

Thursday 14 November 2013

## Insurance, Banking, Construction & Government

### A Daily Bulletin listing Decisions of Superior Courts of Australia

#### Important Announcement



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#### Executive Summary (1 minute read)

**Vero Insurance Ltd v Rail Corporation New South Wales (NSWCA)** - insurance - collision of train and car was *an accident* under car policy - insurer liable for damage to infrastructure and stock owned by state rail and transport entities (I)

**Australian Pipeline v Hastings (NSWSC)** - contract - responsible entity of managed investment schemes replaced after off-market take-over - calculation of incentive fee (B)

**RinRim Pty Ltd v Deutsche Bank Australia Ltd (NSWSC)** - preliminary discovery - waiver - no loss of client legal privilege over Memorandum of Advice - access refused (I B)



**AMP Capital Investors Ltd v Parsons Brinckerhoff Australia Pty Ltd (2009/290489)Retail Employees Superannuation Pty Ltd v AMP Capital Investors Ltd (2013/252050)** (NSWSC) - two sets of proceedings - no conflict of interest - separate representation refused - stay of one proceedings granted (I B C)

**Alder v Khoo** (QSC) - medical negligence - litigation guardian unable to lead evidence to prove allegations - proceedings dismissed (I)

**Quartuccio v The State of South Australia** (SASC) - workers compensation - employer's letter to employee constituted acceptance of her claim - declaration made (I)

**Warr v Sun** (ACTSC) - negligence - motor vehicle collision - liability admitted - damages assessed (I)

## Summaries with links (5 minute read)

### **Vero Insurance Ltd v Rail Corporation New South Wales [2013] NSWCA 372**

Court of Appeal of New South Wales

Barrett, Ward & Gleeson JJA

Insurance - passenger train struck by motor vehicle on level crossing – owner/driver of car was and killed – rolling stock and infrastructure owned by transport entities damaged - state entities sought order under s51 *Insurance Contracts Act 1984* (Cth) that insurer of car pay it an amount equal to insurer's liability under insurance contract in respect of owner's liability to it - success of claim depended on finding owner was liable for loss and damage – whether car driver incurred liability as a result of an *accident* - insurer contended policy did not respond because driver intentionally drove vehicle onto railway line to bring about collision - held: primary judge correct to decide that on balance of probabilities driver did not take own life and collision was *an accident* within meaning of insurance policy - appeal allowed in part to uphold challenge to indemnity costs order - appeal otherwise dismissed.

[Vero Insurance](#) (I)



## **Australian Pipeline v Hastings [2013] NSWSC 1657**

Supreme Court of New South Wales

McDougall J

Contract - defendant fund manager was responsible entity of managed investment schemes (trusts) until it was replaced by plaintiff in off-market take-over - fund manager had paid itself out of trusts' assets on account of fees it said would be payable when it ceased to be responsible entity - dispute arose over calculation of incentive fee - constitutions of funds provided for element to be determined by an *Approved Valuer* - determination carried out on instructions of plaintiff company but parties requested court to determine proper construction of relevant element - provisions of constitutions - whether sales constituted by acceptances of takeover offer were to be described as *trades on ASX* - held: constitutions construed in manner for which fund manager contended - summons dismissed - judgment for fund manager on cross-claim.

[Australian Pipeline](#) (B)

## **RinRim Pty Ltd v Deutsche Bank Australia Ltd [2013] NSWSC 1654**

Supreme Court of New South Wales

Darke J

Evidence - client legal privilege - waiver - proceedings for preliminary discovery under r5.3 *Uniform Civil Procedure Rules 2005* (NSW) - plaintiff sought order that bank not be granted access to counsels' advice on basis it was subject to client legal privilege for purposes of Div1, Pt3.10 *Evidence Act 1995* (NSW) - bank contended privilege over documents had been lost by operation of ss122(2), 122(3) and 126 of the Act by disclosure of other documents, some of which were privileged - *collateral waiver* - held: plaintiff had not acted in manner inconsistent with objection to adducing of evidence of advice - disclosure of recommendation of counsel did not amount to disclosure of substance of advice - client legal privilege over document not lost - defendants did not clarify why disclosure of advice was reasonably necessary in order to enable proper understanding of confidential documents which had lost privileged status.

