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PA e-bulletin

Piper Alderman Legal Update

WELCOME TO THE LATEST EDITION OF THE PIPER ALDERMAN E-BULLETIN. THIS EDITION FOCUSES ON THE COMMONWEALTH GOVERNMENT'S WATER BILL, THE NEWLY CREATED VICTORIAN WATER REGISTER AND SIGNIFICANT COURT JUDGMENTS IN OUR PRACTICE AREAS OF EMPLOYMENT LAW, PROTECTION OF TRADE SECRETS AND CORPORATE REGULATION.

Speedy Passage of the Commonwealth Water Bill

Simon Venus

In the August edition of the Piper Alderman e-Bulletin we provided an overview of the *Water Bill 2007*. Corporate partner, Simon Venus, now gives a brief update of the passage of the legislation and some of the issues considered by the Senate Committee.

The Water Act 2007 gives effect to many of the elements of the Commonwealth Government's $10 billion National Plan for Water Security which broadly comprises three components:

> expenditure on initiatives to make irrigation more efficient;

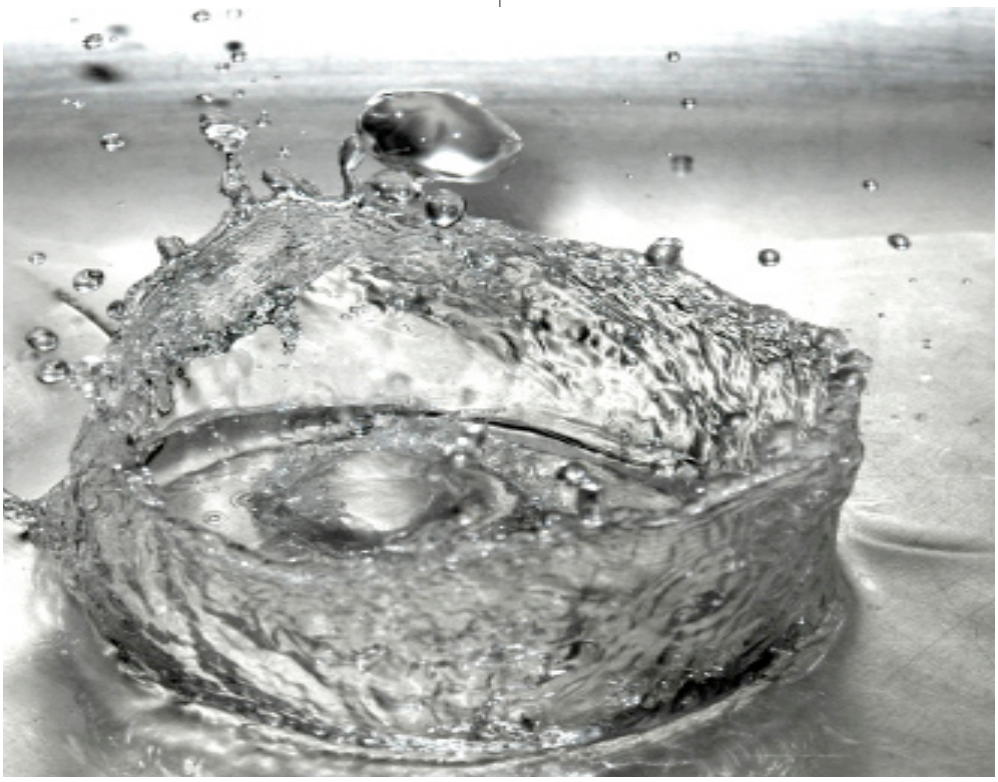
> buying back over allocated water entitlements; and

> improving water management and governance.

In contrast to the flow of the Murray River, the passage of the legislation has been relatively speedy. After its introduction to the House of Representatives on 8 August 2007, the Water Bill was a day later referred to the Senate Environment, Communications and IT Committee for enquiry and report.

The Committee was given a tight timeframe and was required to report by 14 August. Although the timelines limited public participation in the Committee's enquiry process, it nevertheless took numerous submissions from interested parties representing interests across the spectrum including conservation, scientific, as well as the relevant state governments and users of the river's resource such as irrigators and farming groups.

