23 February 2007

In this Issue

National Stock Exchange regional expansion

The recent Federal Court restrictive trade practices decision of *ACCC v IPM Operation and Maintenance Loy Yang*

The recent changes to the monetary jurisdiction of the Victorian County Court

Legal professional privilege and audit letters

The recent New South Wales Court of Appeal decision in *Trust Company of Australia v Skiwing Pty Ltd* dealing with landlord obligations to provide information to tenants

The ACCC guidelines for Collective Bargaining, Revised Authorisation Processes and New Merger Clearances

Sons of Gwalia in the High Court: Shareholders' rights on a winding up

PA e-bulletin

Piper Alderman Legal Update

NSX regional expansion may interest agribusiness

Simon Venus

The foreshadowed easing of drought conditions and a renewed interest in agribusiness by investors has cast the spotlight on capital raising projects in the sector. Corporate partner, Simon Venus, looks at recent developments in agribusiness and the opportunities for small cap agribusiness listings in the context of the National Stock Exchange's expansion into regional areas.

The current drought and ongoing issues concerning climate change have had a particular impact on the agribusiness sector. For investors, the mood might arguably be seen as one of pessimism. Recent announcements relating to the Government's proposed new taxation rulings for non-forestry managed investment schemes and agribusiness products for 2008 and beyond have not lightened the mood.

But there is good reason for optimism in the agribusiness sector.

The Bureau of Meteorology reports that the Southern Oscillation Index is heading into positive territory, indicating an easing of the El Niño weather pattern associated with the drought and pointing to a return of more normal rainfall patterns.

Also recently announced has been a foray into the agribusiness sector by Macquarie Bank which has established its Pastoral Fund. Targeted at wholesale investors, the fund is reportedly looking to raise up to $1 billion for investment in cattle and sheep stations. On the back of export market opportunities for livestock also comes the Packer-owned Consolidated Pastoral Company's announcement that it might look to source capital from the likes of a private equity fund to expand the company's existing significant cattle enterprise and station portfolio.

In both cases the proponents have clearly taken a well researched long-term view about export demand, particularly from Asia, and the returns to be made from investments in agriculture.

But not every company in the agribusiness sector has designs on raising $1 billion from investors, which is why Australia's second of three official stock exchanges, the National Stock Exchange of Australia Limited, may be of interest to agribusiness enterprises looking to access equity capital.

Since it commenced operations under its former name of the Stock Exchange of Newcastle Limited in March 2000, the NSX has sought to supplement listings on the ASX and attract emerging businesses.

This objective has been bolstered by the creation of the NSX Wollongong Exchange which operates as a sub-market of the NSX. Businesses from the Illawarra region can list on the NSX sub-market through the normal application process and are subject to NSX's listing rules. The NSX Wollongong Exchange was created by collaboration between the NSX, Wollongong City Council and the Illawarra Business Chamber. It has been reported that the NSX hopes to replicate the model in other regional areas across Australia. While not suitable for all enterprises and business models, small cap agribusiness companies with a regional base may nevertheless be interested to keep an eye on this expansion as a means of accessing capital and giving regional communities a stake in their business.

While the requirements of the Corporations Act for disclosure to investors still need to be complied with, a listing on the NSX does not carry what can sometimes be onerous requirements on small cap companies under the ASX listing rules, such as the spread requirement. The NSX requires a shareholder spread of just 50 and an expected initial market capitalisation of $500,000. The ASX spread requirement ranges between 400 and 500 and there are profit and assets tests which need to be met.

Deals with unions: The ACCC weighs in

Employment relations lawyer, Peter Ferraro, examines the recent Federal Court decision in *Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang* in which the ACCC

Continued from page 1

alleged that an employer and a trade union were parties to an arrangement which contravened the restrictive trade practices provisions of the Trade Practices Act.

Edison had a contract with the Victorian Government to build a new gas fired electricity generation plant. Edison retained the services of a number of third party contractors, including DJN. DJN was the only contractor who refused to enter into a certified agreement with the CEPU.

