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Daily Civil Law A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (One Minute Read)

In the matter of Northern Minerals Limited (NSWSC) - Court granted an extension of time in which to hold a general meeting called by a foreign shareholder, where the Foreign Investment Review Board was investigating that shareholder's shareholding (I B)

Kvelde v State of New South Wales (NSWSC) - Supreme Court partially struck down laws prohibiting protest activity at major facilities, under the Commonwealth Constitution's implied freedom of political communication (B C I)

Re Haidi Holdings Pty Ltd (VSC) - Court refused application to set aside statutory demand based on unpaid present entitlements between related trustee companies, where one of those companies was now under the control of liquidators (I B)

Niclin Constructions Pty Ltd v Yatala Formwork Pty Ltd (QSC) - Court refused to order the separate determination of five questions in a construction dispute (I B C)

Olympus Superannuation Fund (Tas) Pty Ltd v Recorder of Titles (TASFC) - Recorder of titles was entitled to exercise his power to amend the Register to correct errors where the alleged error arose from a previous exercise of that power (I B C)

HABEAS CANEM

McGregor wishes you a happy and peaceful holiday season



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Summaries With Link (Five Minute Read)

In the matter of Northern Minerals Limited [2023] NSWSC 1568

Supreme Court of New South Wales

Black J

Corporations - Northern Minerals Limited is a public company listed on the ASX - it is a heavy rare earth minerals producer, and rare earth minerals are treated as "critical minerals" for the purpose of the Foreign Investment Review Board's *Guidance 8: National Security*, which encourages consultation with the Foreign Investment Review Board by foreign persons proposing to undertake a "reviewable national security action" by investing in an entity involved in the extraction, processing, or sale of such minerals - Yuxiao Fund Pte Ltd is a foreign shareholder of in Northern Minerals, and had a voting power of at least 9.98%, although the extent of its voting power together with its associates was a matter the subject of ongoing investigation - Yuxiao Fund sought to increase its interest, and the Commonwealth Treasurer issued an order under s67 of the *Foreign Acquisition and Takeovers Act 1975* (Cth) prohibiting Yuxiao Fund from acquiring an additional interest - Northern Minerals' AGM was deferred pursuant to an extension of time granted by ASIC - Northern Minerals received a notice from Yuxiao Fund pursuant to s249D of the *Corporations Act 2001* (Cth) requiring it to call a general meeting to consider resolutions, including a resolution to remove an existing director of the company - Northern Minerals commenced proceedings, seeking an order under s1322(4) of the *Corporations Act* to extend the time to call and hold the general meeting requested by Yuxiao Fund - held: the power under s1322 is remedial and beneficial in nature and is to be interpreted liberally - before the Court makes such an order, it must be satisfied that no substantial injustice has been or is likely to be caused to any person - the Court considered that no substantial injustice would be caused to any person by the making of the relevant order where the Foreign Investment Review Board's investigations were ongoing and the interests of all persons would be best served by voting at a general meeting where the position as to Yuxiao Fund's entitlement to do so, in respect to any additional shares which it or persons linked to it may have purchased, had been clarified - the extension sought should be granted to maximise the prospect that the Foreign Investment Review Board's investigation would be completed and any uncertainties as to the status of Yuxiao shareholdings will be clarified, or, at least, the status of any proceedings that may arise from that investigation will be clearer, by the time of the meeting requested by Yuxiao Fund - the order sought by Northern Minerals should be made - the ultimate form of that order would be to provide for an extension which may travel with a further extension of the AGM which had been sought from ASIC, but only up until 30 April 2024.

[View Decision](#) (I B)

Kvelde v State of New South Wales [2023] NSWSC 1560

Supreme Court of New South Wales

Walton J

Constitutional law - the *Roads and Crimes Legislation Amendment Act 2022* (NSW) introduced s214A into the *Crimes Act 1900* (NSW) - s214A(1) provided that a person must not enter,

