2005).

<sup>35</sup> *Ibid.*

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the preliminary decision in application 03 and for a review of the declined 04 application.<sup>36</sup>

On 5 December 2005 the Panel released the second part of the Panel's decision in application 03 and indicated that there would be no restriction placed on Coopers' directors to vote at the EGM.<sup>37</sup> However, the Panel did decide to make an interim order in relation to the review applications and postponed the EGM again for at least another week in order for LNA to provide supplementary material to Coopers' shareholders in reference to the Coopers' second supplementary corrective target's statement.<sup>38</sup>

LNA requested a further review in relation to the decision in the 03 application. The Panel decided not to continue proceedings in relation to either 03R or the 04R as there were no longer any issues with disclosure in its view.<sup>39</sup> The further review application for 03RB found no unacceptable circumstances, thus allowing the EGM to proceed on 14 December 2005.<sup>40</sup>

### **VIII FINAL RESOLUTION**

Coopers held an EGM on 7 December 2005 to determine the shareholders' views on Coopers' proposed share buy-back. This EGM resulted in an unanimous vote in favour of Coopers' proposed share buy-back scheme with more than 95 per cent of shares eligible to vote being voted. The shareholders voted in favour of amending the constitution to state that the shares purchased in the buy-back were not subject to the

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<sup>36</sup> Takeover Panel 'TP05/84 Coopers Brewery Limited - Panel Receives Two Review Applications' (Media Release, 5 December 2005).

<sup>37</sup> Takeover Panel, above n 33.

<sup>38</sup> Takeover Panel 'TP05/86 Coopers Brewery Limited 03R and 043' (Media Release, 5 December 2005).

<sup>39</sup> Takeover Panel 'TP05/88 Coopers Brewery Limited - Coopers 03 and 04 Review Application Decisions' (Media Release, 12 December 2005).

<sup>40</sup> *Ibid.*

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pre-emptive rights regime.<sup>41</sup> This successfully gave Coopers' shareholders an avenue to greater liquidity of their shares.

On 14 December 2005, a second EGM was held for Coopers' shareholders to determine the fate of LNA in regards to the third tier rights. Only 6.38 per cent of shareholders voted to retain LNA's rights in the Coopers' constitution. The result of the vote removed LNA's pre-emptive rights and the provisions that deemed LNA not to be a competitor of Coopers, thus effectively removing LNA's ability to purchase Cooper's shares.<sup>42</sup>

LNA did not formally announce that it would not extend the bid until March 2006. Even then it was reported as continuing a handful of separate legal actions connected to the bid and stated in a media release that, depending on the outcome of these actions, LNA hoped to become a shareholder of Coopers and may launch a further takeover in the future.<sup>43</sup>

The managing director of LNA, Rob Murray, estimated the legal costs associated with the attempted takeover at over A\$5 million while there were still two or three legal actions in motion.<sup>44</sup> Coopers costs were reported as having blown out to A\$8 million from an estimated A\$5 million to A\$7 million in its target's statement.<sup>45</sup>

As mentioned, the buyback was approved unanimously by shareholders – even by

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<sup>41</sup> Coopers Brewery Ltd, 'Slap in the Face to Lion Nathan in Unanimous Coopers Vote' (Media Release, 7 December 2005).

<sup>42</sup> Coopers Brewery Ltd, 'Coopers Shareholders Dismiss Lion Nathan' (Media Release, 14 December 2005).

<sup>43</sup> Lion Nathan Australia Pty Ltd, 'Lion Nathan Offer for Coopers Brewery Limited' (Media Release, 17 March 2006).

<sup>44</sup> Meredith Booth, 'Lion Nathan failed Coopers fight cost A\$5m', *The Advertiser* (Adelaide), 19 May 2006. To put this in perspective though, Lion Nathan posted a 10 per cent rise in record first-half profit to A\$148.9 million.

