



Friday, 20 December 2024

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

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### Executive Summary (One Minute Read)

**Hampden Holdings I.P. Pty Ltd v Aldi Foods Pty Ltd (FCA)** - Aldi had infringed copyright in relation to artistic works used on packaging for children's food products

**J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund v Nielsen (FCA)** - applicant and class members in representative proceedings succeeded against directors and officers insurer of directors who had breached various provisions of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth)

**Lederer Group Pty Ltd v Hodson (NSWCA)** - shopping centre owner and company that employed cleaners in the shopping centre were not liable in negligence in respect of psychiatric injuries suffered by a cleaner after seeing the covered body of a man killed by a truck in a loading dock

**In the matter of Hammoud Investments Pty Limited (In Liquidation) (NSWSC)** - judicial advice to liquidators they would not currently be justified in investigating and pursuing claims against director where creditors could be paid in full and the substantial beneficiary of success would be contributory

**Allen v Yarra Valley Railway Incorporated (VSC)** - interlocutory injunction restraining from restoring and reconstructing a historic railway line outside normal business hours, on the basis of alleged nuisance, refused



## HABEAS CANEM

Merry Christmas from McGregor

## Summaries With Link (Five Minute Read)

### **Hampden Holdings I.P. Pty Ltd v Aldi Foods Pty Ltd [2024] FCA 1452**

Federal Court of Australia

Moshinsky J

Copyright - applicants sued Aldi for breach of copyright in relation to artistic works used on packaging for children's food products - held: where an artistic work is created under the terms of employment, the employer is the owner of any copyright (s35(6), *Copyright Act 1968* (Cth)) - a 'work of joint authorship' is a work produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contributions of the other authors (s10(1)) - alterations made by A to an earlier work created by B can sometimes result in a work of joint authorship of A and B together - even though an assignment of copyright cannot be given retrospective operation as against a third party, the assignment of the right to sue for copyright infringement, even if that assignment also operates only prospectively, can be a right to sue for past infringement - the applicants had taken a valid assignment of copyright and also a valid assignment of the prospective right to sue for past copyright infringements, and therefore had the right to bring the present proceedings - considered cumulatively, some of the layout and design elements used by Aldi (but not others) constituted a substantial part of various works owned by the applicants - some infringements therefore made out - additional damages should be awarded under s115(4) as the infringement was flagrant, and in order to deter similar infringements.

[Hampden Holdings I.P. Pty Ltd](#)

### **J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund v Nielsen [2024] FCA 1472**

Federal Court of Australia

Halley J

Insurance - a superannuation trustee commenced a class action against two companies and their directors for breaches of various provisions of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) in making improvident loans without adequate security and contrary to representations made to investors - the only active respondent remaining was an insurer who was sued under the *Civil Liability (Third Party Claims against Insurers) Act 2017* (NSW) - the insurer had insured a number the directors of one of the companies under a directors and officers policy - the insurer resisted the claim on the basis that: (1) the directors' company had breached its duty of disclosure under s21 of the *Insurance Contracts Act 1984* (Cth); (2) a professional services exclusion in the policy, and (c) it was entitled to the benefit of a release granted to the directors by a court order, pursuant to s7 of the *Civil Liability (Third Party Claims against Insurers) Act* - held: trustee had proved directors contravened the statutory provisions alleged - applicant and group members could rely on the *Civil Liability (Third Party Claims against Insurers) Act* to claim indemnity under the policy - the matters not disclosed were clearly material to insurer's decision whether to bind cover for the company - however, by ultimately deciding to bind cover without obtaining claims circumstances

information the company would have had to provide had the insurer pressed for a completed proposal form, the insurer had waived the company's duty to disclose those matters - impugned conduct of the company and the directors did not constitute the provision of third party professional services for the purposes of the exclusion clause - the court order did not preclude the trustee from enforcing any judgment that it might obtain against the insurer - common questions answered so as to confirm liability of the insurer.