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remain on or near, climb, jump from or otherwise trespass on or block entry to any part of a major facility if that conduct (a) causes damage to the major facility, (b) seriously disrupts or obstructs persons attempting to use the major facility, (c) causes the major facility, or part of the major facility, to be closed, or (d) causes persons attempting to use the major facility to be redirected - a number of railway stations, ferry and passenger terminals, and infrastructure facilities were prescribed as major facilities - the amending Act also made amendments to s144G of the *Roads Act 1993* (NSW), to prohibit similar conduct regarding the Sydney Harbour Bridge or any other major bridge, tunnel or road - r48A(1) of the *Roads Regulation 2018* (NSW) was amended to provide that any bridge or tunnel in the Greater Sydney Region, the City of Newcastle, or the City of Wollongong, or any bridge or tunnel that joins a main road, a highway, or a freeway, was prescribed major bridge or tunnel - the plaintiffs sought declarations that s214A and r48A(1) were invalid under the implied freedom of political communication in the Commonwealth Constitution - held: the plaintiffs invoked federal jurisdiction under s76(i) of the Constitution in any matter "arising under this Constitution, or involving its interpretation", which may be exercised by the Supreme Court under s39(2) of the *Judiciary Act 1903* (Cth) - the plaintiffs had standing as they were persons who had attended, organised, promoted, and planned many protest actions, and their freedom of action had been particularly affected by the impugned laws - there is a three-part test to establish whether a law contravenes the implied freedom: (1) does the law effectively burden the implied freedom in its terms, operation or effect? (2) if so, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? (3) if so, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? - protests over environmental issues do, as a general proposition, constitute political communication - the implied freedom extends beyond expressive conduct that a "hypothetical ordinary member of the community" may consider to be "reasonable" - the effective burden imposed by s214A was not so slight as to be inconsequential, insofar as it proscribed conduct of entering, remaining on or near a major facility which causes the partial closure of major facilities (contrary to part of s214A(c)) or persons attempting to use the major facility to be redirected (contrary to s214A(d)) - the purpose of these provisions was legitimate - however, those provisions were not reasonably necessary, as an alternative proposed by the plaintiffs would have achieved effectively the same objectives while imposing a significantly lesser burden upon the implied freedom - the adverse effect of s214A(1)(c) and (d) on the implied freedom in terms of deterring otherwise lawful protests significantly outweighed the benefit sought to be achieved by more effectively deterring any conduct that may disrupt major facilities - s214A(1)(c) was therefore partially invalid, and the invalid part could be the subject of partial disapplication - s214A(1)(d) was invalid, and could be severed - the challenges to the balance of s214A and r48A(1) failed - declarations made that s214A(1)(c) was invalid to the extent that it makes it an offence for persons engaged in the conduct to cause part of the major facility to be closed, and that s214A(1)(d) was invalid.

[View Decision](#) (B C I)

Re Haidi Holdings Pty Ltd [2023] VSC 739

Supreme Court of Victoria

Hetyey AsJ

Corporations - Haidi Holdings Pty Ltd and Tesoriero Investment Group Pty Ltd (in liq) were related entities, having a common director and shareholder - they were both trustees of different trusts - Tesoriero Investment Group was wound up in insolvency - Tesoriero Investment Group, now under the control of liquidators, served a statutory demand on Haidi in respect of two unpaid present entitlements distributed by Haidi as trustee of the John Tesoriero Family Trust to Tesoriero Investment Group, but not yet paid - Haidi sought to have the statutory demand set aside on the bases of a genuine dispute under s459H(1)(a) of the *Corporations Act 2001* (Cth), two offsetting claims under s459H(1)(b), and "some other reason" under s459J(1)(b), including that it was an abuse of process and had not been withdrawn on request - held: s459E(1) of the *Corporations Act* relevantly provides that a creditor may serve on a company a statutory demand relating to a debt or debts owed by the company, which are "due and payable" - a debt is due and payable once it is ascertainable, immediately payable and presently recoverable or enforceable by action - s459H(1) provides that the Court may set aside a statutory demand if satisfied that there is a genuine dispute as to the amount of the debt, or that the company has an offsetting claim - for a dispute to be genuine, it must be bona fide and truly exist in fact - a genuine offsetting claim means a claim on a cause of action advanced in good faith, for an amount claimed in good faith - s459J(1)(b) provides that the Court may set aside the statutory demand if satisfied there is "some other reason" why it should do so - aside from the general complaint that Tesoriero Investment Group has not obtained a judgment to support the debt, Haidi did not actually suggest it lacked the status of creditor and only had equitable rights in respect of the unpaid present entitlements - nor did Haidi argue that Tesoriero Investment Group's absolute entitlement to payment of the unpaid present entitlements was subject to some contingency or condition found in the trust deed for the Family Trust, or the underlying resolutions of Haidi as trustee - the genuine dispute contention failed - in the case of both alleged offsetting claims, there was an absence of mutuality in the identity or capacity of Tesoriero Investment Group as creditor who served the demand, and Haidi who asserted the alleged offsetting claim - Haidi had not identified any nexus between itself and Tesoriero Investment Group in respect of the asserted transactions - both offsetting claims lacked sufficient particularity to enable the Court to determine they were not fanciful - the offsetting claims contention failed - Haidi could not allege that there was "some other reason" to set aside the demand on the basis of abuse of process and a refusal to withdraw it, as these contentions were not identified expressly, or by reasonable inference, in the affidavits filed in support of Haidi's application within the 21 day statutory period to make such application - further, there was no evidence that Tesoriero Investment Group's liquidators sought to invoke the statutory demand procedure as a means of obtaining an advantage for which it was not designed or some collateral advantage beyond what the law offers - application to set aside statutory demand dismissed.

