

## CHANGE OF CONTROL ISSUES\*

*Coopers Brewery Ltd v Lion Nathan Australia P/L* (Judgement of the Full Court [2005] SASC 400 19 October 2005)

*Corporations – Constitution – Change of Control Provisions – Effect on Pre-emptive Rights – Construction*

### Background

Lion Nathan's hostile bid for Coopers Brewery Limited (**Coopers**), announced in September 2005, has triggered a number of proceedings in both State and Federal Courts and in the Takeovers Panel. Although not directly related to the bid, these proceedings were issued by Coopers in the Supreme Court of South Australia seeking declarations as to the effect of the certain provisions in the Coopers Memorandum and Articles of Association (**Constitution**) relating to the "change of control" of Lion Nathan Australia Pty Limited (**LNA**) and LNA's pre-emptive rights. The declarations, if made, could ultimately result in Lion Nathan losing its third tier pre-emptive rights.

The trial judge, who resolved the proceedings in Coopers favour, formulated the question in the following terms:

Whether in April 1998, Kirin Brewery Company Ltd (Kirin) acquired a relevant interest in more than 40 per cent of the issue shared capital of Lion Nathan Limited (the ASX listed holding company of LNA) within the meaning of Article 44 of the Coopers' Constitution.

### Change of Control Provisions

LNA effectively had a third tier pre-emptive right of purchase of Coopers shares under the Constitution. A member proposing to transfer shares must give a transfer notice to Coopers. That initiates a process whereby the shares must be offered by the directors of Coopers first to an existing member or a member's relative. If no member or member's relative is willing to purchase all or any of the shares, the unsold shares must be offered to the trustees of the Coopers Superannuation Fund. If the trustees are not willing to purchase all or any of the shares, they must be offered to LNA.

Coopers' Constitution contains provisions specifically protecting LNA's pre-emptive rights by prohibiting any alteration or amendments of the Constitution that are inconsistent with these rights (the Regulations). These rights were inserted in 1995 pursuant to a settlement of a dispute involving Coopers and LNA. Importantly, the provisions protecting LNA's rights will "cease to have effect on a Change of Control of LNA...."

In the Constitution, "Change of Control" was defined as:

- (i) [A]ny transfer of shares or other equity interest in a member or in any entity that directly or indirectly controls or influences a member; or...

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- (ii) if, after such a transaction, there would be a change in the person having the power to direct its management and policies; or if no one has such power, a change in the majority of such persons who, acting together, have such power; or
- (iii) without limiting the generality of the foregoing, if any person acquires a relevant interest (as that term is defined in the Corporations Law) in 40 per cent or more of the voting shares of the member.

The Full Court observed that any reference to “member” in the definition of Change of Control must be read, for the purposes of the Regulations, as a reference to LNA. To have any meaning at all the definition must be transposed *mutatis mutandis* in that manner.

Further, the Full Court considered the principles regarding the incorporation into a contract (the Coopers Constitution being such a contract, between the company and each director and between the members themselves) of terms defined elsewhere. The Full Court relied on a line of authorities holding that:

...Where parties by agreement import the terms of some other document as part of their agreement those terms must be imported in their entirety but subject to this: that if any of the imported terms in any way conflict with the expressly agreed terms, the latter must prevail over what would otherwise be imported.<sup>2</sup>

The definition of “relevant interest” in s 9 of the former *Corporations Law* was contained in ss 30 to 33. The Corporations Act 2001 now defines “relevant interest” in slightly different terms in ss 608 and 609, however the principles remain pertinent.

LNA sought to confine the meaning of “relevant interest” only to s 31 of the *Corporations Law* and to ignore ss 32 and 33. Importantly, s 33 provided that (similar to the current s 608(3) of the *Corporations Act 2001*) a person has the same relevant interest in any shares that a body corporate, in which the persons power to vote is greater than 20 per cent, has. Section 31 stated merely that a person who has power to dispose of a share has a relevant interest in that share.

The Full Court had no difficulty in holding that Kirin, by the operation of s 33 and by its acquisition of 45 per cent of the voting shares of Lion Nathan Limited, was deemed to have the same power as Lion Nathan Limited in relation to the shares in LNA. That is the power to vote in respect of 100 per cent of the shares, as LNA was at that time (and still is) a wholly owned subsidiary of Lion Nathan Limited. That is more than 40 per cent of the voting shares in LNA, and for the purposes of the Coopers Constitution, there had been a Change of Control of LNA.

Grey J viewed the Coopers Constitution as a commercial document that “should be given a businesslike interpretation”. He held that it was inappropriate to confine the acquisition of a relevant interest in LNA to a direct acquisition of shares at the level of LNA (that is, incorporating s 31 only) as that would amount to a non-commercial construction that would frustrate the spirit and intent of the Coopers Constitution.

In summary, the Full Court held that the regulations in Coopers Constitution ensuring LNA’s preferred status under the pre-emptive rights regime were entrenched while, but only for so long

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<sup>2</sup> Buckley LJ, *Modern Buildings Wales Ltd v Limmer & Trinidad Ltd* [1975] 1 WLR 1281 at 1289.

as, LNA remained in practical terms, the same corporate entity as it was when those terms were first inserted.

The decision of the Full Court in this case, although related to the (still open, as of the date of this publication) bid of Lion Nathan for Coopers, holds some relevance to the energy and resources industry. Joint venture agreements in the mining and petroleum industry typically contain preemptive or preferential right clauses that are triggered by a “change of control” in the joint venture partners or their controlling entities. The parties to these agreements can take some comfort that a court will have no difficulty in giving the provisions a “businesslike” construction, however parties should take care that when drafting the agreements, that the commercial force of the preemptive rights are not unduly or unintentionally hampered by imprecise wording

## TASMANIA

### COMPENSATION FOR COMPULSORY ACQUISITION FOR TASMANIA GAS PIPELINE PROJECT\*

*State of Tasmania v Effingham Pty Ltd* [2005] TASSC 55 (19 July 2005) (Supreme Court of Tasmania; Blow J)

*Real Property – Acquisition Of Land – Compensation – Assessment And Related Matters – Injurious Affect On Other Land – Pipeline Easement Through Grazing Property*

This matter involved an application under the *Land Acquisitions Act 1993* (Tas) (the Act) for the determination of the amount of compensation to be paid for compulsory acquisition of certain parcels of land and easements over other parcels of land owned by the respondents. The land was acquired by the State of Tasmania for the purpose of the Tasmania gas pipeline project. The State of Tasmania had acquired:

- a small parcel of land close to the shoreline of the Bass Strait for the purpose of a valve installation;
- pipeline easements, which were 20 metres wide and a total of 5.6kilometers long;
- access and service easements for vehicular access to the valve site and for the purpose of an anode bed.

#### ‘Injurious Affection’

There was general agreement as to the amount of compensation payable to the respondents, except for the amount payable for ‘injurious affection’ to other land under s 27(1)(e) of the Act. Blow J emphasised that his task was limited to assessing the injurious effect on land other than the land which was acquired or over which easements had been acquired. His Honour cited, with approval,

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