proponent for the native title parties' consents to required project rights and those offered as part of a cultural heritage protection scheme. Experience suggests that the types of benefits which might be offered as part of compensation packages for native title consents, such as royalty-type payments, traineeships, scholarships and long-term employment opportunities, are sometimes sought by Aboriginal parties in CHMP negotiations.

Following the Powerlink Decision, project proponents negotiating a CHMP where native title is not an issue will have no legal imperative to offer Aboriginal parties benefits greater than those which are contemplated in the guidelines. However, relationship considerations may dictate offers of more generous benefits even though the absence of such benefits is unlikely to be considered unreasonable by the Tribunal.

Conclusion

Since the Powerlink Decision, the Tribunal has handed down a further decision about the approval of CHMPs. The decision in *State of Queensland and Best & Ors*[11] deals with the notice requirements in the Act relating to the approval of CHMPs.

As more judicial consideration is given to the approval of CHMPs under the Act, project proponents and relevant Aboriginal parties will hopefully find the negotiation of CHMPs more streamlined, with fewer contentious issues. However, at present there remain numerous issues in proposed CHMPs which parties will need to resolve by negotiation in order to avoid Tribunal involvement.

SOUTH AUSTRALIA

PRE-EMPTIVE RIGHTS ISSUES*

Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd (Judgement of Finn J [2005] FCA 1812 13 December 2005)

Corporations - Share buy back provisions - Effect on Pre-emptive Rights - Construction – Interpretation

Background

Lion Nathan Australia's well publicised bid for Coopers Brewery Limited (**Coopers**) has resulted in a number of proceedings in various jurisdictions. These proceedings were commenced by Lion Nathan Australia Ltd ("Lion Nathan") in the Federal Court claiming that Coopers were in breach of an agreement made between the parties in the mid-1990's.

Subsequent to the settlement of certain proceedings which involved, amongst others, Coopers and Lion Nathan in the mid 1990's, the parties entered into an agreement whereby Lion Nathan obtained a third tier pre-emptive right for the purchase of shares in Coopers.

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[11] [2006] QLRT 9

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Lion Nathan argued that the three tiered pre-emptive rights regime constituted an express restriction on Coopers exercising its power, for the purposes of s 125 of the *Corporations Act*, to effect a share buy-back in accordance with Division 2 of Part 2J.1 of the *Corporations Act*. Accordingly, the share buy-back which occurred in late September 2003 breached Article 38 of Coopers' Articles of Association ("Articles") which provided as follows:

> No member may make any transfer of shares and the Directors must not register any transfer of shares without complying with Articles 40-53.

Articles 40-53 established the three tiered pre-emptive rights regime.

Coopers' contrary arguments were twofold. Firstly, the pre-emptive rights regime was not an express restriction on Coopers right to exercise its buy-back power. Secondly, the "*transfer of shares*" envisaged by Article 38 did not extend to a transfer in respect of a share buy-back under the *Corporations Act*.

Finn J set out the issues clearly when he asked the following question:

> There are in fact two issues here.....One raises a question of construction of s 125(1) (of the Corporations Act): Is an article cast in the form of Article 38 capable of being characterised as "an express restriction on... the company's exercise of its [buy-back] powers? The other raises a question of construction of Art 38 itself: "Does the transfer of shares under a buy-back fall within the meaning of "any transfer of shares" for Article 38's purpose?

Effect of Transfer

The three tiered pre-emptive rights regime in Coopers' Articles operated so that any member proposing to transfer shares had to give a notice to Coopers. That initiated a process whereby the shares had to be offered by the Directors to an existing member or a member's relative. If no member or member's relative was willing to purchase all or any of the shares, then the unsold shares were to be offered to the trustees of the Coopers Superannuation Fund. If the trustees were not willing to purchase all or any of the shares then they were to be offered to Lion Nathan.

Because of the view taken by his Honour on the second issue, he indicated that it was strictly unnecessary to take a concluded view on the first. However, his Honour was of the view that where a provision in a constitution expressly states that the company must, may only, or must not, conduct itself in a particular way, then such an express requirement is capable of constituting an express restriction on, or prohibition of, the company's exercise of statutory powers, the exercise of which would conflict directly with the requirement imposed on the company by its constitution.

In relation to the second issue, Finn J considered in some detail the principles to be applied in the interpretation of both commercial contracts and statutes and the way in which the Articles were to be construed.

He noted that it is now consistent with orthodox rules of construction of articles of association for courts to recognise that articles are instruments of company governance intended to endure and to be capable of operating with flexibility in changing circumstances. That said, his Honour stressed that such an approach does not permit the extension of an expression in the constitution to a

subject matter that might later be comprehended by the expression itself, if this would be inconsistent with the purpose contemplated by the use of that expression at the time of its adoption.

His Honour was of the view that the primary concern of the relevant provisions in the Articles, which included the pre-emptive rights regime, was to regulate membership in the company when shares became available. Put briefly, the Articles erected impediments to the introduction of new members into the company when the possibility for a change in membership arose. Despite the fact that a share buy-back under the *Corporations Act* can affect the membership of a company, it is not concerned with regulating or impeding the introduction of new members.

Finn J stressed that it was clear from the surrounding circumstances which were known to Lion Nathan, Coopers and members of Coopers at the time when the Articles were amended in 1995 that those amendments had particular purpose. His Honour explained this on the basis that given:

(i) the small, closely held and relatively static membership of Coopers;

(ii) the distinctive character and purpose of the pre-emptive rights regime; and

(iii) the particular and publicised provenance of the 1995 amendments to the Articles,

it was reasonable to consider that a reasonable member of Coopers, would have known, or had the means of knowing, that the purpose and intent of the pre-emptive rights provisions were such that they did not apply to a buy-back.

His Honour noted that the pre-emptive rights regime addressed the question of who could become and continue to be an owner of shares in Coopers. In that sense Article 38 was addressed to what could be described as a '*bilateral transaction*' in that it contemplated the continuing existence and ownership of the shares in Coopers and a reasonable shareholder would have understood this to be the case.

Accordingly, his Honour was of the opinion that the pre-emptive rights regime contained in Coopers' Articles was neither intended to apply, nor on its proper construction did apply, to a share buy back effected under Division 3 of Part 2J.1 of the *Corporations Act*.

This decision is subject to an appeal which is yet to be decided.

It should be noted that at the end of his judgment, Finn J did indicate that he was of the view that the share buy-back provisions could, as a matter of ordinary English usage be said to involve a transfer of shares to Coopers (that being the usual method by which property in shares is consensually passed between parties). In this case such a transfer did not fall within Article 38 because "*any transfer of shares*" meant "*any transfer of share to any other person other than Coopers*".

This comment should serve as a warning to practitioners, it may be prudent to insert words into such provisions, where appropriate, to the effect that any transfer of shares would not be subject to the share buy-back provisions in the *Corporations Act*.