IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M155 of 2011

BETWEEN: **THE PILBARA INFRASTRUCTURE PTY LTD (ACN 103 096 340) & ANOR**

Appellants

and

**AUSTRALIAN COMPETITION TRIBUNAL & ORS**

Respondents

No. M156 of 2011

BETWEEN: **THE PILBARA INFRASTRUCTURE PTY LTD (ACN 103 096 340) & ANOR**

Appellants

and

**AUSTRALIAN COMPETITION TRIBUNAL & ORS**

Respondents



No. M157 of 2011

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## APPELLANTS' SUPPLEMENTARY SUBMISSIONS

## PURSUANT TO LEAVE GRANTED ON 8 MARCH 2012

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## Part I: Certification for internet publication

1. The appellants certify that these submissions are suitable for publication on the internet.

## Part II: Status of these submissions

2. These submissions are made pursuant to leave granted on 8 March 2012 (T6920) (a) in support of why leave should be granted to amend the notices of appeal and (b) to present the substantive arguments that would be addressed if leave were granted.

3. The form of the amendment is indicated on the document provided to the Court on 8 March 2012 in respect of the matter concerning the Hamersley line. In the other two matters, the substance of the grounds of the amendment are the same. The only addition is to ensure that the relief sought includes in all cases the possibility of a remitter to the Tribunal.[1]

## Part III: Reasons why leave to amend should be granted

4. The proposed amendments to the appellants' notices of appeal raise issues of public importance respecting the jurisdiction of the Tribunal. Clarification of the true functions and powers of the Tribunal will remain of relevance even after the amendments introduced by Act No 102 of 2010.

5. The point respecting the limits of the task of Tribunal in the face of Chapter III of the Constitution is of substantial public importance and of general application. It was raised below[2] but not considered by the Full Court.

6. No new factual material is required in considering the points raised by the proposed amendments. Nor is any necessary material absent. The questions raised are resolved by construing the terms of the statute and the record as it exists and has been brought before this Court, primarily the Minister's decisions and the Tribunal's reasons for determination. To the extent that it is necessary to consider the terms of the NCC Recommendations themselves, they were before the Full Court.[3]

7. Further, it is important that the case as a whole be decided on all true legal issues and that it not go off on a false basis. Indeed, should the question of remitter arise, even on the issues already raised in the proceedings, much of the analysis below will be directly relevant.

## Part IV: Submissions as to the merits of the subject matter of the amendments

8. The subject matter addressed by each sub-paragraph of the proposed paragraph 5 of each of the Notices of Appeal will be examined below by subject, rather than *seriatim*.

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1 An affidavit of Simon Uthmeyer affirmed 22 March 2012 has been filed exhibiting the three proposed notices of appeal, together with a proposed notice under sec 78B, and identifying other material noted below.

2 See the submissions referred to in Mr Uthmeyer's affidavit at [4].

3 See Mr Uthmeyer's affidavit at [5].

**Sub-paragraph (a) and (e): nature of the task of the Tribunal and matters it must consider**

9. The Tribunal's jurisdiction was invoked by Rio Tinto on 13 November 2008, by two applications under sec 44K. The background to Rio's applications was as follows:

   (a) TPI had made two applications to the NCC under sec 44F(1), one for the Hamersley Line (on 16 November 2007) and the other for the Robe Line (on 18 January 2008);

   (b) the NCC had on 29 August 2008 – pursuant to sec 44F(2)(b) – made two recommendations, that each service be declared;

   (c) the Minister had declared the services, pursuant to sec 44H(1), and – pursuant to sec 44HA(1) – published his decision on the declaration recommendations and his reasons for the decisions.

10. **The NCC.** The obligation upon the NCC in respect of each application was to "recommend to the designated Minister ... that the service be declared; or ... that the service not be declared" (sec 44F(2)(b)), and to publish "a recommendation under section 44F and its reasons for the recommendation" (sec 44GC(1)).

11. In carrying out its tasks, the NCC is to bring to bear not only its specialist opinion,[4] but also is empowered to receive public submissions and analyse them for the benefit of the Minister (sec 44GB). The product of this work will be a precisely delineated advice in respect of each separate matter that the Minister must consider.