The CEPU demanded that Edison ensure that all contractors used at the plant have a certified agreement with the CEPU. In order to secure a site agreement with the CEPU, Edison agreed to the request in a letter which included the following phrase:

> *"We propose the parties agree to the following position.*
>
> *All contractors performing work at Loy Yang B Power station under the scope of the Electrical, Communications Contracting Industry Award, shall have a current certified Agreement with the CEPU Electrical Division, Victorian Branch prior to commencing work for their respective contractor at the site."*

Heads of agreement were entered to a similar effect. As a consequence of this Edison ceased to use DJN.

Edison admitted that its conduct constituted restrictive trade practices and reached a settlement with the ACCC prior to the hearing. The CEPU defended the allegations.

Section 45E of the *Trade Practices* Act prohibits the making of a contract or arrangement (or arriving at an understanding) with an organisation of employees if it contains a provision that prevents or hinders that person from acquiring or continuing to acquire goods or services from another person where those persons have been accustomed, or were under an obligation, to deal with each other.

The CEPU argued that the content of the letter (set out above) was rendered otiose by the subsequent agreement in the heads of agreement. It submitted that the clause in the heads of agreement, which stated (relevantly):

> *"[Edison shall request that third party electrical contractors] have acceptable industrial arrangements in place before work is commenced. What constitutes acceptable industrial arrangements includes having a current certified agreement with the union."*

did not breach section 45E. It said that the wording of the heads of agreement merely obliged Edison to "request" that electrical contractors have acceptable industrial arrangements. The CEPU submitted that the clause simply provided that having a current certified agreement with the CEPU was one way, but not the mandated way, that an electrical contractor could have acceptable industrial arrangements for the purposes of the heads of agreement.

Young J noted that an "arrangement" or "understanding" is something less than a binding contract, but that nonetheless there must be a "meeting of the minds" of the two parties.

Young J held that the letter amounted to an arrangement or understanding between Edison and the CEPU that satisfied the provision of section 45E and that the heads of agreement considered alone also breached section 45E. His Honour held that section 45E was not only concerned with written agreements (that is, the wording of the heads of agreement), but also with the making of an arrangement or arriving at an understanding.

Given the factual matrix, his Honour was satisfied that there was a broader arrangement between the parties which overshadowed and controlled the language used in the heads of agreement.

The ACCC also obtained declaratory relief against the CEPU for "aiding, abetting, counselling, procuring and inducing" Edison to breach section 45E. It made orders that the CEPU be restrained for three years from entering into such a similar arrangement or understanding.

The County Court of Victoria: Now with unlimited jurisdiction!

Rohan Barton

Dispute resolution senior associate, Rohan Barton, explains recent changes to the jurisdiction of the Victorian County Court.

When litigating in Courts other than the Supreme and Federal Court systems litigants will be guided by the quantum of their claim when deciding the forum in which proceedings are commenced.

Prior to 1 January 2005, the jurisdictional limits of the Magistrates' Court, the County Court and the Supreme Court were $40,000, $200,000 and unlimited jurisdiction respectively. However, with the uplift of the jurisdiction of the Magistrates' Court on 1 January 2005 to $100,000, the jurisdiction of the County Court was significantly restricted to claims between $100,000 and $200,000. This led to the passing of the *Courts Legislation (Jurisdiction) Act 2006* which, as of 1 January 2007, increased the jurisdiction of the County Court from $200,000 to unlimited jurisdiction and provided litigants with the choice of issuing claims larger than $200,000 in either the County Court or the Supreme Court, with the Supreme Court retaining its exclusive jurisdiction over prerogative writs, judicial review and its appellate jurisdiction.

Litigants can now take into consideration other matters in relation to the forum in which they issue proceedings, such as the complexity of the legal issues involved, the urgency in which they seek to resolve a dispute and the costs recoverable upon judgment.

It will be interesting to observe whether the bringing of larger claims in the County Court will streamline the progress of claims in the Supreme Court and whether the County Court will become the predominant trial court for commercial and civil claims with the Supreme Court primarily becoming an appellate jurisdiction.

Audit letters are not privileged documents

Brisbane based commercial lawyer, Alison Blyth, provides a timely reminder about the contents of audit letters.