[RinRim](#) (I B)



**AMP Capital Investors Ltd v Parsons Brinckerhoff Australia Pty Ltd (2009/290489)Retail Employees Superannuation Pty Ltd v AMP Capital Investors Ltd (2013/252050)**

**[2013] NSWSC 1633**

Supreme Court of New South Wales

Pembroke J

Conflict of interest - stay - AMP sought damages for loss of value of investments in Lane Cove Tunnel Project (AMP proceedings) - company (REST) which was not party to AMP proceedings commenced another set of proceedings (REST proceedings) to recover same sum from AMP that AMP was endeavouring to recover on its behalf in AMP proceedings - competing interlocutory applications - application for leave for AMP to be represented by two sets of solicitors on basis of supposed conflict of interest arising from allegations of contributory negligence - application for order staying REST proceedings pending determination of AMP proceedings or for proceedings to be heard concurrently - principles applicable to existence of actual conflict - scope of experts' reports - statutory objectives of *Civil Procedure Act 2005* (NSW) - held: AMP party did not have competing and irreconcilable allegiances and question of conflict was a matter for it, not other parties - application for representation by two sets of solicitors dismissed - REST proceedings stayed pending determination of AMP proceedings.

[AMP Capital Investors](#) (I B C)

**Quartuccio v The State of South Australia [2013] SASC 167**

Supreme Court of South Australia

Stanley J

Workers compensation - judicial review - worker sought declaration that determination made by employer pursuant to s53 *Workers Rehabilitation and Compensation Act 1986* (SA) rejecting her claim for compensation was void because employer had previously made determination accepting her claim by letter - employer submitted letter was issued by mistake and was not a determination to accept worker's claim pursuant to s53 - ss2, 30, 32, 32A, 34, 35, 43, 43A, 43B, 44, 45A, 45B, 45C, 50B, 50G, 51, 52, 53, 61, 89A, 90, 90A & 97 of the Act - held: letter constituted determination by employer of worker's claim for compensation - s53(5) could be construed by characterising letter as determination - by sending letter employer gave worker notice in writing of the determination - employer had accepted claim - declaration made.

[Quartuccio](#) (I)



**Alder v Khoo [2013] QSC 312**

Supreme Court of Queensland

Daubney J

Negligence - limitation of actions - stay - dismissal – 25 year old plaintiff commenced proceedings through his father as litigation guardian alleged his disabilities were caused by obstetrician and hospital and commenced proceedings against them in 2008 - father sought to represent plaintiff at trial - obstetrician and hospital sought that proceedings be dismissed - history of non-compliance by litigation guardian with orders and directions - evidence was one report of midwife - s29 *Limitation of Actions Act 1974* (Qld) - rr303 & 304 *Uniform Civil Procedure Rules 1999* (Qld) - s42(4)(b) *Personal Injuries Proceeding Act 2002* (Qld) - held: plaintiff's claim was barred other than as pursued in present proceeding - litigation guardian not in a position to lead evidence to prove basic factual allegations on which claim founded - interests of justice served by finality in litigation - every opportunity had been given to present case - proceeding dismissed.

[Alder \(I\)](#)**Warr v Sun [2013] ACTSC 222**

Supreme Court of the Australian Capital Territory

Master Harper

Damages - negligence - driver injured in motor vehicle collision with vehicle driven by defendant - defendant admitted liability - pre-existing asymptomatic degenerative changes in spine - medical evidence - accounting evidence - credit - held: court satisfied collision was at least a cause and almost certainly the major cause of plaintiff's symptoms since accident and continuing - damages assessed.

[Warr \(I\)](#)

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