



Friday, 15 December 2023

Weekly Corporate Governance **A Weekly Bulletin listing Decisions** **of Superior Courts of Australia covering Corporate Governance** **Law**

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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

In the matter of West Homes Australia Pty Ltd (VSC) - company that had failed to comply with a statutory demand was refused leave to oppose winding up on the grounds of solvency and the existence of a genuine dispute about the debt

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

HABEAS CANEM

McGregor wishes you a happy and peaceful holiday season



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](#)

[From Benchmark Friday, 15 December 2023]

In the matter of West Homes Australia Pty Ltd [2023] VSC 732

Supreme Court of Victoria

Irving AsJ

Corporations - the plaintiff applied to have West Homes Australia Pty Ltd wound up after failure

to comply with a statutory demand - West Homes sought leave to oppose the winding up application, as it disputed the existence and quantum of the debt West Homes also asserted that it was solvent - held:s495 of the *Corporations Act 2001* (Cth) provides that, on an application for a company to be wound up in insolvency on the basis of failure to comply with a statutory demand, the company may not, without leave of the Court, oppose the application on a ground that the company relied on for the purposes of an application by it for the demand to be set aside; or that the company could have so relied on, but did not (whether it made such an application or not) - further, the Court is not to grant leave unless it is satisfied that the ground is material to proving that the company is solvent - in considering whether to grant leave, the Court must give preliminarily consideration to the company's basis for disputing the debt, examine the reason why the issue of indebtedness was not raised in an application to set aside the statutory demand and the reasonableness of the party's conduct at that time, and investigate whether the dispute about the debt is material to proving the company is solvent - the Court must be provided with the 'fullest and best' evidence of solvency, and unaudited accounts and unverified claims of ownership or valuation are not ordinarily probative in this regard - nor are mere assertions of solvency arising from a general review of the accounts, even if made by qualified accountants who have detailed knowledge of how those accounts were prepared - West Homes was presumed insolvent unless it could prove that it is able to pay its debts as and when they become due and payable - West Homes was not trading, it was clearly not a dormant company - in October 2023 it was a plaintiff in Supreme Court proceedings in which interlocutory costs orders were made against it - the financial reports provided to the Court made no reference to the costs order, and contained no historical information to explain when and in what circumstances West Homes ceased trading - West Homes had not discharged its burden of proving solvency such as to displace the presumption of its insolvency - it was therefore not strictly necessary to decide whether there was a genuine dispute about the existence or quantum of the debt - however, the Court was not satisfied that there was such a genuine dispute, even on a preliminary basis - there was no dispute between that the statutory demand had been served on West Homes at its registered address - there was some dispute about whether the *Masri* principle remained good law, that is, the principle that, where the directors of a company did not become aware of the existence of the statutory demand until after the expiration of the 21-day period for filing of an application to set aside a statutory demand, and they acted reasonably with respect to the collection of mail within their registered office, fairness requires the company be permitted to raise a ground available to challenge the demand - in the Court's view, the *Masri* principle was no longer good law and, even if it were, on the facts of this case the mail collection system at the registered office was not reasonable - leave to oppose the winding up application on the asserted grounds refused.

[In the matter of West Homes Australia Pty Ltd](#)

[From Benchmark Tuesday, 12 December 2023]

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](#)

[From Benchmark Friday, 15 December 2023]



Benchmark

INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Minnesota v Torgerson (MINSC) - Odor of marijuana on its own without other facts did not constitute probable cause for warrantless search of vehicle

Summaries With Link (Five Minute Read)

Minnesota v Torgerson 995 N.W.2d 164 (2023)

Supreme Court of Minnesota

Gildea CJ, Anderson, & McKeig JJ

A motor vehicle was stopped by the police because it had too many lights mounted on the grill. When the driver gave his license to the police, the officer stated that he smelled marijuana emanating from the vehicle. When questioned, the driver denied possessing marijuana. After conferring with a second officer, the police ordered the driver and passengers out of the vehicle and conducted a search. In the course of the search, the police discovered a canister of what was later found to be methamphetamine. At trial, the defendant sought to suppress the evidence obtained from the vehicle search on the grounds that there did not exist requisite probable cause for the search. The trial court suppressed the evidence and dismissed the matter. This was affirmed by the Minnesota Court of Appeals. The Minnesota Supreme Court stated that both the US and Minnesota Constitutions protect against unreasonable searches and seizures. Warrantless searches are *per se* unreasonable unless one of the exceptions to the warrant requirement applies. One of these exceptions is the automobile exception which permits the police to search a vehicle without a warrant if there is probable cause to believe the search will result in the discovery of evidence. The Court said that probable cause requires more than suspicion but less than the evidence necessary for conviction. A warrantless search must be based on objective facts and not the subjective good faith of the police. The Court noted that both industrial hemp and medical cannabis were lawful in Minnesota and the possession of a small quantity of marijuana was a petty misdemeanour and not a crime. The Supreme Court stated that, while the odour of marijuana can be a fact that supports probable cause, it is insufficient on its own because of the lawful right to possess medical cannabis under certain circumstances. As there was nothing else to support probable cause, the facts were insufficient to establish a fair probability that the search would yield evidence of criminal conduct. The suppression order was affirmed.

[Minnesota](#)



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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