12. **The Minister.** The obligation upon the Minister was "[o]n receiving a declaration recommendation" to "either declare the service or decide not to declare it" (sec 44H(1)). Other sub-paragraphs of sec 44H affect the content of the Minister's decision-making process. It is, however, clear that receipt of the declaration recommendation is a jurisdictional fact for the Minister's decision, and that such a declaration recommendation must be considered by the Minister: sec 44HA(1) requires the Minister to publish "his or her decision *on a declaration recommendation*". Therefore, in addition to the other factors mandated by sec 44H, the Minister is obliged to have regard to the NCC's recommendation in making his or her decision.

13. This requirement is not altered by the remaining sub-paragraphs of sec 44H, which mandate some considerations (eg sec 44H(2) and 44H(4) and – in appropriate cases – 44H(5) and (6)) and forbid others (eg sec 44H(3), (3A)). Indeed, the converse is the case, as the statute requires the Minister to consider factors expressed in identical language to those required to be considered by the NCC.[5] In the present case, the Minister properly made and formulated his reasons by substantial reference to the NCC's

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4 The NCC is an expert body, tasked with conducting research and providing advice to the Minister: sec 29C(3) and sec 29B(1) respectively.

5 The factors in sec 44H(2) are the same as sec 44F(4), those in sec 44H(3) are the same as in sec 44G(1), and those in sec 44H(4) are the same as in sec 44G(2).

recommendations: see generally AB 1/5-26.

14. The Act gives the Minister no special powers beyond dealing with questions of confidentiality. In coming to his decision, the Minister is not prohibited from making further inquiry or receiving submissions from any interested persons, but is not bound to do so. Nor is the Minister bound or entitled to treat his or her decision as being the resolution of an *inter partes* controversy between the applicant for declaration and the service provider. Larger public interest issues are involved.

15. **The Tribunal.** Sec 44K(1) empowers the provider to "apply in writing to the Tribunal for review of the declaration" in the event that the Minister declares a service. The words of sec 44K(1) make clear that the Tribunal's task is then to "review [ ] the declaration".[6] In turn, it is clear that the Tribunal is to review a decision by the Minister that is premised on, and must make reference to, the NCC's declaration recommendation. The Tribunal must therefore analyse both the Minister's decision and the NCC's recommendation.

16. The Tribunal did not do so. There is no analysis in the Tribunal's reasons of the NCC's recommendation or the Minister's reasons for decision, and no reference to any of the information before the NCC. Such references as can be found to either the recommendation or the reasons for the Minister's decision are very limited,[7] and do not constitute the form of analysis required by sec 44K.

17. Having not done so, the Tribunal's reviews in the present case miscarried. It failed to exercise the task it was required to perform, and this is sufficient to have the Tribunal's determination set aside.

18. The Tribunal misconceived its task. It considered its task to be a consideration of an application to the NCC itself for the services to be declared, rather than a review of the Minister's declaration of the service based upon the NCC's recommendations to declare them. See eg [26] ("the Tribunal must reconsider each *application* afresh" [emphasis added]) and [1172] ("the Tribunal should consider consequences that are likely to arise as a result of access, giving them a weight that pays regard to their degree of likelihood").

19. So far as the Tribunal referred to the Minister's decisions, it indicated (at [1347]) that "it does not follow that we disagree with those decisions". That statement should have been the end of the matter. It is sufficient to entitle the appellants in this case to the orders they seek, of having the Minister's decisions in respect of each service restored.

**Sub-paragraphs (b), (c), (d) & (g): nature of the review before the Tribunal**

20. As set out above, the statutory task for the Tribunal was to review the Minister's

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6 In the event that the Minister decides not to declare the service, the access-seeker may – under sec 44K(2) – apply for review of the "decision" not to declare the service, and the Tribunal's task is to review that "decision".

7 There is passing reference by the Tribunal at [1045] to the NCC recommendation for BHPB's Goldsworthy and at [1075] and [1117] to the NCC recommendation for BHPB's Mt Newman, neither of which is in issue in this case.

declarations of the services: sec 44K(1). The critical question for this appeal is the nature of that review. Sec 44K(4) provides that "[t]he review by the Tribunal is a re-consideration of the matter".