[Re Haidi Holdings Pty Ltd \(I B\)](#)

Niclin Constructions Pty Ltd v Yatala Formwork Pty Ltd [2023] QSC 285

Supreme Court of Queensland

Martin SJA

Building and construction - Niclin Constructions Pty Ltd was a building company that contracted with Yatala Formwork Pty Ltd as a subcontractor for Yatala to carry out formworks at a building in Springwood - Niclin commenced proceeding, contending that Yatala failed to achieve practical completion as required by the contract and that it was, therefore, entitled to liquidated damages - Niclin sought to have five questions determined separately under r483 of the *Uniform Civil Procedure Rules 1999* (Qld) - held: the general principles that govern an application for determination of a separate question are: (a) the judicial determination of the question must involve a conclusive or final decision based on concrete and established or agreed facts for the purpose of quelling a controversy between the parties; (b) where the preliminary question is one of mixed fact and law, it is necessary that the question can be precisely formulated and that all of the facts that are on any fairly arguable view relevant to the determination of the question are ascertainable either as facts assumed to be correct for the purposes of the preliminary determination, or as agreed facts or as facts to be judicially determined; (c) care must be taken to avoid the determination of issues not ripe for separate and preliminary determination, and an issue may not be ripe in this sense where it is simply one of two or more alternative ways in which an applicant frames its case and determination of the issue would leave significant other issues unresolved; (d) factors which tend to support the making of an order include that the separate determination of the question may contribute to the saving of time and cost by substantially narrowing the issues for trial, or even lead to disposal of the action, or contribute to the settlement of the litigation; (e) factors which tell against the making of an order include that the separate determination of the question may give rise to significant contested factual issues both at the time of the hearing of the preliminary question and at the time of trial, or result in significant overlap between the evidence adduced on the hearing of the separate question and at trial, possibly involving the calling of the same witnesses at both stages of the hearing of the proceeding, or prolong rather than shorten the litigation - there were some serious issues raised which were interlinked and the resolution of which would depend on decisions made on other issues, including the true date of the contract, whether events displaced the date for practical completion, and other issues - if separate questions were to be ordered, and the answers did not lead to a resolution of the entire case, then it would be almost certain that witnesses called on the separate questions would be required to be called again - the general principle is that all issues of fact should be determined at the same hearing - the pleadings demonstrated substantial disagreement, and there were issues which will require more than the construction of clauses of the contract - the Court expected that the separate questions hearing would take at least three days - application for determination of separate questions dismissed.

[Niclin Constructions Pty Ltd](#) (I B C)