<sup>45</sup> Simon Evens, 'Coopers Brewery boss makes headway', *Australian Financial Review* (Sydney), 6 April 2006. However, Coopers managing director claimed that beer sales on the eastern seaboard had been given an unexpected fillip from the publicity generated by Lion's failed bid.

shareholders who had signed pre-bid agreements to sell to LNA.<sup>46</sup> However, when the buy-back eventually took place, only a 'handful' of shareholders offered 57 637 shares into the buy-back.<sup>47</sup> Coopers managing director reportedly said this indicated that shareholders were happy with the way the Adelaide-based brewer was being managed and with its prospects.<sup>48</sup> Coopers also pledged to conduct annual buy-backs in the future.

Barry Schrapel's action was discontinued and he apparently settled on 'favourable terms' with Coopers.<sup>49</sup> Unfortunately, the details of the agreement are confidential.

## **IX THE MAIN CORPORATE LAW ISSUES THAT ARISE FROM THIS SAGA**

### ***A Directors' Duties***

The conduct of the Cooper's board before and during the bid certainly raises this issue. LNA's public affairs manager, Paul Evans, stated: 'In our view, the Coopers defence strategy has been more about consolidating control and their own personal ambitions for this company than achieving outcomes for all shareholders'.<sup>50</sup> He also questioned whether Bill Cooper should have voted as executor the shares held by the Swiss Federal Institute of Technology in Zurich, stating: 'A conflict of interest exists in Bill Cooper being a director of the board of Coopers and also having an obligation to act in the best interest of the beneficiary of that will'.<sup>51</sup> Mr Evans claimed that the

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<sup>46</sup> Chris Milne, 'Coopers takes heart from buyback', *Australian Financial Review* (Sydney), 8 December 2005; Lion Nathan chief Rob Murray stated that Cooper's shareholders were using it merely as a 'back-up plan' for the bid. Verity Edwards, 'Coopers buyback approved', *The Australian* (Sydney), 8 December 2005.

<sup>47</sup> Blair Speedy, 'A\$15m Coopers buyback to keep Lion bid at bay', *The Australian*, (Sydney), 17 January 2006; Coopers executive chairman Glenn Cooper reportedly stated that 'just over 20' of the company's shareholders had sold shares into the buyback, with only a handful disposing of their entire stake. Those that did sell their entire shareholding were said to be shareholders who had previously declared their intention of selling to Lion Nathan.

<sup>48</sup> Chris Milne, 'Cheers – Coopers shareholders happy to hang on', *Australian Financial Review* (Sydney), 17 January 2006.

<sup>49</sup> 'Coopers share win', *Sunday Mail* (Adelaide), 16 April 2006.

<sup>50</sup> Verity Edwards, 'Lion Nathan off the wagon', *The Australian*, (Sydney), 15 December 2005.

<sup>51</sup> *Ibid.* See also Chris Milne, 'Lion mulls options after vote mauling', *Australian Financial Review*, (Sydney), 15 December 2005.

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vote to remove LNA's share-purchase rights wiped out A\$70 million of shareholders' value.<sup>52</sup>

Coopers directors denied any wrongdoing. As stated by Tim Cooper: 'The directors feel very comfortable that they've conducted their affairs in accordance with the constitution and always in a lawful manner'.<sup>53</sup>

The majority of directors openly opposed the bid and supported the vote to remove LNA's pre-emptive rights. The question may be asked whether it would not have been prudent for the directors to have established an independent board sub-committee to advise minority shareholders – particularly on the effect of the vote on the value and liquidity of their shares.<sup>54</sup>

This argument is strengthened by another criticism that was levelled at directors during the bid, namely their failure to respond to LNA's move to make its offer effectively unconditional. As one commentator stated: 'Arguably, that's a dereliction of their duty. Having earlier justified their continued recommendation to reject on the conditional nature of the bid it should be incumbent on the directors to clarify whether they still stand by their recommendation now that those obstacles have been removed'.<sup>55</sup> The directors of a target company in fact have an obligation under the Corporations Act to ensure that a supplementary target's statement is prepared if a material new circumstance arises.<sup>56</sup>

The issue of directors' fiduciary duties is also raised by the way in which the pre-emptive rights regime was administered by the board in the past. When shares were

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<sup>52</sup> Cameron England, 'Brewer v Brewer – Hope to recoup some of the costs – Bill for fighting Lion soars towards A\$7m', *The Advertiser* (Adelaide), 15 December 2005.