21. There is no definition of the term "re-consideration" in the Act. It is not a term of art. The only other use in a Commonwealth enactment of the word in that form outside of Part IIIA appears to be in sec 13(8) of the *Veterans' Entitlements Act* 1986 (Cth). To the extent it is relevant, it is used in that section as a counterpart to, and a repeating of, a "consideration". The section appears to be devoid of relevant judicial exposition.

22. "Matter" cannot have its constitutional meaning, as the Tribunal would then be a non-Chapter III body exercising federal jurisdiction.

23. Construction of sec 44K(4) should therefore proceed according to the "ordinary and natural sense" of the words used, looking to the operation of the statute according to its terms and to legitimate aids to construction.[8]

24. The natural meaning of the word "re-consider" and hence "re-consideration" (and also the way in which it appears to be used in the *Veterans' Entitlements Act*) is set out in the 3rd edition of the Oxford Dictionary (2009):

> **a.** To consider (a matter or thing) again.
>
> **b.** To consider (a decision, conclusion, opinion, or proposal) a second time, with a view to changing or amending it; to rescind, alter. Also *intr.*

25. The word "matter" has its lay meaning within the definition above.

26. The sense imported by the term is to consider the correctness of the original decision, *on the material before the original decision maker*: only the same "matters" that were *originally* considered can be "re-considered". This view, bringing in concepts somewhat similar to an appeal *strictu sensu* to this Court (as set out in R *v Eastman* (2000) 203 CLR 1), is reinforced by sec 44K(5) and (6).

27. Sec 44K(5) is an ambulatory provision making clear that the Tribunal is in the same position as the Minister – including as to any fetters imposed. Absent further provision, the Tribunal is bound to consider the record created by the Minister's decision on the declaration recommendation. The Minister creates the record; the Tribunal reviews it.

28. To take a practical example, while the Minister may not be precluded from conducting a site visit, or hearing from the applicant for declaration and the service provider, what he ultimately had to do was make a decision on a declaration recommendation (sec 44HA(1)). Accordingly, unless what occurred on the site visit is brought into the Minister's reasons for the decision, it is not part of what the Tribunal is there to review. It also follows that it would not be for the Tribunal to conduct its own site visits unless

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[8] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-1; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 400-2.

some further specific power is given to it.

29. Sec 44K(6) is the only provision within sec 44K enlarging the rights of the Tribunal compared to the Minister, in that it allows the Tribunal to consider material additional to that before the Minister when undertaking the re-consideration. Sec 44K(6) empowers the Tribunal to require "information and other assistance and [ ] reports" from the NCC. The provision of a specific and demarcated power to obtain material beyond what was considered by the Minister tells against further enlarging that power indirectly or by implication. There is no other provision enlarging the Tribunal's power in the present case: it will be shown below that neither the provisions of Part IX, nor any of the regulations, relevantly enlarge the Tribunal's powers in a review under sec 44K.

30. The combined effect of sec 44K(5) and (6) is that sec 44K envisages a limited, narrow task for the Tribunal. The Tribunal must examine the reasons that were given by the Minister for reaching the result arrived at (which reasons must exist unless the decision is a deemed refusal on account of the time limit) and check them for correctness. It must do so on the basis of the material before the Minister – the NCC recommendation – as it may be supplemented by further information requested from the NCC under sec 44K(6). It must (subject to 44K(6)) re-consider such material as the Minister considered or (in the case of a deemed refusal) had before him or her to be considered.

31. While the statutory context was not identical, some assistance can be gained from the statement in *Eastern Australian Pipeline Pty Ltd v ACCC* (2007) 233 CLR 229 at 239 [77], modified to reflect the facts in this case: "what is involved is a review on the record which was before the [Minister] as the relevant [decision-maker], rather than a full 'merits' review of the type considered in *Re Herald & Weekly Times Ltd*".

32. Indeed, the latter case (17 ALR 281 at 295-6) makes clear that the usual import of the word "review" in a section such as sec 44K is *not* a full "merits" review but a review of "what the Commission had determined in the sense of considering whether the Commission was right or wrong on the material before the Commission"; it was the characterisation of the task to be performed by the Tribunal in *Re Herald & Weekly Times Ltd* as "a re-hearing of the matter" (sec 101) which led to a different characterisation. That is not, of course, the task in sec 44K. Had it been intended that the task before the Tribunal in the present case was a similar re-hearing, then the statute would have said so.

