



Tuesday 4 October 2014

## Banking

# A Daily Bulletin listing Decisions of Superior Courts of Australia

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## Executive Summary (1 minute read)

**ACCC v Air New Zealand Ltd** (FCA) - trade practices - price fixing - surcharges on carriage of air cargo - claims against airlines dismissed

**Firebird Global Master Fund II Ltd v Republic of Nauru (No 2)** (NSWCA) - stay - application for special leave to appeal to High Court - limited and conditional stay of orders

**Lawrence v Martin** (NSWSC) - succession - family provision order for deceased's de facto partner

**International Petroleum Investment Company v Independent Public Business Corporation of Papua New Guinea** (NSWSC) - contract - bond deed poll - two independent valuations of shares' market value - one valuation binding

**Lew Footwear Holdings Pty Ltd v Madden International Ltd (No 2)** (NSWSC) - stay - statement of claim served on overseas defendant - strongly arguable case - stay refused

**Amricama Pty Ltd v Red Carpet Real Estate** (QSC) - landlord and tenant - rent to be paid under renewed lease - valuer's determination of current market rent of no effect

## Summaries with links (5 minute read)

### **ACCC v Air New Zealand Ltd [2014] FCA 1157**

Federal Court of Australia

Perram J

Trade practices - price fixing - ACCC sued Air New Zealand and Garuda Indonesia alleging collusive behaviour in fixing of surcharges and fees on carriage of air cargo from overseas into Australia contrary to ss45 & 45A *Trade Practices Act 1974* (Cth) - held: s45 applied only to competition in a market in Australia - ACCC's case was limited (in all but one minor case) to flights from airports outside Australia into airports inside Australia - no market in Australia was involved - surcharges were imposed and collected at origin airports - competition which occurred between airlines and which surcharges interfered with was competition in markets in Hong Kong, Singapore and Indonesia and not competition in any market in Australia - prices may have been affected in Australia, but that did not mean market in which airlines were competing was located here - actions dismissed.

[ACCC](#)

### **Firebird Global Master Fund II Ltd v Republic of Nauru (No 2) [2014] NSWCA 375**

Court of Appeal of New South Wales

Basten J

Stay - Court set aside registration of foreign judgment obtained by Firebird against Nauru and also set aside garnishee order - effect of orders was to release both bank and Nauru from any constraints on dealing with money subject of accounts held by Nauru with bank - Court granted stay against possibility Firebird might appeal to High Court - Firebird sought special leave to appeal to High Court - Firebird sought extension of stay limited to certain accounts held by bank - held: there were a number of aspects of proceedings which were unusual if not unique in jurisprudence in Australia - there were respectable arguments to be put on either side and these were matters as to which High Court might well be willing to grant special leave to appeal - clearly arguable that at least part of funds should be frozen to preserve subject matter of litigation - Court satisfied it was appropriate to grant a limited and conditional stay of orders - Firebird to provide an undertaking to pursue expedition in High Court and to pursue its proceedings expeditiously.

[Firebird Global Master Fund II Ltd](#)

### **Lawrence v Martin [2014] NSWSC 1506**

Supreme Court of New South Wales

Hallen J

Succession - plaintiff sought family provision order pursuant to *Succession Act 2006* (NSW) on basis she was living in de facto relationship with deceased at time of his death - held: no dispute that plaintiff was living in de facto relationship with deceased at time of death - plaintiff was eligible

person under s57(1)(b) - Court satisfied for purposes of s59(1)(c) that deceased did not make adequate provision for proper maintenance or advancement in life of plaintiff - Court satisfied lump sum provision should be made for plaintiff out of deceased's estate.

[Lawrence](#)

## **International Petroleum Investment Company v Independent Public Business Corporation of Papua New Guinea [2014] NSWSC 1289**

Supreme Court of New South Wales

Hammerschlag J

Contract - defendant (IPBC) issued Exchangeable Bonds to plaintiff (IPIC) - IPBC raised amount which it used to finance participation in gas project - terms and conditions of Bonds contained in Bond Deed Poll made by IPBC - Maturity Date of Bonds was 5 March 2014 - mature Bonds subject to mandatory exchange into ordinary shares in capital of company whose shares were listed on Australian Securities Exchange (ASX) - if, on Maturity Date, Principal Amount of Bonds being redeemed exceeded Current Market Value of all of the Shares, IPBC as Issuer was to pay to IPIC as Holder a Cash Settlement Amount equivalent to shortfall - conditions incorporated mechanism to determine Current Market Value of Shares - terms and conditions included procedure for parties to appoint Independent Valuer to assess market value and average of two valuations taken - IPBC issued an Alternative Valuation Notice (AVN) - parties each appointed an Independent Valuer - whether AVN was invalid - whether valuations by Independent Valuers were binding on parties - held: AVN valid - valuation by Independent Valuer appointed by IPBC not binding - valuation by Independent Valuer appointed by IPIC binding.

[International Petroleum Investment Company](#)

## **Lew Footwear Holdings Pty Ltd v Madden International Ltd (No 2) [2014] VSC 541**

Supreme Court of Victoria

Elliott J

Stay - service - further hearing of application by defendant (Madden) to have proceeding stayed permanently - Madden was served in Hong Kong with writ filed in Supreme Court of Victoria - Court found plaintiff (Lew) failed to establish strongly arguable case that relevant conditions of r7.01(1)(i) and (j) *Supreme Court (General Civil Procedure) Rules 2005* (Vic) had been met - Lew had pleaded reliance as a necessary element of relevant causes of action but Court found Lew failed to establish strongly arguable case in this regard - it followed Lew had not established strongly arguable case that a tort had been committed or damage had been caused by tortious act or omission - Court proposed to stay proceedings permanently but deferred order - Lew filed further affidavits seeking to establish case on reliance - held: on totality of evidence, Lew established strongly arguable case - Lew entitled to proceed with its contractual claims and representations claims - summons dismissed.

[Lew Footwear Holdings Pty Ltd](#)



## **Amricama Pty Ltd v Red Carpet Real Estate [2014] QSC 267**

Supreme Court of Queensland

Martin J

Landlord and tenant - applicant leased retail shop from respondent - lease was subject to provisions of *Retail Shop Leases Act 1994* (Qld) - applicant exercised option for further 5 years - dispute concerned rent to be paid under renewed lease - s27A allowed for determination of market rent before an option to renew - s28 provided for current market rent to be determined by specialist retail valuer - valuer agreed upon by parties in mediation as part of QCAT proceedings was not a specialist retail valuer - lease did not provide for rent to be determined in a particular way - respondent refused to provide lease in registrable form - applicant sought declarations and order that respondent deliver up a lease in registrable form containing a provision for rent in accordance with the determination of valuer - held: valuer was not a specialist retail valuer - valuation was not a determination of *current market rent* referred to in s27A - applicant could not rely on valuation for purposes of renewed lease - respondent could not be estopped, nor could it be said to have waived its rights under the Act - application dismissed.

[Amricama Pty Ltd](#)

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