<sup>53</sup> Ibid.

<sup>54</sup> A suggestion made by Lion Nathan chief executive Rob Murray 'given the lack of independent advice coming from the Coopers boardroom': Simon Evans, 'Lion wants new valuation by Grant Samuel', *Australian Financial Review* (Sydney), 9 December 2005. He also called for Coopers to provide an updated independent expert's opinion considering the raised bid price.

<sup>55</sup> Bryan Frith, 'Sad day for shareholder rights as Coopers keeps it in family', *The Australian* (Sydney), 14 December 2005. This commentator suggested that ASIC should cast an eye over the matters disclosed during the bid.

<sup>56</sup> Section 644, *Corporations Act 2001*(Cth).

put up for sale, they were not offered to all shareholders but rather to a select ‘inner sanctum’ consisting mainly of directors and their relatives who were able to acquire shares at ‘bargain basement’ prices – from A\$8.54 in 1997 to A\$45.01 a share as recently as October 2004 – compared to the A\$310 that LNA was offering in the bid.<sup>57</sup>

Furthermore, directors may have been in possession of information that the other shareholders were not aware of at the time of the sales. For example, there was a trade of 1250 shares in 2004 with directors Glenn, Tim and Bill Cooper apparently purchasing the shares. At the time, the company was expecting increased profits resulting from an increase in interstate beer sales. If this information was not known to the shareholder selling the shares, it could be argued that the directors had material, non-public information which gave them an advantage, especially in the absence of a share valuation updating the 2003 buyback price of A\$45.01.<sup>58</sup> This is compounded by the fact that LNA had been talking to Coopers since October 2003 about possible joint operations.

The inappropriateness of this past conduct was in effect acknowledged by Coopers during the bid when it adopted a new allocation policy under which any shares put up for sale would be offered to all shareholders. The shares would be allocated pro-rata if applications exceed the number of shares for sale. Furthermore, Coopers decided that directors and their immediate family would be excluded from purchasing any of the 6000 shares put up for sale in September 2005 because the 2005 results had not yet been released.

### ***B Claims of Oppression***

Barry Shrapel lodged a claim alleging oppression and that the directors were acting to concentrate ownership of Coopers in their hands. This was however denied in

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<sup>57</sup> See Bryan Frith, ‘Brewer’s record in governance is nothing to shout about’, *The Australian* (Sydney), 9 December 2005, where many of these points are raised and it is argued that the ‘brewer’s corporate governance has long been questionable, not just during its defence of the unwelcome bid’.

<sup>58</sup> Cameron England, ‘Beer Wars: Potential breach of duties – Directors silent on share trading deal’. *The Advertiser* (Adelaide), 10 December 2005. This reporter states that Coopers did not respond to questions on whether this trade constituted a breach of directors’ duties.

Coopers' target's statement. The directors claimed that the constitution granted them the discretion to allocate shares that were offered for sale to shareholders of their choice and that they were entitled to give preference to family members. This raises the interesting issue of the extent to which a company's constitution can modify the directors' duties.

Mr Schrapel complained about the resolution of a dispute between Industrial Equity Limited (IEL) and Coopers in 2000 involving a preferential purchase of shares for a subsidised price by directors of Coopers and by shareholders nominated by them. Mr Schrapel contended that, in not being aware of the IEL matters in 2003 when Coopers conducted a buy-back, he sold his shares at an undervalued price.<sup>59</sup>

It was also reported that there was another action under way by an Adelaide lawyer, Andrew Short, who argued that Coopers should have paid him A\$100-150 a share when it bought his 1 500 shares in the 2003 buyback, rather than the A\$45 a share he actually received.<sup>60</sup> He alleged that Coopers misled shareholders by leading them to believe all information regarding the buyback was disclosed to them and requested that his shares be reinstated and his costs met. It appears that this matter was also settled.

### ***C Buy-backs***

This case study illustrates that share buy-backs can be used as an effective defence tactic during a bid. The facts of this case raised some issues though. For example, how the directors could justify the company paying shareholders A\$260 per share when the directors themselves had bought shares off shareholders for only A\$45 fairly recently. It is not usual to include a takeover premium in the price of a share buy-back.