[J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund](#)

## **Lederer Group Pty Ltd v Hodson [2024] NSWCA 303**

Court of Appeal of New South Wales

Ward P, Leeming JA, & Basten AJA

Negligence - Hodson was employed by Hurex, who supplied his services as a shopping centre cleaner to Lederer - Hodson saw the covered body of a man who had been killed by a truck in a loading dock - he was diagnosed with anxiety and depression and sued both Hurex and Lederer in negligence - the primary judge found both defendants liable - Lederer appealed and Hurex cross-appealed - held: primary judge erred in finding Lederer owed Hodson a duty of care - Hodson's supervisor (who directed him to replace another colleague at the scene of the accident) could not have foreseen that a person with normal fortitude might suffer a psychiatric injury if confronted with the scene of the accident, as required by s32 of the *Civil Liability Act 2005* (NSW) - Hodson had never seen the uncovered body, and had not proved he could sense a 'smell' from the body - primary judge erred in finding Hodson's diagnosed disorders were caused by being at the scene - primary judge also erred in finding Hurex liable - it was not reasonably foreseeable by Hurex (who was not in control of the Centre and not responsible for giving day to day instructions) that a person in Hodson's position might suffer psychiatric injury if Hurex failed to instruct him not to attend a significant incident at work - further, the direction it was said Hurex should have been given was imprecise and would give rise to practical difficulties in its implementation - appeal and cross-appeal both allowed.

[View Decision](#)

## **In the matter of Hammoud Investments Pty Limited (In Liquidation) [2024] NSWSC 1636**

Supreme Court of New South Wales

Hammerschlag CJ in Eq

Corporations law - liquidators of a company applied for judicial directions under s90-15(1) of the *Insolvency Practice Schedule (Corporations)* as to (1) whether it would be reasonable to investigate and pursue possible claims against the company's director in circumstances where the creditors could be paid in full and the substantial beneficiary of success would be the company's contributory; and (2) whether they would be justified in pursuing a CGT concession which might be available to the company - held: if the contributory was granted leave to bring a derivative action on behalf of the company she would, almost inevitably, have to indemnify the company against losses constituted by its own costs and any costs of the defendants the company may have to pay - the contributory had not sought such leave - the application also assumed the company would be wound up and any surplus distributed to the contributory, and

did not take account of the possibility that, in the light of the surplus, the director or other shareholders may move the Court to terminate the winding up - the liquidators would not be not justified in investigating or pursuing either of the foreshadowed claims unless, within a reasonable time, the contributory moved the Court for leave to bring a derivative action and failed, or another party applied for the termination of the winding up and failed.

[View Decision](#)

## **Allen v Yarra Valley Railway Incorporated [2024] VSC 796**

Supreme Court of Victoria

Quigley J

Nuisance - the plaintiffs lived on a large rural property in a green wedge zone - YVR was a not for profit incorporated association who leased a rail corridor adjacent to the plaintiffs' property, and who was restoring and reconstructing a historic railway line in that corridor - the plaintiffs contended YVR's work caused a nuisance, in that that works were carried out before and after hours, and on weekends - the plaintiffs said their mental and physical health was being affected, as was that of their children, their horses, and their other animals - the plaintiffs sought an interlocutory injunction restraining YVR from doing work outside normal business hours - held: the tort of private nuisance occurs where a person interferes with another person's use or enjoyment of their land in a way that is both substantial and unreasonable - one type of interference that can constitute nuisance is unduly interfering with the comfortable and convenient enjoyment of land - public benefit may be relevant to the reasonableness of the interference, but does not operate as a defence - the strength of the plaintiff's nuisance claim was marginal, although it was possibly arguable - however, damages would potentially be an adequate remedy after trial - the plaintiffs had proffered no undertaking as to damages and no explanation for not having done so - the balance of convenience favoured refusing the injunction - interlocutory injunction refused.

[Allen](#)



## Poem for Friday

### Somewhere

By Rev David Conolly

Somewhere,  
unexpectedly,  
hope is born.

A voice.  
At first, only the cry  
of a new-born  
gulping for breath.

In time, a voice.

The voice speaks to  
a world grown used to  
darkness, despair.

The voice says,  
*You are light for the world;  
Let it shine.  
Love, and forgive*

And suddenly, hope is born.

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