33. Similarly, it is not the case that the review performed under sec 44K is the same as the review performed by the Administrative Appeals Tribunal, such that considerations apposite to the latter should automatically be applied to a review under sec 44K. The structure of the AAT is to create a second tier of administrative decision-making in which the person(s) whose interests are affected and who seek review, and the primary decision maker, become the contestants before the AAT. Sec 25 of the *Administrative Appeals Tribunal Act* 1975 provides for the provision of power to the AAT to review decisions made in the exercise of powers conferred by an enactment. Sec 27 prescribes the class of

those who may make an application to the AAT, and the Act provides for such persons to be given notice (sec 27A) and reasons (sec 28). Sec 30(1) provides that the applicant(s) for review and the decision maker are parties to a proceeding before the AAT, and sec 33(1AA) obliges the decision maker to give assistance to the AAT in relation to the proceeding. The AAT has the power to take evidence (sec 40(1)), make orders in the nature of a subpoena (sec 40(1A)), make a decision by consent (sec 42C), remit a decision to the decision-maker at any stage of a proceeding (sec 42D), refer questions of law to the Federal Court of Australia (sec 45), and give advisory opinions (sec 59). An appeal lies from a decision of the AAT to the Federal Court of Australia, on a question of law (sec 44(1); cf sec 44ZR(1) of the TPA, applicable only to a re-arbitration). Broad statements about the process engaged in by the AAT being "merits" review (see eg *Drake v Minister for Ethnic Affairs* (1979) 24 ALR 577 at 589) sit within a statutory context very different from that of sec 44K.

34. The above is the answer to the respondents' oral submissions (T6747) that there is a long settled course of authority that the Tribunal and its predecessor exercise "merits jurisdiction". The correct position is that the powers of the Tribunal vary depending upon the particular statutory language in question. This view of the operation of sec 44K sits comfortably with the balance of Part IIIA and other provisions within the Act, to which we now turn.

35. **The balance of Part IIIA.** The above view of the Tribunal's (and Minister's) tasks is consistent with the time limits within which each must act. The Minister must make a decision within 60 days, or is deemed to have decided to refuse to declare the service: sec 44H(9). The Tribunal's only power to extend time is in the case of an *inability* to make the decision, in which case an extension is *mandatory*: sec 44ZZOA(1) and (2); no other power to extend time is available.[9] The clear implication is that the record is already closed (subject to sec 44K(6)) and all that is to be done is examine it again. Such short time limits do not sit easily with a notion of a full rehearing or of the Tribunal resolving *inter partes* litigation.

36. In the present case, the Tribunal created the very problem (that the "nature of the industry that was before the Minister when the decisions were first taken is significantly different from the industry that we have here": Tribunal at [1347]), by delaying making its decision in order to hear the matter as it did. The material introduced at the heel of the hunt which told against the appellants, in contravention of the rules of procedural fairness, was only able to be created because of the delay between the application to the Tribunal (13 November 2008: see AB1/30) in respect of a decision of the Minister of 27 October 2008, to the date that the new material was irregularly (Full Court [133]) received (March 2010). There would have been no scope for this had the Tribunal conducted its

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9 Sec 44ZZOA(2) provides: "If the Tribunal is unable to make a decision on the review within the standard period, or that period as extended, it must, by notice in writing, extend the standard period by a specified period." (emphasis added) The standard period is 4 months: sec 44ZZOA(1).

review in accordance with the Act.

37. Had the Tribunal conducted itself under these constraints, it should have finished no later than the statutorily-required date of 13 March 2009 (being 4 months after the date of receipt of the applications to it, 13 November 2008 – AB 1/30, AB 1/49 – save if there was true inability requiring an extension). The Tribunal did not make its decision until over 15 months after 13 March 2009, on 30 June 2010.

38. It is true that the appellants did not separately challenge the lawfulness of the Tribunal's decisions to extend time. Whether those extensions were premised on a misunderstanding of the concept of "inability" in the context of sec 44K is not directly before this Court. Nevertheless, even if the extensions were properly granted they could not lawfully be the occasion for the Tribunal expanding its task beyond what sec 44K permits.