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<sup>59</sup> Coopers Brewery Ltd, 'First Supplementary Target's Statement', 23 November 2005.

<sup>60</sup> Cameron England, 'Beer Wars: Coopers still a target in court' *The Advertiser* (Adelaide) 17 December 2005.



The question also arises whether the Corporations Act 2001 (Cth) should be amended to exclude shareholders from voting to approve a buy-back if they are likely to substantially increase their control as a result of the buy-back. This matter may be better left to the discretion of the Panel.<sup>61</sup>

#### **D Experts' Reports**

There may be a need for the legislation to be amended to require directors to obtain an updated independent experts' report where circumstances have materially changed during a bid.

### **X CONCLUSION**

How does one explain the almost illogical loyalty of the Coopers shareholders to the incumbent directors? Part of the answer must lie in the fact that it is a family company – about 90 per cent of the shareholders are related, either as direct descendants or through marriage – and the majority of them appear to value the company for more than money. Most of the family still live in South Australia and 'tend to inhabit the upper social register'.<sup>62</sup>

Coopers made much of the fact that 97 per cent of the shares 'eligible to vote' did vote and that 93.42 per cent voted against LNA. However, one large block of shares was excluded by court action.<sup>63</sup> Had it not been, the vote was likely to have been about 86 per cent. Part of this was owned by Prince Alfred College and 6.2 per cent was owned by the Swiss institute of which Bill Cooper was trustee.<sup>64</sup>

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<sup>61</sup> As happened in this case: In the matter of *Coopers Brewery Ltd 03* [2005] ATP 22.

<sup>62</sup> Chris Milne, 'Why beer's worth more than money', *Australian Financial Review* (Sydney), 17 December 2005. Philip Cooper, a brother of Coopers' chairman Glenn, cited '143 years of family history' for his opposition to Lion Nathan and added that: 'Tradition is worth more than money'.

<sup>63</sup> This matter concerned a disputed will containing 114,000 Coopers shares bequeathed to Mary Henderson. At the meeting, her representative, Lindy Powell QC, called for an adjournment until the ownership of the shares was resolved in the South Australian Supreme Court but the motion was defeated.

<sup>64</sup> Terry McCrann, 'Coopers' curious coup', *The Advertiser* (Adelaide), 17 December 2005. This commentator states that: 'It is incomprehensible how any rational person could have voted to exclude Lion from buying shares.' He points out that now neither Lion Nathan nor any other third party can buy a single share in Coopers unless and until the family insiders remove their 'not for sale' sign.

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In the lead-up to the crucial vote, both sides ran advertisements seeking to highlight their local links. This was easier for Coopers, for example an advert asking whether the non-existent Mr Lion and Mr Nathan would be attending the Crows versus Port showdown attempted to highlight that Coopers was local and LNA not. In the end though, the advertising campaigns probably did little to influence the shareholder vote.<sup>65</sup>

It was reported that LNA's lawyers sent more than 60 legal letters to Coopers during the period of the bid.<sup>66</sup> There were also approximately a dozen separate legal actions, four applications to the Takeovers Panel and three Takeovers Panel review applications.

The LNA bid for Coopers provides a case study of an interesting and complex takeover attempt that raises many corporate law issues. A small, family company (albeit a public one) was able to withstand the most strenuous and ingenious tactics of a large corporate group and its highly paid advisers. It managed to retain the loyalty of its shareholders to the astonishment of many observers. On the face of it, those shareholders had every reason to feel disgruntled by their past treatment and one might have expected that they would gladly accept an offer at a large premium - but this was not to be.

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<sup>65</sup> Maria Moscaritolo, 'Spin the bottle', *The Advertiser* (Adelaide), 15 December 2005, quoting John Dawes, associate professor of marketing at the University of South Australia, who mentioned 'the appearance, whether it's true or not, that Coopers is being picked on by Lion Nathan and so our natural tendency is to be sympathetic to the underdog...'

<sup>66</sup> Simon Evans, 'Vote could leave Lion high and dry', *Australian Financial Review* (Sydney), 14 December 2005.