

Legal doubts cloud the rise of the awesome Oswals

Michael Sainsbury and Jennifer Hewett | *June 07, 2008*

IT sounds like another remarkable West Australian success story born of the extraordinary resources boom.



Pankaj and Radhika Oswal at their home in Perth with daughters Vasundhara, 10, and Riddhi, 4. Picture: Tom Rovis-Hermann

A giant industrial plant on a remote coastal peninsula: a project riven with cost overruns, a bitter shareholder dispute, construction delays, supply problems and pitched legal battles.

Now, Indian entrepreneur Pankaj Oswal is about to dramatically increase his personal wealth through the \$500 million float of the world's largest ammonia plant, valuing his company Burrup Holdings at \$2.5 billion.

Oswal will, within weeks, become a few hundred million dollars richer by cashing in some of his ownership of Burrup Fertilisers from 70 per cent to 53 per cent. For someone who only arrived in Perth in 2000, it's a massive achievement.

And questions remain over the single input to Burrup's ammonia plant after West Australian taxpayers footed a \$9 million bill for emergency gas supplies to Oswal, who then sold them back to the state for a multiple of the price he paid.

But as the Intelligent Investor newsletter said this week: "To put it bluntly, it's one of the least attractive large floats we've ever seen."

The Burrup prospectus flashed last month in investor boardrooms in Paris, London and New York by Mr Oswal and its promoters UBS last month is light on detail and appears to have gaping holes -- it has failed to mention a host of related-party transactions.

And Oswal, who has taken on the dual chairman and chief executive roles frowned upon by the corporate watchdog, appears determined to continue running his listed company as a family concern.

"This position is important to me," Oswal told *The Weekend Australian*. "This is a family-run business. It is still run like a family business because a lot of blood has gone in to take it to where it stands and I would like to pass it on to my children."

The prospectus makes it clear how much money is at stake for Pankaj Oswal, whose planned \$70 million mini-Taj Mahal will stand on a tract of land that used to be owned by legendary property developer Warren Anderson.

The scale of the project has even managed to offend the sensibilities a city used to the grossest extravagance.

The Burrup dividend payout ratio is 85 per cent. "I would rather it be 100 per cent," Mr Oswal said. "The company does not need the money, so why leave it in there? They company doesn't need the money, I need the money."

Only 18 months ago, Oswal's dream was about to be shattered by both his then partners in the project supporting an application to place Burrup into receivership.

One of those partners, fellow Indian Vikas Rambal, is now out of the business after the payment last year of a large undisclosed sum -- possibly as much as \$US75 million -- to drop the court action.

The other partner, Norway's world leading fertiliser group, Yara, will make more than \$70 million from selling its stake down from 30 per cent to 27 per cent. That should help make up for a separate legal action in which Yara sued Burrup Holdings and Pankaj Oswal for around \$250 million. Yara only withdrew that action in January of this year just ahead of the proposed float. And the testy Yara relationship is only part of the complicated financial arrangements that seem to be in place at Burrup Holdings.

The Corporations Act is very clear about the treatment of related-party transactions in prospectuses. Section 711(2) of the Corporations Act requires disclosure of interests and fees of certain people involved in the offer during the two years before the offer, in connection with (1) the formation or promotion of the company or (2) property acquired or proposed to be acquired by the company in connection with its formation or the offer under the prospectus. These people include: directors and proposed directors; persons named in the prospectus as an adviser, promoter of the company, underwriter.

In addition, the general disclosure test under s.710 of the Act requires all information that investors and their professional advisers would reasonably require to make an informed assessment of the assets, liabilities, financial position and performance, profits and losses and prospects of the company, and the rights and liabilities attaching to the securities offered.

A related-party transaction could be caught by s.711(2) or s.710, a spokesperson for the Australian Securities and Investments Commission said.

According to investigations by The Australian and Burrup's financial statements, private companies associated with Oswal have received payments and loans worth many millions of dollars from Burrup Holdings in the past few years.

