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

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### Executive Summary (1 minute read)

**Deputy Commissioner of Taxation v A & S Services Australia Pty Ltd (No 2)** (FCA) - corporations - winding up - orders made winding up corporate defendants on just and equitable ground

**The Owners Strata Plan No 66375 v Suncorp Metway Insurance Ltd (No 2)** (NSWSC) - building and construction - contract - agency - evidence - owners' corporation's claim in respect of defects in development dismissed

**Mahmoud v Australian Broadcasting Corporation (No 3)** (NSWSC) - defamation - vexatious proceedings - proceedings were 'manifestly hopeless' because truth defence would succeed - proceedings dismissed

**CTI Joint Venture Company Pty Ltd v Cardno Hard & Forester Pty Limited; CRI Chatswood Pty Ltd (In Liquidation) (Receivers and Managers appointed) v Cardno Hard & Forester Pty Ltd** (NSWSC) - discovery - justifications for discovery based on 'erroneous conception of both the case sought to be made out' - limited discovery granted to defendant

**Nurisvan Investment Ltd v Anyoption Holdings** (VSCA) - contract - deed - specific performance - Heads of Agreement was not a contract between parties to enter Share Sale Agreement - appeal allowed

**Fairbank's Selected Seed Co Pty Ltd v Amar Produce Pty Ltd** (VSCA) - trade practices - oral representations concerning suitability of seeds for crop - appellant engaged in misleading or deceptive conduct - appeal dismissed

**Ugarin Pty Ltd v Lockyer Valley Regional Council** (QSC) - administrative law - planning and environment - challenge to validity of reference to land use codes in descriptions of differential categories of land failed - application dismissed

## Summaries With Link (Five Minute Read)

### **Deputy Commissioner of Taxation v A & S Services Australia Pty Ltd (No 2) [2017] FCA 663**

Federal Court of Australia

Davies J

Corporations - winding up - just and equitable ground - provisional liquidators appointed to corporate defendants pursuant to s472(2) *Corporations Act 2001* (Cth) - Deputy Commissioner of Taxation sought that each corporate defendant be wound up on just and equitable ground under s461(1)(k) - 'phoenix' operation - held: defendants had not adduced evidence to oppose winding up applications - Court satisfied there was 'justifiable lack of confidence' in conduct and management of corporate defendants' affairs, thus risk of public interest warranting protection - orders made winding up corporate defendants on just and equitable ground.

[Deputy Commissioner of Taxation](#)

### **The Owners Strata Plan No 66375 v Suncorp Metway Insurance Ltd (No 2) [2017] NSWSC 739**

Supreme Court of New South Wales

Ball J

Building and construction - agency - evidence - equity - plaintiff was owners corporation in respect of development involving conversion of warehouse owned by third and fourth defendants - builder was second defendant - first defendant provided home warranty insurance concerning works - fifth defendant was developer whose sole directors were third and fourth defendants - plaintiff claimed for defects in development - whether third and fourth defendants liable for defects on basis they were 'developers' under s3A *Home Building Act 1989* (NSW) - whether, if third and fourth defendants liable, liability extended to certain defects subject claim - whether third and fourth defendants were persons 'on whose behalf' building work done - whether third and fourth defendants were a party to building contract - whether loss claimed by plaintiff resulted from breach of statutory warranties - admissibility of evidence - s76A(1) *Environmental Planning and Assessment Act 1979* (NSW) - s69 *Evidence Act 1995* (NSW) - ss3A, 18B & 18C *Home Building Act 1989* (NSW) - held: if third and fourth defendants were developers, they would be liable to plaintiff breaches of statutory warranties to extent builder liable to them for breaches - claim against third and fourth defendants dismissed - matter to be relisted for determination of outstanding issues.

[The Owners Strata Plan](#)

**Mahmoud v Australian Broadcasting Corporation (No 3) [2017] NSWSC 764**

Supreme Court of New South Wales

McCallum J

Defamation - three applications in respect of amended statement of claim - in first application third and thirtieth defendants sought dismissal of proceedings on basis no reasonable cause of action disclosed - in second application eighth defendant contended plaintiff did not provide particulars of download of matter allegedly published by eighth defendant - in third application first defendant and journalist sought stay of proceedings pursuant to *Vexatious Proceedings Act 2008* (NSW) - cl 13(b) Defamation List Practice Note SC CL 4 - r 13.4 *Uniform Civil Procedure Rules 2005* (NSW) held: appropriate to determine third application first - Court satisfied that proceedings were 'manifestly hopeless' - no utility in allowing plaintiff to provide further particulars - proceedings dismissed.

