

## Insurance Banking & Construction

# A Daily Bulletin listing Decisions of Superior Courts of Australia

### Today's Cases

**Confidential Information** – Federal Court ordered List of Documents to refer to undertaking given by party to Court concerning certain confidential documents. See *Newcrest Mining v Apache Northwest (No 2)* (I, B, C)

**Non-Delegable Duty of Care** – personal injury sustained by person who fell from “high ropes” during course when rope safety strap broke; inherently dangerous activity; duty of care owed by sub-contractor who certified the ropes; whether occupier had non-delegable duty of care for actions of sub-contractor – whether law of non-delegable duties should be expanded; whether claim fell within scope of insurance policy. See *Transfield Services (Australia) v Hall; Hall v QBE* (I, C)

**Post-Judgment Interest** – effect of claim for interest on Judgment following damages being reduced by Court of Appeal. See *Erect Safe Scaffolding v Sutton & Anor (No 2)* (I, C)

**Trade Practices** – liability of recruitment agency for alleged failure to conduct background checks on candidate later recommended for employment. See *Driver Recruitment v Wedeco AVP* (I, B, C)

**Confidential Information** – subpoena to ASIC to produce statements and transcripts of interviews during ASIC investigation – whether ASIC entitled to resist production on grounds of confidential information. See *Shiple v Masu Financial Management* (I, B, C)

**Equitable Rights & Remedies** – interlocutory application to extend caveat on property in case involving alleged misappropriation of partnership funds. See *Raulfs v Fishy Bite* (I, B)

**Civil Penalty Proceedings** – application for stay of civil penalty proceedings pending institution of criminal proceedings. See *Re AWB Limited* (I, B, C)

**Apprehended Bias** – application to remove arbitrator in industrial dispute – granted. See *Aylett v Peter Rowland Catering & Ors* (I, B, C)

**Motor Accident (Qld)** – application for extension of time granted. See *Paterson v Leigh & Anor* (I)



## Thursday 13 November 2008

### **Newcrest Mining Limited v Apache Northwest Pty Ltd (No 2) [2008] FCA 1663**

Federal Court of Australia

Tracey J (in Melbourne)

Confidentiality regime – preliminary discovery – list of authorised persons -Gas Supply Agreement - explosion on Varanus Island in June 2008 - each document produced by first respondent Apache referred to in first respondent's verified list of documents as being confidential to bear the following notice: "CONFIDENTIAL: This document is confidential and is subject to a confidentiality undertaking given to the Federal Court of Australia."

[Newcrest Mining](#) (I, B, C)

### **Transfield Services (Australia) v Hall; Hall v QBE Insurance (Australia) [2008] NSWCA 294**

Court of Appeal of New South Wales

Beazley & Campbell JJA; McClellan CJ at CL

Personal injuries – extra-hazardous or inherently dangerous activity - duty of care – non-delegable duties of care – respondent injured in fall from high ropes course when safety strop from which rope suspended broke – for decision 2 August 2007 see 'Benchmark Monday 6 August 2007 & link below - appellant contracted by Commonwealth to maintain plant & equipment at site – appellant engaged subcontractor to carry out inspection of ropes course & certify – whether subcontractor negligent – whether appellant owed non-delegable duty of care to respondent for negligence of subcontractor – whether general doctrine in Australian law that a person has a non-delegable duty to ensure reasonable care taken by an independent contractor employed to engage in an extra-hazardous or inherently dangerous activity – whether subcontractor employed to engage in extra-hazardous or inherently dangerous activity – whether scope for extending concept of non-delegable duties beyond existing categories - indemnity insurance – products liability – whether liability arose out of insured's business – where activities giving rise to liability were incidental to insured's business – whether ropes course a product within meaning of policy – whether exclusion clause applies -"possession" – "control" – "advice" – appeal upheld. (I, C)

[Transfield Services \(Australia\)](#), and

[Hall v Adventure Training Systems](#) – decision 2 August 2007 - insurance – construction of policy: "business", "product", "professional advice or service" – exclusion clause - onus of proof on insurer - personal injuries sustained during course of employment in 2002 – at date of accident, plaintiff employed by Royal Australian Navy as Reservist - required to ascend Endeavour High Ropes Course (the course) at HMAS Sterling in Western Australia - steel rope broke causing him to fall suffering injuries primarily to his pelvis, left leg and left wrist – no proceedings brought against employer - first defendant a company based in New South Wales - its involvement related to fabrication, installation, maintenance & repair of certain aspects of the course - second defendant Transfield Services (Australia) Pty Limited, the contractor pursuant to comprehensive maintenance contract with Commonwealth of Australia regarding Defence establishments in Western Australia, including HMAS Stirling - third defendant QBE Insurance (Australia) Ltd, the public & product liability insurer of Adventure Training pursuant to a contract of insurance entered into in New South Wales (at



time of accident, professional indemnity policy had lapsed) - on 28 October 2005, Hoeben J had granted leave for QBE to be joined as a defendant pursuant to s6 *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) - plaintiff's case that Adventure Training was agent of Transfield during the performance by it of its work at HMAS Stirling, at least from August 2000 - common ground that substantive law governing the plaintiff's entitlements was the common law of Western Australia, to which no civil liability statute applies - no claim for contributory negligence made - consideration of case law on non-delegable duty of care - assessment of damages - total damages rounded to \$1,457,712.00.