The Committee reported that it heard broad support for the Bill and the wider water reform package represented by the National Plan for Water Security. However, the Bill was not without its critics. Victoria indicated that it would not provide in-principle support for the Bill at all. The Australian Greens, while supporting some measures in the Bill, pointed to what they considered weaknesses including the long lead time for the Basin Plan to come into operation, lack of clear environmental targets and timelines and the creation of another large bureaucracy in the form of the Murray Darling Basin Authority.



In its report, the Committee highlighted that the majority of debate centred on cost allocation for compensation if water availability is reduced.

This issue relates to clauses 77 and 83 of the Bill which provide for payments to water access entitlement holders where the value of the entitlement is reduced as a result of a reduction in water allocations or the reliability of allocations. In broad terms, the provisions which were the subject of the debate before the Committee deal with how the risks of reductions in water availability are to be shared between the holders of the entitlements (such as irrigators), the Commonwealth and relevant States. Clause 77 provides that water access entitlement holders may in certain circumstances be eligible for financial payments from the Commonwealth if the entitlement holder suffers a reduction in water allocation. Decisions on eligibility and any amount payable are made by the Minister, but are subject to merits review by the Administrative Appeals Tribunal.

Another issue addressed was whether the Bill should incorporate a mechanism for compulsory acquisition of water entitlements on just terms. Such a form of acquisition was opposed by farming and irrigation groups in submissions put to the Committee but was supported by some in the scientific community. The Committee noted that while the Bill fell short of providing for compulsory acquisition, a part of the plan did provide for buy-back of water entitlements from unviable or inefficient irrigators.

The Committee recommended in its report that the Bill be passed. The Bill was subsequently introduced to the Senate. The Senate passed the Bill on 17 August and the legislation was assented to on 3 September 2007.

The substantive provisions (amounting to in excess of 200 pages of legislation) have not yet commenced and are awaiting proclamation. There is effectively a 6 month window for proclamation, until early March 2008, and it is expected that the legislation will be proclaimed to commence in early 2008.

Vines v ASIC - meaning of "fit and proper to manage a corporation"

Kyla Banton

In the June 2007 edition of the e-Bulletin we commented on an appeal by Mr Vines against findings that he had contravened provisions of the Corporations Act. In this edition Dispute resolution lawyer, Kyla Banton, discusses Mr Vines' appeal on penalty in which the New South Wales Court of Appeal set aside Austin J's decision to disqualify Mr Vines finding that he erred in concluding that Mr Vines was not a fit and proper person to manage a corporation.

The legislation

The appeal involved a consideration of section 1317EA which provides that where a person has contravened a civil penalty provision:

"….

> (3)(a) The Court may…make… the following orders in relation to the contravention:
>
> (a) an order prohibiting the person, for such period,…from managing a corporation.
>
> (4) The Court is not to make an order under paragraph (3)(a) if it is satisfied that, despite the contravention, the person is a fit and proper person to manage a corporation.";

Note that the Court power of disqualification for contravention of a civil penalty provision is following amendments found at Section 206C.

The facts

The conduct in question relates to Vines' role as the chief financial officer of GIO Insurance Limited, during the takeover bid by AMP for GIO in 1998.

At first instance, Austin J held that Vines had contravened several penalty provisions. These contraventions generally involved a failure by Vines to fully disclose certain matters to the Due Diligence Committee in respect of GIO's forecasts of profits. However, it was held both at first instance and in this appeal that Vines did not act dishonestly or with impropriety, that he had no intention to deceive or consciousness of impropriety of others, and he did not receive any personal gain through his wrongful conduct.

Reasoning of Austin J at first instance

The words "manage a corporation" refer to the management of corporations generally, not the particular corporation in which the offence occurred, nor the particular subgroup of business activities involved. The issue of fit and proper is directed to the overall suitability of the person to continue to engage in business management activities in the corporate sphere, encompassing all types of corporate entities.

A conclusion that a person has demonstrated some deficiency or inadequacy with respect to a particular corporation or subset of corporations may be sufficient for the court to be satisfied that the person is not fit and proper to manage corporations generally. The question will be whether the deficiency or inadequacy relates to the person's overall suitability to engage in business management activities in the corporate sphere.

Factors relevant to the fit and proper threshold include:

> a continuity and pattern involving failure to discharge duties of care and diligence as an executive officer;

> a conscious contravention involving dishonesty, impropriety, intention to deceive or a personal gain;

> the position of the person in question;

> whether the person properly appreciated the duties encompassed by their position;

> whether any unsuitable conduct has been addressed at the time of the contravention(s); and

> contrition, remorse, understanding of the court's reasons and willingness to comply in the future.

