

Friday, 20 December 2024

Weekly Banking Law Review Selected from our Daily Bulletins covering Banking

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Executive Summary (One Minute Read)

Secretary, Department of Social Services v FNPQ (FCA) - AAT had erred in construing s1073A of the *Social Security Act 1991* (Cth) (deeming employment income as payable when actually received) in a way that allowed s1073A to be circumvented simply by making a fresh age pension application

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)

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



HABEAS CANEM

Merry Christmas from McGregor

Benchmark

Summaries With Link (Five Minute Read)

Secretary, Department of Social Services v FNPQ [2024] FCA 1428

Federal Court of Australia

Snaden J

Administrative law - a woman received lump sum payments from her former employer after it had been found she had been underpaid - the Secretary cancelled her and her husband's age pensions on the basis s1073A of the *Social Security Act 1991* (Cth) deemed the back-pay amounts as payable at the time that they were received - Centrelink rejected fresh applications - the AAT set Centrelink's decision aside and ruled the couple's income for age pension purposes did not include the back-pay amounts - the AAT's General Division affirmed - Secretary appealed to Federal Court - held: where a statutory provision has more than one construction, the court must prefer the one that aligns best with the statute's purpose or object (s15AA of the *Acts Interpretation Act 1901* (Cth)) - s1073A's purpose was to ensure that employment income was brought to bear in calculating eligibility for the age pension; regardless of when the amounts were paid - AAT's construction of s1073A would allow the immediate circumvention of the very consequences s1073A was plainly intended to address - it would allow a cancellation for deemed employment income to be immediately set at naught simply by making a fresh pension application - this would be absurd - parties to consider whether the Court has power to remit the matter to the Administrative Review Tribunal (which has replaced the AAT) in same way it would have earlier remitted the matter to the AAT.

[Secretary, Department of Social Services](#)

[From Benchmark Monday, 16 December 2024]

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](#)

[From Benchmark Friday, 20 December 2024]

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](#)

[From Benchmark Friday, 20 December 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Khachatryan v Armenia (EUHR5S) - In a matter of first impression, the European Court of Human Rights found that a member state has an obligation to provide a mechanism whereby victims of domestic violence may seek compensation for non-pecuniary damage from the perpetrator of the violence

Summaries With Link (Five Minute Read)

Khachatryan v Armenia, Case 11829/16

European Court of Human Rights

Guyomar P, Elósegui, Harutyunyan, Felici, Zünd, Sârcu, & Šimáková JJ

In Armenia, the victim had been subjected to numerous events of serious physical and emotional abuse by her former spouse. He repeatedly threatened and insulted her. He also repeatedly beat her, breaking bones and causing concussions and other grievous injuries. The perpetrator was charged with aggravated torture of a person who was dependent on the perpetrator. However, he was convicted of non-aggravated torture and sentenced to 18 months imprisonment. He did not serve any time as he was exempted under an Amnesty Act. The victim of the abuse unsuccessfully launched civil legal proceedings seeking compensation for both pecuniary and non-pecuniary damage for emotional and psychological suffering due to ill-treatment. Armenian domestic law did not provide for compensation for non-pecuniary damages in this situation. The judgment was affirmed by the local court of appeal. Armenia is one of the 46 member states comprising the Council of Europe and is subject to the European Convention on Human Rights and the jurisdiction of the European Court of Human Rights. The victim sought review of the decision by the Armenian courts by alleging that Armenia had acted in violation of Article 3 of the *European Convention on Human Rights*, which states that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The Court found that the Armenian criminal-law mechanisms were so defective in terms of protecting the victim that they amounted to a breach of Armenia's obligations under Article 3. The European Court said that Armenia had repeatedly failed to discharge its procedural obligation to respond adequately to the serious acts of domestic abuse. In a decision of first impression, the Court also found that Article 3 imposed an obligation on the state to allow claims by the victim against the perpetrator for compensation for non-pecuniary damages in matters of serious domestic abuse. The Court stated that Article 3 created a positive obligation on the part of a member state in respect of allowing claims for non-pecuniary damage from the perpetrators of such violence directly, or indirectly through the member state. The European Court awarded the victim €24,000 plus €2000 in costs as against Armenia.

[Khachatryan](#)



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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