Piper Alderman's 19 December 2005 E-Bulletin (page 3) reported on the case of *789TEN Pty Ltd v Westpac Banking Corporation*, in which Westpac Banking Corporation sought an order to prevent 789TEN Pty Ltd from having access to audit letters which had been produced on subpoena from KPMG, on the basis that those letters were privileged documents.

In that case, Justice Bergin of the New South Wales Supreme Court found that the dominant purpose of the letters, which were between the bank's solicitors and PricewaterhouseCoopers,

Continued from page 2

was to provide information to assist with the audit process, not as part of a legal service; and that as required by the *Corporations Act 2001* (Cth), the information had been received by PricewaterhouseCoopers as an independent auditor, not as agent for the bank, and such the privilege between solicitor and client did not apply. The claim for privilege failed.

Both the Court of Appeal, and the High Court have affirmed the decision of Justice Bergin.

The case demonstrates that audit letters may be subpoenaed by an opposing party, exposing what may be delicate advice about the potential exposure of a company in litigation audit queries. Such information is a powerful tool in litigation to determine an opponent's solicitors' true view of their client's prospects of success (and quantum for any contingent exposure) and can detrimentally affect a party's bargaining position in the litigation.

The case serves to remind corporations that where there are actual or threatened proceedings, to help minimise the risk of compulsory disclosure and protect the information under privilege, they should correspond directly with their solicitors about such matters in the context of those proceedings, and provide the information required by auditors for physical review, rather than as part of an audit letter sent directly or copied to the auditor.

Landlords' obligations in relation to contributions by tenants to outgoings

Tom Griffith

Dispute resolution senior associate, Tom Griffith, examines the recent New South Wales Court of Appeal decision in *Trust Company of Australia v Skiwing Pty Ltd* which clarifies commercial landlords' obligations in relation to tenants' contribution towards outgoings.

The issue arose during a long running dispute between Skiwing Pty Ltd (Tenant) and Trust Company of Australia (Landlord) in relation to premises at Piccadilly Arcade, Pitt Street, Sydney. The lease the subject of the dispute was governed by the Retail Leases Act 2004 (NSW) and the dispute was largely conducted in the Administrative Decisions Tribunal (Retail Leases Division) (the **Tribunal**).

The Tenant made various claims in relation to its obligation to pay contributions towards outgoings (that is, the fund for commonly shared facilities such as air-conditioning, cleaning of the arcade's common areas, etc).

Relevantly, the case considered the extent to which a commercial landlord of a shopping centre is obliged to disclose to a tenant:

> the number of other tenants who are obliged to pay outgoings; and

> the level of vacancies in the centre.

The Tribunal and the Court of Appeal both concluded that there was no additional obligation on a commercial landlord to provide such information provided that the tenant's outgoings contribution was calculated by reference to the proportion of the lettable area of (their) premises to the total retail area of the relevant centre.

The case also considered the extent of a lessor's obligation to provide an audited statement of outgoings. The Tenant had sought extensive production to the Tribunal of documents relating not only to Piccadilly Arcade but relating to other properties owned by the Landlord in the CBD, and documents relating to other tenants to whom the Landlord had offered leases. In circumstances where there was no evidence of an error in the audit and even a 10% error in the audit would result in only a marginal difference to the Tenant, the court concluded that the Tribunal was not in error in exercising its discretion not to require production of such documents.

The decision is a useful clarification of commercial landlords' obligations in relation to the recovery of outgoings in shopping centres.

New ACCC guidelines for Collective Bargaining, New Revised Authorisation Processes and New Merger Clearances

Dispute Resolution lawyer, Shannon Cogan, comments on new ACCC guidelines to assist businesses to understand Trade Practices Act collective bargaining processes, authorisation processes and new merger clearance processes which came into effect on 1 January 2007.

The *Trade Practices Act* is competition driven and encourages businesses to act independently with regard to sales, and the marketing and pricing of goods.

The *ACCC's Review of the Competition provisions of the Trade Practices Act* notes that small businesses are disadvantaged in collective bargaining negotiations. It noted that small businesses had less bargaining power and less influence over contractual terms and conditions and that small businesses had greater bargaining power when they collectively negotiated with other businesses.