Olympus Superannuation Fund (Tas) Pty Ltd v Recorder of Titles [2023] TASFC 6

Full Court of the Supreme Court of Tasmania

Wood, Pearce, & Brett JJ

Benchmark

Torrens title - Olympus Superannuation Fund (Tas) Pty Ltd and Bluehouse Corner Pty Ltd owned adjoining land in Hobart - an easement had purportedly been created by the reservation of a right of way over Olympus' land in favour of the then owners of Bluehouse's land when they sold the land to Olympus' predecessor in title in 1915 - both parcels of land were then under the general law system - the easement was recorded on Olympus' land when it was brought under the *Land Titles Act 1980* (Tas) in 1989 - however, when Bluehouse's land was brought under the Torrens system in 1923, the benefit of the easement was not recorded on the titles issued at that time - the Recorder registered the easement on Bluehouse's titles in 2019, pursuant to the power in s139 of the Act to correct errors and supply omissions in the Register - Olympus requested the Recorder reverse this decision and remove the easement from the Register, claiming that the instrument in question did not identify a dominant tenement, and hence was not an easement, but merely granted a personal licence to the individuals named in it - the Recorder refused to remove the recording - Olympus applied to the Supreme Court for relief pursuant to s144 of the Act - the primary judge dismissed the action, holding that the Recorder could not vary or reverse his decision (because the easement, once registered, was indefeasible) and did not find it necessary to address the underlying question - Olympus appealed - held: the Act confers substantial and varied powers upon the Recorder, and an important purpose of this conferral is to ensure that the Recorder has sufficient powers to maintain the accuracy of the Register - s139 provides the Recorder with a general power to correct errors in the Register or an instrument, including a plan, irrespective of the source of the error - the power of correction is not confined to administrative and clerical errors or omissions for which the Recorder or his staff are responsible, and the ultimate purpose of the provision is to ensure the accuracy of the Register - further, once the Recorder has exercised his power under s139 in respect of a particular asserted error, he is not *functus officio*, and unable to revisit that decision - the prima facie position in Tasmania is that a statutory authority or decision-maker has the power to vary or reverse a statutory decision, due to s20(a) of the *Acts Interpretation Act 1931* (Tas) - provided that the provisions of s139 are properly engaged in the circumstances, there is no reason why the Recorder cannot exercise power under that provision to revisit or vary an earlier decision made under that section - however, in determining whether to take action to correct an error under s139 which may have arisen as a result of an initial decision under that section, the Recorder was bound by the provisions of the Act which implement the general principles of protection afforded by the Torrens system - the registered proprietor of land to which an easement is appurtenant has an indefeasible title to that land but not to the easement, so that the easement cannot be enforced unless the certificate of title of the registered proprietor of the servient tenement states that that title is subject to the easement, or unless the easement falls within one of the exceptions to indefeasibility - the answer to whether the easement was protected by the indefeasibility provisions in the *Land Titles Act* required the primary judge to assess the effect of the Memorial of Conveyance referred to in the Register, and, if part of the Register, the underlying instrument, to determine whether these created an easement, and in particular whether there was identification of a dominant tenement - appeal allowed, and matter remitted to the primary judge for a rehearing of the application.

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L A W Y E R S

[Olympus Superannuation Fund \(Tas\) Pty Ltd \(I B C\)](#)



Poem for Friday

In Memoriam, (Ring out, wild bells)

By: Alfred, Lord Tennyson (1809-1892)

Ring out, wild bells, to the wild sky,
The flying cloud, the frosty light:
The year is dying in the night;
Ring out, wild bells, and let him die.

Ring out the old, ring in the new,
Ring, happy bells, across the snow:
The year is going, let him go;
Ring out the false, ring in the true.

Ring out the grief that saps the mind
For those that here we see no more;
Ring out the feud of rich and poor,
Ring in redress to all mankind.

Ring out a slowly dying cause,
And ancient forms of party strife;
Ring in the nobler modes of life,
With sweeter manners, purer laws.

Ring out the want, the care, the sin,
The faithless coldness of the times;
Ring out, ring out my mournful rhymes
But ring the fuller minstrel in.

Ring out false pride in place and blood,
The civic slander and the spite;
Ring in the love of truth and right,
Ring in the common love of good.

Ring out old shapes of foul disease;
Ring out the narrowing lust of gold;
Ring out the thousand wars of old,
Ring in the thousand years of peace.

Ring in the valiant man and free,



The larger heart, the kindlier hand;
Ring out the darkness of the land,
Ring in the Christ that is to be.

Alfred, Lord Tennyson was born on 6 August 1809, in Somersby, Lincolnshire, England. *Ring Out, Wild Bells*, was part of *In Memoriam*, written to Arthur Henry Hallam, who died at 22. The poem was published in 1850, the year Tennyson was appointed Poet Laureate. The poem is inspired by the English custom to have the ring of bells, muffled to ring out the old year, and then, with muffles removed, to ring in the new year. *Ring Out, Wild Bells*, has been set to music including by Charles Gounod and Percy Fletcher. Alfred, Lord Tennyson died on 6 October 1892.

Ring Out, Wild Bells, Gounod, sung by the Mormon Tabernacle Choir
https://www.youtube.com/watch?v=TVEAt8v7b_g

Ring Out, Wild Bells, from *The Passing of the Year* by Jonathan Dove, Andrew Hon, conductor, sung by the Yale Glee Club
<https://www.youtube.com/watch?v=yPlqqvOM8Og>

Bell Ringing in the Belfry at Great St. Mary's, Cambridge
<https://www.youtube.com/watch?v=KNMFvNZIsCM>

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