Several of these deals are not disclosed in the prospectus despite the laws on related-party transactions. They can be traced back only via Burrup's financial statements from 2006 to 2008.

Blake Dawson lawyer Roger Davies, who was head of the due diligence committee, said:

"There was a process put in place to ensure that all the information relevant to investors in the float would be put in the prospectus."

The key difference between past problems and the present is that in mid-2008, Pankaj Oswal, having paid his way out of a potential receivership, now looks like a man in just the right place at the right time.

Shares in Burrup are due to start trading on June 26 after the institutional book-build closes on June 17.

The soaring price of ammonia and global demand for fertiliser -- along with the partial recovery of the stock market -- have already sparked strong investor interest in a recent roadshow to Europe and North America. This was despite UBS initially pulling the planned float in February due to the global stock market stock slide. About \$500 million was knocked off the value of Burrup after Oswal's attempt to on-sell excess gas appears to have been thwarted by his suppliers under the terms of the contract.

"There are two plans," Oswal said. "Either we expand the capacity by 600 tonnes per day or we sell the excess gas. The discussions are still ongoing with Apache whether we can sell it or not. Or we will set up the brownfields expansion -- taking the capacity from 800,000 tonnes to 1 million tonnes."

Pankaj Oswal can expect to pocket somewhere between \$300 million and \$450 million from the float. Part of that is undoubtedly due to his extraordinary ability to pull off his vision after he landed in Perth from India: that was financing and building a giant ammonia plant on the Burrup peninsula near Karratha. It also included cleverly locking in what is now an extremely cheap supply of gas to power the plant.

Gas prices around the world are touching \$15 per gigajoule, whereas Burrup has locked in supply at between 86c and \$1.60 in a 25-year agreement.

But the vision can't obscure some curious anomalies in the Burrup prospectus, particularly involving the issue of related-party transactions with regard to millions of dollars worth of equipment used in the plant, a private aircraft and the non-disclosure of recent previous payments.

There is also the question of who will pay for a proposed new ammonium nitrate plant adjacent to the ammonia plant and valued at around \$500 million on which the prospectus is silent

"Under the memorandum of understanding Yara will fund everything until financial close," Oswal said.

"That means he will do basic engineering, detail engineering, environment approvals, everything to do with dollar values. Once the financial close is achieved, taking the value of \$500 million reached by the feasibility study.

"It could go down to \$450 million, depending on how the value comes out. Yara will arrange for the debt -- 70 per cent of the \$500 million, \$350 million, Yara will arrange. Yara will put in 50 per cent of their equity. All in all, Burrup will put in \$75 million or \$80 million over three years. That is an easy job for Burrup from internal cash."

According to the prospectus, none of the money raised from the float will go towards this expansion. Instead, the vast majority will go directly to shareholders Oswal and Yara, with the balance of around \$30 million to be spent on repaying loans from these same shareholders.

"Everything has been disclosed in the audited accounts," Burrup chief financial officer Raj Jeyarajah said.

He said disclosure was a matter for the due diligence committee headed by Blake Dawson lawyer Roger Davies.

Some of the companies linked to Oswal are based in the British Virgin Islands or other overseas locations which make it difficult to check their financial records.

But some of the payments in question include a total of \$26.5 million to Katz Investments and Perrera Investments -- both of which are based in the British Virgin Islands.

According to the 2008 financial statements from Burrup Holdings, these two companies were owed \$16.379 million and \$10.1 million in accrued interest. These statements say that these two companies are related to shareholders and directors of Burrup, without specifying who.

However, Yara is not associated with them, leaving Oswal or other directors of Burrup. Jeyarajah would not comment on those companies. Yet the Burrup prospectus doesn't mention the two companies at all, or whether these loans have been repaid or the background to the financial relationship.