As collective bargaining may contravene the *Act* the guidelines are intended to assist small businesses avoid such breaches. A guide is provided to recent amendments to the *Trade Practices Act* which are intended to streamline the process whereby small businesses may attract immunity when bargaining collectively.

The guidelines assist small businesses with how to lodge a collective bargaining notification without breaching the Act. The guidelines also explain how to lodge an application, how an application is assessed and promote an understanding and awareness of this process.

The new authorisation process guidelines outline the six month time constraint for non-merger authorisation applications and that the ACCC has a discretion to waive non-merger authorisation lodgement fees. The new guidelines also deal with the application process when applying for a fee waiver.

The new merger clearance guidelines deal with the merger authorisation process and how to gain clearance from the ACCC when acquiring shares and other assets.

Continued from page 3

Sons of Gwalia in the High Court: Corporate Insolvency and Shareholders' rights

Simon Morris

Dispute Resolution partner, Simon Morris, comments on the High Court decision in *Sons of Gwalia v Margaretic.*

The High Court by majority (6 to 1) has upheld the decision of the Full Federal Court finding that shareholders with damages claims against an insolvent company alleging that they were misled when buying shares rank equally with other unsecured creditors on a winding up. The decision, while not unexpected, has significant implications for insolvency practitioners, unsecured lenders, trade creditors, litigation funders and shareholders.

Margaretic invested $26,200 in shares in Sons of Gwalia. Eleven days after making that investment the company was placed in voluntary administration. Margaretic's investment was completely lost.

Margaretic claimed that when acquiring shares in Sons of Gwalia he had been misled and that the company had breached its continuous disclosure obligations.

The Voluntary Administrators refused to admit Margaretic's claim relying on Section 563A of the Corporations Act which subordinates to all other creditors debts owed by a company to members in their capacity as members.

The High Court found that as a matter of law the Administrators had got it wrong and that shareholders with damages claims such as that brought by Margaretic were not claims that arose in their capacity as members. Rather the claims arose from the company's alleged contraventions of the *Corporations Act* and the *ASIC Act*.

The decision has immediate implications for insolvency practitioners who will now have to form a view whether shareholders are contingent creditors. Adding shareholders to the pool of potential creditors will significantly increase the costs and complexity of insolvency administrations, for example in the calling for proofs and the holding of meetings. If claims are brought the litigation process is likely to be lengthy and distributions will be postponed until each shareholder's rights are finally determined. Notwithstanding that shareholder actions of the type brought by Margaretic lend themselves to class actions each member of the class will need to prove that the company's contravening conduct caused their loss. The decision in this respect is something of a green light for litigation funders.

Additional costs of insolvency administrations and sharing available funds with a larger pool of creditors will dilute returns to traditional unsecured creditors. Justice Callinan (in dissent) commented *"it is not difficult to imagine a situation in which claims of a large body of shareholders, perhaps most of them, would dilute the creditors' rights to less than a tickle".*

A further consequence of the decision is likely to be an increase in the cost of unsecured finance and also an increase in the prevalence of secured lending.

Given what are largely perceived as the negative consequences of the ruling it is likely that we will see legislative reform in the future amending section 563A of the Corporations Act to bring it into line with the United States Bankruptcy Code which subordinates shareholder claims regardless of the basis of the claim. However, given the number of Australians who own shares it would be a brave government that moved to take away shareholder rights in an election environment.

Piper Alderman Lawyers

Sydney
Level 23
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
DX 10216, Sydney Stock Exchange
Phone: + 612 9253 9999
Facsimile: + 612 9253 9900

Melbourne
Level 24
385 Bourke Street
Melbourne VIC 3000
DX 30829, Collins Street
Phone: + 613 8665 5555
Facsimile: + 613 8665 5500

Brisbane
Level 9
239 George Street
Brisbane QLD 4000
GPO Box 3134
Brisbane QLD 4001
DX 105, Brisbane
Phone: + 617 3220 7777
Facsimile: + 617 3220 7700

Adelaide
167 Flinders Street
Adelaide SA 5000
GPO Box 65
Adelaide SA 5001
DX 102, Adelaide
Phone: + 618 8205 3333
Facsimile: + 618 8205 3300

Email: enquiries@piper-alderman.com.au

www.piper-alderman.com.au