## **Erect Safe Scaffolding (Australia) Pty Limited v Sutton & Anor (No 2) [2008] NSWCA 289**

Court of Appeal of New South Wales

Giles & Basten JJA; McClellan CJ at CL

Interest - for Court of Appeal decision 6 June 2008 see 'Benchmark' Insurance, Construction & IBC Monday 16 June 2008 & link below - trial judge's damages reduced on appeal - interest entitlement under s101 *Civil Procedure Act 2002* (NSW) - interest not included in substituted judgment - costs - offers of compromise - offers in Court of Appeal - indemnity costs from date of offer - appeal & cross-appeal allowed in part. (I, C)

[Erect Safe Scaffolding \(Australia\)](#), and

[Erect Safe Scaffolding \(Australia\)](#) - decision 6 June 2008 reported at 173 IR 412 - insurance - negligence - workplace injury - large & complex construction site - contractual indemnity clauses - 'arising out of' - whether subcontractor required to indemnify head contractor - whether liability of head contractor arose out of performance of subcontract works - failure to obtain insurance in joint names - whether subcontractor required to obtain insurance for independent negligence of head contractor - damages - whether award excessive - calculation of non-economic loss & past & future economic loss - workers compensation - s151Z(2) *Workers Compensation Act 1987* (NSW) - extensive consideration of case law.

## **Driver Recruitment Pty Ltd (trading as Authorised Solutions) v Wedeco AVP Pty Ltd [2008] NSWCA 290**

Court of Appeal of New South Wales

Giles, Hodgson & Bell JJA

*Trade Practices Act 1974* (Cth) - appeal on liability & quantum - whether recruitment agency had falsely represented that it had performed background & employment checks on candidate - respondent supplier of equipment & services in relation to water treatment had engaged appellant recruitment agency to find person suitable for appointment as its sales manager for South East Asia - appeal dismissed.

[Driver Recruitment](#) (I, B, C)

## **Shipley v Masu Financial Management [2008] NSWSC 1187**

Supreme Court of New South Wales

White J

Confidentiality of information - proceedings relating to mezzanine companies in Westpoint Group - plaintiffs issued subpoena to Australian Securities & Investments Commission for production of records of examinations conducted under s19 *Australian Securities & Investments Commission Act 2001* (Cth) of directors, officers or agents of the defendant, & any related books - application by defendant & three of its officers, who were examined under s19, to restrain plaintiffs from having access to



transcripts of examination & some other documents produced by ASIC on subpoena - reasonable possibility that documents will advance a legitimate forensic purpose of plaintiffs – in the first instance, material to be produced only to solicitors & barristers for plaintiffs & not otherwise disclosed – once plaintiffs' legal representatives have identified material they consider to be of material & of forensic significance, they are to seek defendant's consent to disclosure of that material to plaintiffs, the parties they represent, & any other relevant persons such as expert witnesses or a litigation funder - if consent to such disclosure not forthcoming, leave to make such disclosure can be sought from a judge.

[Shipley](#) (I, B, C)

### **Raulfs v Fishy Bite & Ors [2008] NSWSC 1195**

Supreme Court of New South Wales

White J

Tracing – equitable rights and remedies – subrogation – volunteers – property at Clovelly - interlocutory application for extension of caveat – prima facie case that first defendant misapplied partnership funds – funds used to reduce a mortgage debt owed by second & third defendants – application dismissed – text & case law examined.

[Raulfs](#) (I, B)

### **Re AWB Limited [2008] VSC 473**

Supreme Court of Victoria

Robson J

Application to stay civil proceedings where criminal proceedings reasonably possible – the Cole Report - in civil proceedings, Australian Securities Investments Commission seeking declarations, civil penalties & injunction against each of defendants alleging contravention of ss180(1) & 181(1) *Corporations Act* 2001 (Cth) whilst an officer of AWB Limited by breaching his duties under the *Corporations Act* 2001 in relation to AWB's contracts with Iraq under United Nations Oil-for-Food Programme - civil penalty proceedings stayed until & unless ASIC, the Oil-for-Food Task Force or Cth. DPP advise each defendant that no criminal proceeding will be instituted against him that relies on conduct of defendant that is substantially same as that alleged by ASIC herein, or until further order – comprehensive review of legislation & Australian case law.

[Re AWB](#) (I, B, C)

### **Aylett v Peter Rowland Catering Pty Ltd & Ors [2008] VSC 467**

Supreme Court of Victoria

Pagone J

Apprehension of bias – commercial arbitration – removal of arbitrator – case concerns dispute as to plaintiff's termination of employment, first & second defendants maintaining that plaintiff was not dismissed but, rather, repudiated his employment contract by accepting full-time position as chief executive officer with North Melbourne football club – application for removal of arbitrator granted – detailed consideration of case law. [Aylett](#) (I, B, C)



**Paterson v Leigh & Anor [2008] QSC 277**

Supreme Court of Queensland

McMeekin J

Limitation of actions – personal injuries – motor accident claim - application made within limitation period – where all requirements under *Motor Accident Insurance Act 1994* (Qld) not yet been complied with – application for extension of time granted.

[Paterson](#) (I)

**Key: (I) Insurance, (B) Banking, (C) Construction**