39. The above construction of sec 44K is consistent with the fact that the NCC will have produced a considered recommendation, supported with such material as it found fit to incorporate. It is relevant that – at this point – the process is concerned only with the declaration aspect ("stage 1"). There is, as at this point, yet no adversarial dispute. Matters involving input from the parties in an adversarial sense are left to the arbitration process that occurs if (and only if) negotiation fails ("stage 2"). Only at that point – if it is ever reached – will there necessarily be a contradictor, and issue joined.[10] Indeed, only when issue is joined will a touchstone of relevance exist to govern the reception of material. Only at "stage 2" is it appropriate to consider matters beyond those considered by the NCC and Minister.

40. It is of note that neither the applicant nor the service provider has any privileged role before the NCC beyond that of the general public: indeed, sec 44GB is the only section expressly dealing with putting information before the NCC, and it is phrased in terms of a discretion in the NCC to invite submissions from the public. The only place in which the applicant and service provider are specifically mentioned is sec 44GC(4), dealing with their ability to seek confidentiality orders upon material that the NCC proposes to publish. Similarly, the applicant and service provider have no statutorily privileged role before the Minister. It is incompatible with such a framework to allow a review by the Tribunal of a decision of the Minister that must operate upon the NCC recommendation to range far beyond the NCC recommendation itself or the Minister's consideration of it.

41. Similarly, while sec 44K requires the Tribunal to perform a task of review, it makes no specific provision for any person to be a "party" to such a review. The Tribunal's jurisdiction is invoked either by the original applicant for declaration (under sec 44K(1)) or by the service provider (under sec 44K(2)) but not both; the two sub-sections are mutually exclusive. They are also exhaustive and limited: there is no ability, for example,

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[10] Note the importance to the public interest of having a contradictor, as shown in the remarks of French J (as his Honour then was) in *Lakes R Us Pty Ltd* [2006] ACompT 3 at [38]-[39].

for an original applicant for declaration to seek review of a decision to declare a service on the basis that it considers the period of the declaration specified via sec 44H(8)) to be too short.

42. The sole reference to other persons being involved in the process before the Tribunal is in reg 22B, which permits the original applicant to "participate in the review" triggered by the service provider, and *vice versa*. Again, such a designation cannot be used to enlarge indirectly the Tribunal's powers beyond what it is directly granted. The clear import would be that the participating persons would be entitled to make submissions to the Tribunal, but not to enlarge the factual matrix. Participation satisfies any concerns as to procedural fairness, and particularly the opportunity to be heard. Again, the comparison with an appeal to the present Court is clear.

43. Similarly, while the regulations require the original applicant for declaration, *or* the service provider, to initiate the review before the Tribunal by filing an application in a prescribed form (reg 20A) there is no provision for any other participant in the review to file documents in response. Again, the lack of any documents akin to pleadings in this process reflects the non-adversarial nature of the review, and its inaptness to generate a joinder of issue.

44. Also note that the Minister does not become a "participant" in the review by the Tribunal. He or she cannot argue for the correctness of the decision, nor argue against any views the Tribunal might be inclined towards. This confirms the primacy in the review of the record created by the Minister.

45. Nor does the NCC have an uncircumscribed role in the review. It can (and should) meet requests under sec 44K(6), but does not have any general right to lead "evidence" or make "submissions". Absent request under sec 44K(6), its work will be confined to its declaration recommendation and the reasons therein.

46. Finally, the pairing of a decision on an identified base together with a "re-consideration" by the Tribunal of that decision, within the time-frame set by sec 44ZZOA and with an express power of augmentation of the record via requests to the NCC alone, in identical terms as sec 44K, is a frequent theme in Part IIIA. It exists in sections 44L (decision by the Minister not to revoke a declaration); 44O (decision by the Minister on the effectiveness of an access regime); 44PG (approval by the Commission of a tender process as a competitive tender process); 44PH (decision of the Commission to revoke an approval); 44ZX (decision by the Commission not to register a contract); and 44ZZBF (decision by Commission that is an access undertaking decision or an access code decision).