[Mahmoud](#)

**CTI Joint Venture Company Pty Ltd v Cardno Hard & Forester Pty Limited; CRI Chatswood Pty Ltd (In Liquidation) (Receivers and Managers appointed) v Cardno Hard & Forester Pty Ltd [2017] NSWSC 775**

Supreme Court of New South Wales

McDougall J

Discovery - negligence - plaintiffs sued defendant in negligence in relation to its survey of development site and for misleading or deceptive conduct - plaintiff contended survey mislocated boundary of site, with result that building could not be built - defendant sought discovery of documents concerning advice given to plaintiffs during due diligence process - defendant contended it was entitled to discovery on basis documents went to reliance and causation and to pleading of reliance - held: defendant's justifications for seeking discovery involved 'erroneous conception of both the case sought to be made out on causation' and principles of causation - defendant granted discovery in terms of amended proposed category further amended by Court - limited discovery granted.

[CTI Joint Venture](#)

**Nurisvan Investment Ltd v Anyoption Holdings [2017] VSCA 141**

Court of Appeal of Victoria

Osborn, Santamaria & Kaye JJA

Contract - deed - specific performance - first applicant was second applicant's sole shareholder - second applicant was authorised to carry on a financial services business - parties negotiated with view to respondent's purchase from first applicant of its shares in second applicant - second applicant and respondent executed 'Binding Heads of Agreement' - first applicant named as party but did not execute agreement - document provided for parties' entry into 'Share Purchase Agreement' - first applicant advised respondent it did not consider itself bound by any agreement with respondent and was not obliged to comply with Heads of Agreement - respondent sought specific performance of Heads of Agreement, or draft Share Transfer Agreement - primary judge ordered specific performance of Share Sale Agreement on

terms in Heads of Agreement - held: Heads of Agreement was not a contract between parties to enter Share Sale Agreement, but an agreement between parties to negotiate in good faith concerning Share Sale Agreement's conclusion - appeal allowed.

[Nurisvan](#)

## **Fairbank's Selected Seed Co Pty Ltd v Amar Produce Pty Ltd [2017] VSCA 139**

Court of Appeal of Victoria

Maxwell P; Whelan & Santamaria JJA

Trade practices - misleading or deceptive conduct - oral representations - respondent horticulturalist sourced broccoli seedlings from nursery which sourced seeds from appellant - respondent sought advice from nursery as to which seeds were appropriate to plant as seedlings - trial judge found appellant told nursery that 'Ironman' seed was suitable for planting, and that nursery conveyed information to respondent, which directed nursery to purchase and propagate Ironman seeds - nursery had then supplied seedlings to respondent - crop failed - trial judge found appellant engaged in misleading and deceptive conduct by telling nursery that Ironman was suitable for planting and that respondent relied on advice suffering loss - trial judge awarded damages to respondent - ss52 & 53(c) *Trade Practices Act 1974* (Cth) - held: no error in trial judge's findings that appellant conveyed to nursery that Ironman seed suitable for crop, and that nursery conveyed information to respondent - appeal dismissed.

[Fairbank's](#)

## **Ugarin Pty Ltd v Lockyer Valley Regional Council [2017] QSC 122**

Supreme Court of Queensland

Mullins J

Administrative law - planning and environment - applicant sought review of two decisions of respondent concerning differential general rates - first decision was 'to adopt different categories of rateable land and different rates for different categories' - second decision was 'to identify differential general rates category 8 as the rating category' which applicant's land belonged to - ss94, 251, 257 & 259 *Local Government Act 2009* (Qld) - ss80, 81, 88, 91, 92, 93, 154, 155, 169 & 170 *Local Government Regulation 2012* (Qld) - held: applicant failed in challenge to validity of reference to land use codes in both decisions - application dismissed.

[Ugarin](#)

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