Another Australian-based company, Double Time Enterprises, of which Oswal is the sole shareholder and director, appears to be the beneficiary of a \$US50 million debt forgiveness. According to the Burrup financial statements, this was associated with a \$US50 million loan from Rabobank for supposed cost overruns on the ammonia plant.

This was even though the project was actually built on a fixed-price contract basis.

"That's nothing to do with Burrup Holdings, so I can't answer that," Jeyarajah said.

According to the judgment in the receivership application, the contractor SNC Lavalin, a Canadian company, had the contract to build the plant and subcontracted

that to Paramount, a Hong Kong company with a registered office in WA which shut up shop last year.

Its ownership remains unclear but its directors included Raj Jeyarajah and Vinojit Ambalavaner. Jeyarajah has since been appointed director of Burrup by Oswal and Ambalavaner has a senior position as director commercial.

The prospectus fails to mention their previous employment with Paramount but there are several mentions of their relationship with Paramount in the 2006 receivership application by Vikas Rambal.

In the prospectus, Burrup says it is a defendant in Supreme Court proceedings commenced by Paharpur Cooling Towers Ltd. Court documents reveal the other defendants in the action are Paramount and Pankaj Oswal.

Another note in the 2008 financial accounts -- but not mentioned in the prospectus -- shows an amount of \$840,000 paid out to Biz Dev International Pty Ltd. Mr Oswal and Jeyarajah are both directors of Biz Dev.

Another interesting part of the Burrup story is its relationship with its bankers, particularly ANZ. Under a so-called project loan asset swap agreement, ANZ makes payments to the Burrup Trust, the Oswal family trust, of the amount it receives from Burrup Holdings. The family trust then makes payments to ANZ "based on the financial accommodation made available to Burrup Fertiliser". The total made available to Burrup Fertiliser is \$US360 million. But the upshot is that the prospectus doesn't make it clear whether the Oswal trust receives a financial benefit from the arrangement on the way through. Jeyarajah said yesterday there was no benefit.

The prospectus does disclose that Burrup has entered into a 25-year agreement with Oswal Projects, an engineering services business based in India. Oswal is a director and the largest shareholder, according to the prospectus.

Oswal Projects is charging \$1.08 million per annum for this service. But the prospectus doesn't say whether Oswal will charge any mark-ups on products provided. Burrup has also entered into an agreement with Project Support Services Asia Pty Ltd which will do a maintenance shutdown of Burrup at a total cost of \$30.5 million.

A company search of Project Support Services Asia shows it was incorporated only six months ago and has a sole director and shareholder, Alfred Benedict, born in Pakistan. It has no white pages listing and no web page and lists the address of a legal firm, AWB Partners, in the Perth suburb of Attadale as its principal place of business. Burrup company secretary Wolfgang Jovanovic said the company had been chosen in a tender and had already performed work for Burrup. He would not say whether the company had performed work for any other company.

According to the 2008 financial statements, Burrup has already paid out \$20.5 million for the plant shutdown but it does not say to whom.

In addition, according to the prospectus, Burrup also pays up to \$7.5 million per annum to AV West Pty Ltd for the use of an aircraft. The aircraft is owned by an

entity, name undisclosed, of which Oswal, Jeyarajah and Basil Lenzo (Burrup's in-house legal counsel) are directors. Jeyarajah would not reveal the name of the company or its financial relationship with AV West.

Another issue is the dependence of the board. The Burrup prospectus says that the company's board must have five members "of which 2 must be independent".

Yet the board consists of Oswal, Jeyarajah, Yara senior vice-president Ken Wallace -- all employed by Burrup shareholders so not independent. The other two spots are taken by Perth lawyer Roger Steinepreis and Perth property developer and company director Michael Perrot.

Steinepreis is supposed to be an independent non-executive director, yet on page 98 of the prospectus he says his law firm has acted for Oswal in his personal capacity and for the Burrup Trust for last few years. Jovanovic said Steinepreis was no longer acting for Oswal personally.