47. However, this particular theme does not appear to exist outside of Part IIIA, suggesting a conscious intention of Parliament to create a unique, discrete and streamlined regime for specified kinds of decisions relating to access under Part IIIA. A corollary is that

concepts applied to reviews by the Tribunal under sections outside of Part IIIA do not automatically apply to reviews by way of "re-consideration" within Part IIIA.

48. Further support is obtained for the above construction when contrasting other review tasks vested in the Tribunal within Part IIIA itself. Sec 44ZP empowers the Tribunal to review a determination of the Commission in an arbitration. Sec 44ZP(3) provides that the Tribunal in such a case is to conduct "a re-arbitration of the access dispute". This is clearly a different task from re-consideration of a decision. Of note, when arbitrating an access dispute, the Commission may inform itself of any matter relevant to the dispute in any way it thinks appropriate (sec 44ZF(1)(c)), may require evidence or argument to be given (sec 44ZF(3)) and may refer any matter to an expert and accept the experts report as evidence (sec 44ZG(1)(e). The Tribunal has like powers on its re-arbitration: sec 44ZP(4). Such powers are, of course, absent in sec 44K.

49. The Tribunal's "re-arbitration" function is in turn subject to an appeal to the Federal Court on a question of law: sec 44ZR(1). This is structurally similar to under the AAT Act (see paragraph 33 above). This "appeal", which is a proceeding in the original jurisdiction of the court, ensures that a Chapter III court can resolve any justiciable controversy that arises out of the proceedings in the AAT. No such provision exists, or is required, in respect of a sec 44K review.

50. **Comparison outside of Part IIIA and the Position of Part IX of the Act.** The above view of the Tribunal's task is also reinforced when other parts of the Act are considered. Part IIIA appears to be the only Part empowering the Tribunal to review a decision of a Minister other than sec 10.82D (discussed below at paragraph 62). Elsewhere in the Act, the Tribunal is either acting as the initial decision-making body, reviewing decisions of the a regulator such as the ACCC or considering applications to revoke or vary decisions of the Tribunal itself.

51. One example of the Tribunal acting as the initial decision-making body is sec 50A, which empowers the Tribunal to make declarations in respect of acquisitions occurring outside Australia. The section specifically provides that the subject matter before the Tribunal is a proceeding: sec 50A(2)(b) specifically nominates those persons "entitled to appear, or be represented, at the proceedings following the application". The section specifies what factors the Tribunal must consider but places no express limit upon the material that the Tribunal (acting as the body of first instance) may consider or upon the sources from which the Tribunal can obtain that material.

52. However, it is in considering the position of the Tribunal when conducting reviews under Parts of the Act other than Part IIIA that critical differences become apparent. For while numerous sections outside Part IIIA speak of the Tribunal reviewing a decision of the Commission – see eg sec 50(5), 91(1A), 93(2) – neither those sections nor sections located near them provide the mechanism for the Commission's decision or the Tribunal's review. The reason is that the Act provides for the Commission's decision in

Part VII and for the Tribunal's reviews of those decisions in Part IX. (The Act also provides in Part VII for certain decisions to be made by the Tribunal as the decision-maker of first instance.)

53. So, for example, sec 45(6) speaks of conduct not being a contravention if authorised under sec 88(8). Sec 88 (which is in Division 1 of Part VII) authorises the Commission to grant authorisations in respect of sec 45 upon the application of a corporation. (In its subsections, sec 88 also empowers the Commission to grant authorisations in respect of other sections, including secs 45B, 45D and 45E.)

54. Importantly, the Tribunal's review of the Commission's decision is provided for in sec 101 (Division 1 of Part IX). Consideration of Part IX makes it clear that it is not of general operation applying to all reviews conducted by the Tribunal, but is limited (unless express provision is elsewhere made) to the Tribunal's review of decisions made under Part VII. This is clear for a number of reasons.

55. *First*, the operative provisions of Division 1 of Part IX are sec 101, 101A and 102. Sec 101 empowers triggering of reviews of "a determination by the Commission under Division 1 of Part VII" in respect of specific matters, while sec 101A empowers a review of "the giving of a notice by the Commission under subsection 93(3) or (3A) or 93AC(1) or (2)".