Austin J held that Vines knowingly disclosed the incomplete or misleading disclosure of material information.

Reasoning of Spigelman CJ on Appeal

In order to make an order under section 1317EA(3)(a) the court does not have to be satisfied that a person is not a "fit and proper person to manage a corporation". However, a disqualification order cannot be made if the Court is satisfied, notwithstanding the finding of contravention, that the person is fit and proper.

His Honour disagreed with Austin J's suggestion that a contravention created some kind of presumptive case that a person was not fit and proper. He reasoned that even serious contraventions of the Act would not necessarily be determinative of that proposition.

Spigelman CJ reasoned that the Court should determine the question of fitness and propriety as at the present date. Therefore post contravention evidence of the character of the person is relevant to the determination of whether the person is fit and proper. His Honour found that Austin J erred in not giving sufficient weight to the evidence of Vines' capacity and fitness to participate in management and by giving excessive weight to the contraventions.

His Honour also stated that the test to be applied when deciding whether a person is fit and proper to manage a corporation includes the whole definition of "management" which extends to being "in any way (whether directly or indirectly) concerned in or taking part in the management of a corporation". The test is whether the person is fit and proper to play any role in management – this is a lesser standard, for example, than a person's fitness to be an executive director.

Other factors relevant to a person's fitness and propriety include:

> all of the person's experience and his full range of qualifications including any subsequent executive employment;

> the nature of the contravening conduct of the person. A person is more likely to not be fit and proper where the findings of contravention involved dishonesty, an intention to deceive, impropriety or an awareness of impropriety on the part of others; and

> past records and contributions to relevant industries.

Specifically in relation to the case at hand, Spigelman CJ found that Vines' profession and expertise as a chartered accountant and auditor, employment history, and relationships with, and understandings of, key persons at GIO were relevant factors in deciding that Vines was fit and proper.

In particular, Spigelman CJ considered:

> in his role as Managing Partner of PricewaterhouseCoopers, Vines was responsible for ensuring compliance with the firm's quality control standards with respect to 120 partners and 1200 staff and he had a period of 4 years on the Membership Committee of the Institute of Chartered Accountants which assessed the quality and suitability of applicants for membership;

> in his role at GIO, apart from the specific contraventions, Vines displayed his fitness and propriety to manage a corporation;

> Vines displayed skill and propriety in the conduct of management of ReAC, which was particularly pertinent to the very conduct found to have contravened the duty of care and *diligence in section 232(4) of the Corporations Act. Vines played a "pivotal role" in the company's turnaround and this is specifically relevant because of the similarities between ReAC and GIO;*

> the character evidence is unanimous in praise for the skill, competence and integrity which Vines displayed and none of the evidence was subject to any challenge.

Spigelman CJ concluded by stating that Vines was fit to play any role, whether direct or indirect, in the management of a corporation. Further, his Honour added that Vines clearly has a wide range of skills that could be deployed, and that in the absence of a higher order of negligence or some kind of impropriety, it is difficult to see how a person of such qualifications would not be fit and proper to perform some role in management.

In respect of his interpretation of the legislative provision, the meaning of fit and proper and the evidence as to Vines' fitness the other members of the Court, Santow and Ipp JJA, in separate judgments agreed with the Chief Justice.

Access All Areas - director access to financial records

Amanda Lazarou

Dispute Resolution associate, Amanda Lazarou, discusses the recent decision of the Victorian Supreme Court in On Q *Group Limited v Peter McDougall & Kinarra Pty Limited.*

The plaintiff, On Q Group, was a publicly listed company. The defendant, Mr McDougall, was a director. On Q Group claimed that Mr McDougall owed On Q Group money pursuant to a loan agreement.

Mr McDougall sought orders that On Q Group produce certain financial records to him for immediate inspection, and further that authorisation be granted to his accountants to inspect the documents. Mr McDougall contended that he had suspicions that the company's claim was overstated but that he could not confirm those suspicions because he had been denied access to various financial records of the company for the previous two years.

Section 290 of the Corporations Act (Cth) provides that a director has a right of access to a company's financial records. That right is only limited where a company is able to establish that a director intends to exercise their right of access in the following circumstances:

1. to materially injure the company;
2. to act in breach of their fiduciary duty; or
3. where there is clear proof that a misuse of power is involved.