56. Sec 102 applies "[o]n a review of a determination of the Commission under Division 1 of Part VII in relation to" specified matters, and empowers the Tribunal to undertake the review. The clear words of the sections specifically limit their ambit of operation. Importantly, unlike in sec 44K, (and as noted above in relation to the *Herald & Weekly Times Case*) sec 101 provides that "[a] review by the Tribunal is a re-hearing of the matter".

57. The provisions giving effect to the operative provisions of Div 1 are in Div 2 of Part IX. As a matter of construction, these provisions do not apply of their own force outside of the operative provisions in Div 1 of Part IX. Further, the fact that these powers need to be granted to the Tribunal for its reviews under Part IX implies that they are otherwise not vested in the Tribunal. If they were, Div 2 would be otiose.

58. *Secondly*, and additionally, the heading to Part IX of the Act is "Review by Tribunal of Determinations of Commission". The heading is part of the Act: *Acts Interpretation Act* 1901 (Cth), sec 13(1).[11] "Commission" is defined in sec 4 to mean "the Australian Competition and Consumer Commission established by section 6A, and includes a member of the Commission or a Division of the Commission performing functions of the Commission."

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[11] This is true both in the form of sec 13 as at the time the Tribunal conducted its review (sec 13(1) "The headings of the Parts Divisions and Subdivisions into which any Act is divided shall be deemed to be part of the Act"), and the present form (sec 13(1) "(1) All material from and including the first section of an Act to the end of: … (b) if there are one or more Schedules to the Act—the last Schedule to the Act; is part of the Act."). Sec 13 was amended by Act no 46 of 2011.

59. As a simple matter of statutory construction (and independently of any issue based upon the meaning of the term "proceeding" in sec 103), Part IX (which includes sec 103) simply will not apply to the Tribunal when reviewing the Minister's declaration unless it is specifically applied by some other provision. No such provision exists in respect of a review conducted under sec 44K.

60. *Thirdly*, it is of note that Division 2 of Part IX applies only in respect of Division 1 of Part IX, which in turn only covers review of some of the decisions made by the Commission under Part VII. Division 3 of Part IX covers other decisions of the Commission made under Part VII, and a different regime in turn applies: sec 113 requires the Commission to give certain material to the Tribunal; sec 114 empowers the Tribunal to obtain further information "for the purposes of clarifying the information given to it under section 113"; sec 115 empowers the Tribunal to require the Commission to give information, assistance and reports to it; and sec 116 expressly limits the material to which the Tribunal may have regard. Thus Division 2 of Part IX does not even apply to Division 3 of Part IX, let alone outside of Part IX.

61. *Fourthly*, the above view of the relationship between Part IIIA and Part IX then explains sec 44ZQ. As noted above, sec 44ZP empowers the Tribunal to conduct a re-arbitration of an access dispute. In the context of sec 44ZP, where the Tribunal is reviewing a decision of the Commission, in respect of a situation that might fall within the ordinary meaning of the word "proceedings" (the access dispute being one between identified parties whose competing contentions need to be resolved) the provisions of secs 103-110 might otherwise be thought to have some application (noting the very heading of Part IX in which those sections fall). Section 44ZQ avoids any doubt by negativing any such implication, because the statutory intention is clearly for the Tribunal to have all of the detailed powers of the Commission in respect of an arbitration set out in secs 44ZD to 44ZNB.

62. The other place where the Tribunal "reviews" decisions of the Minister is in respect of international liner shipping under sec 10.82E. The Minister's decisions (which can be made at a delegated level: sec 10.81, 10.82) are capable of directly affecting existing rights (eg a direction to cancel a registered conference agreement in sec 10.44(1); a direction to the Registrar not to make a deletion from the register in sec 10.46(3); a direction to the Commission to cease holding a specified investigation in sec sec 10.49(3)(b); direction to the Registrar to record an ocean carrier as one with substantial market power in sec 10.51(1); and so on as set out in sec 10.82D). Critically, the review by the Tribunal of the decision is <u>not</u> stated to be a re-consideration of the matter. Rather, such a review is made upon the application of a person whose interests are affected by the decision (sec 10.82D(3) and (4)). The Minister may have a role in the review: the Tribunal may compel the Minister to give information, reports and assistance as the presiding member requests (sec 10.82E(3)). The Tribunal also may have regard to any information, documents or evidence given to the Minister in connection with the making of the decision (sec