On Q Group in resisting the application agreed that Mr McDougall sought access in a person capacity and not for the purposes of his directorship.

Mr McDougall contended that the access was in relation to his personal situation but also was needed in order that he satisfy his obligations as a director.

Hargrave J, found that the onus rested with On Q Group to establish that Mr McDougall sought access to the company's financial records for personal reasons and that they had failed to discharge that onus. His Honour found that the fact that a director required access to company documents to defend a claim against them by their company does not, of itself, establish that the director requires access for a private purpose only. Rather, His Honour noted, that where a director of a public company expresses concern about the integrity of the accounts of the company, that director should be given access, unless the company can show a compelling reason why such access should be restricted.

Amendments to Land Act 1994 (Qld)

Nicholas Prove

Property & Projects associate, Nicholas Prove, reports on amendments to the Land Act 1994 (Qld) affecting rural leases issued for agricultural grazing or pastoral purposes.

Nearly 71% of the area of Queensland is held under State leases, to more than 23,000 tenure holders. The categories of State leases include pastoral, grazing, commercial and industrial uses, tourism complexes, housing estates, land below the high water mark, and reserves to sporting organisations or clubs for example. The Land Act 1994 (Qld) which is the legislation dealing with the administration and management of non-freehold land, was substantially amended in April 2007.

There are three main types of leases:

1. term leases (for a term between 1 and 100 years);
2. perpetual leases (held by the lessee in perpetuity); or
3. freehold leases (where the freehold title is approved, but is only issued once the lessee pays off the purchase price over time).

Rural Leases

The following new provisions affecting rural leases for grazing, pastoral and agricultural purposes, have not yet commenced:

Term leases for rural leasehold land must not be issued for more than 30 years, although there are exceptions. A term lease for rural leasehold land may be issued for a term of no more than 40 years where the Minister is satisfied the leased land is in good condition. A term lease for rural leasehold land may be issued for a term of up to 50 years where the Minister considers that the leased land is in good condition and the land which is all or part of the leased land should be the subject of a Conversation Agreement or Conservation Covenant and that agreement and/or covenant as applicable exists. A further proviso is that where the Minister considers it is appropriate for there to be an Indigenous Access and Use Agreement ("IAUA") relating to the leased land, such IAUA has been entered into. An IAUA is defined to mean an indigenous land use agreement as noted in the Register of Indigenous Land Use Agreements under the Native Title Act 1993 (Cth), or a contractual agreement between a lessee and Aboriginal people or Torres Strait Islanders that allows camping, fishing, gathering or hunting, performing rites or other ceremonies, or visiting sites of significance for traditional purposes.

Extensions of existing types of rural leases for a term of no more than 40 years can be extended in certain circumstances. Those circumstances include the following:

(i) There is a Land Management Agreement ("LMA") for the lease, which is an agreement the Minister may make or amend with the lessee about the management and use of the lease land, and which is effective only if registered. The LMA must contain a

commitment by the Minister to extend the lease if the following circumstances apply:

(a) the Minister considers the land should be the subject of a conservation agreement or covenant;

(b) the conservation agreement or covenant has been entered;

(c) the Minister considers it is appropriate for there to be an IAUA, and such IAUA has been entered.

The lease must not have already been extended pursuant to these provisions of the Act.

(ii) Where the Minister is satisfied that the lessee has complied with the LMA and any requirements under it for the granting of the extension, and the leased land is in good condition, the extension for no more than 10 years may be granted.

(iii) The extension only has effect from the date it is registered. Conversely the Minister may reduce the term of an extended term lease where an extension has previously been granted and the Minister considers the leased land is no longer in good condition or otherwise that an IAUA which was entered into under the Act, is no longer in effect in relation to the leased land.

For new leases of rural land for a term of 20 years or more over lease land of 100 hectares or more, there must be a current LMA for the lease with which the lessee must comply. The same provisions apply to the grant of a new perpetual lease of rural leasehold land. The Minister must at least once every 10 years review each LMA to access the lessee's performance in relation to the management outcomes sought under the agreement.

The existing duty of care conditions in the Act have been expanded. For leases for agricultural grazing or pastoral purposes the lessee's duty of care includes taking reasonable steps to:

(i) avoid causing or contributing to land salinity that reduces its productivity or damages to any other land;.

(ii) conserve soil;

(iii) conserve water resources;

(iv) protect riparian vegetation;

(v) maintain pastures dominated by perennial and productive species;

(vi) maintain native grassland free of encroachment from revegetation;

(vii) manage any declared pest and conserve biodiversity.

The Act also now provides that leased land may be used only for the purpose for which the lease or licence or permit as applicable, was issued. A term lease for pastoral purposes must be used only for agricultural or grazing purposes or both. These existing provisions are subject to the proviso that the Minister may approve an application that a lease be used for additional or fewer purposes on certain conditions including that an additional purpose must be complimentary to and not interfere with the purpose for which the lease was originally issued.

A lessee must perform all of the conditions of the granted tenure failing which the tenure may be cancelled or forfeited. However this does not apply to the failure to comply with a LMA for the lease, in which case the Minister may issue the lessee with a remedial action notice stating the necessary action and time within which the action must be taken. There are a number of steps prerequisite to the issue of the remedial action notice and appeal rights of a lessee. Failure to comply with the remedial action notice may result in the court imposing a penalty and ordering compliance.

Security of Tenure

Whilst the Land Act 1994 does not create indefeasible titles, state leasehold interests are by registration considered as a matter of practicality to attain on being registered, a similar protection as would an indefeasible title, such as freehold.

The Act now specifies that even though a document is recorded in the relevant register by the Registrar, it is not registered if the Minister's approval or consent is required for the document under this Act, and the relevant approval or consent has not been obtained, or the terms of the document are inconsistent *with the terms of approval or consent given by the Minister. The mere fact that a document is registered in the Land Titles Registry does not cure a defect. The result is that a person proposing to obtain an interest in land under the Land Act 1994 must undertake further inquiries of the seller's title, which brings a significant change to the effect and consideration of such registered dealings.*

ASIC Releases Consultation Paper on Non-traditional Rights Issues

Craig Yeung

ASIC has recently released Consultation Paper 91: "Non-traditional rights issue", and invited comments on its proposal to widen the disclosure exemption for rights issues to cover non-traditional features developed by issuers and advisers. Corporate senior associate, Craig Yeung, reports.

Background

The Corporations Act was amended in June 2007 to allow a listed entity to conduct a rights issue without a prospectus or product disclosure statement. The exemption was introduced with the intended effect of benefiting retail holders by encouraging listed entities to use rights issues, rather than other forms of fundraising targeting institutional investors.

For an entity to fall within this disclosure exemption, it must fit within the meaning of a rights issue as defined by section 9A of the Act. This section broadly provides that an offer by an entity will be a rights issue where:

> the offer is made to all existing holders in a particular class;

> the offer is made to existing holders in proportion to their holdings; and

> the terms of the offer are the same.

Broadly, if the offer qualifies as a rights issue, the offer will be exempted from the disclosure requirements in the Corporations Act, provided that the entity's securities are quoted, and the entity provides the market operator with a cleansing notice within a 24 hour period before the offer is made.

The Proposal

The disclosure exemption was originally designed to apply to a more "traditional" rights issue. However, ASIC notes that some entities were moving away from the traditional rights issue structure to other non-traditional structures with institutional holders (such as jumbo, RAPIDS or AREO structures), to enable those entities to raise funds more efficiently and to provide them with more certainty. ASIC recognises that these non-traditional structures have not qualified for the disclosure exemption due to certain characteristics breaching the equality principle. In light of this, ASIC proposes to widen the disclosure exemption in relation to rights issues to allow these non-traditional structures to fall within the exemption.

ASIC's consultation paper proposes to incorporate these non-traditional rights issue structures in the extended disclosure exemption provided these non-traditional forms offer, in substance, an equality of opportunity to participate for all holders.

The consultation paper indicates that ASIC will be receiving comments until 7 November 2007. In particular, the consultation paper calls for comment on specific circumstances in which it might be appropriate to provide relief to non-traditional rights issuers in the form of:

> multiple cleansing notices;

> disposing of shortfall;

> *offer to convertible noteholders;*

> *offer of options;*

> *application of the takeovers provisions; and*

> *technical relief.*

ASIC has stated that they are keen to fully understand and assess the financial and other impacts of the proposals. Further, ASIC has invited submissions concerning the above issues or comments on the likely compliance costs, the effect on competition, and other impacts, costs and benefits.

If you would like to make a submission or would like more information in relation to the rights issue disclosure exemption, please contact a member of Piper Alderman's Corporate Team.

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