10.82E(4)). Sec 10.82G negatives any implication that Division 1 of Part IX applies to a review. The note to sec 10.82E states that Div 2 applies to proceedings before the Tribunal. The purpose of this note is unclear, but need not be resolved, as at the relevant time it was not part of the Act: sec 13(3) of the *Acts Interpretation Act* as it then stood. It mirrors the note to sec 10.82B in the context of the Tribunal's review of certain Part X decisions of the Commission. Whatever it means, it can only have relevance if what the Tribunal is doing is a "proceeding" and a relevant one. In summary, Division 7 of Part X is a separate, self-contained code, with its own distinctive pattern of decision-making and cross-referencing within the Act, even down to the section numbering. Its procedures do not create some implication contrary to the above arguments on sec 44K.

63. In contrast, within a sec 44K review of a decision of the Minister, there would be no available implication that sec 103 to 110 would operate on their terms. It is not a review of a determination of the Commission and is thus outside the heading of Part IX. Further, it is not naturally to be described as a "proceeding", given that it is not an *inter partes* dispute being resolved by either the Minister or the Tribunal.

64. *Fifthly*, secs 44ZZP and 44ZZR illustrate the above propositions further. Sec 44ZZP creates a binary divide, and applies to functions of the Tribunal other than in relation to its functions under a State/Territory energy law or a designated Commonwealth energy law. Those carved out functions are dealt with in sec 44ZZR, which specifically picks up and applies certain of the provisions in Part IX. Again, this reaffirms that Part IX will only apply to so much of Part IIIA as it is expressed to: the words in sec 44ZZR(1) only make sense and have work to do if Part IX does not of its own force apply to Part IIIA. It may also be noted that, for decisions referred to in sec 44ZZR, the primary decision maker will be a body such as the Commission or a like regulatory authority. Functionally, the Tribunal is dealing with a review of a decision of a similar character to Part IX, and the reasons for picking up and applying parts of Part IX are more clearly apparent.

65. In making these submissions, Fortescue seeks to go beyond the position put in oral argument (T6900) and to contend that the matter dealt with essentially by concession in *Lakes R Us* should be determined against sec 103-110 having application to sec 44K.

66. **Inapplicability of Regulations to Sec 44K.** The only regulation that might be urged against the above construction is reg 22. Although the Regulations are not drafted with ideal clarity, it is submitted that reg 22 does not apply to reviews conducted under sec 44K.

67. *First*, reg 7B specifically applies certain of the regulations (including reg 22) to decisions under sec 44ZZR(2) – a course that would be unnecessary if those regulations applied of their own force. Sec 44ZZR(2) is, of course, within Part IIIA. The terms of reg 7B further amplify the points made above in respect of sec 44ZZR: it refers to the decision being undertaken by the Tribunal under sec 44ZZR(2) as being "merits review".

68. *Secondly,* and more importantly, it may be observed that the terms of reg 22(1) are identical to the regulation-making power conferred in sec 104, down to sub-reg 22(1)(aa) mirroring sub-sec 104(aa). Regulation 22 is made in pursuance of sec 104 and is not intended to operate at large. It will only operate outside of the operation of sec 104 if expressly provided for; that is what reg 7B does and why reg 7B exists at all.

69. *Thirdly*, reg 22 speaks of "proceedings". For the reasons given above, that term is apt to describe reviews of the kind provided for in Part IX of the Act or for a re-arbitration of an access dispute, but not sections within Part IIIA such as sec 44K.

70. **Conclusion on these grounds.** The whole structure of the Act speaks against the Tribunal undertaking the task it in fact took. Section 44K does not support undertaking a review on the basis that it "ha[s] every appearance of a court-style hearing" (Tribunal at [24]). Neither the Minister, nor the Tribunal, is empowered to act in this way. The Tribunal's task is to review the declaration (or decision not to declare) on the same material as before the original decision-maker, subject to any amplification of it (on a request to the NCC alone) under sec 44K(6). It is not to hold a hearing comprising 42 sitting days over five months, under which vast amounts of new material is adduced.

71. By taking the course that it did, the Tribunal, in this case, did not consider the Minister's decision but instead embarked upon an entirely different task; it did not stand in the Minister's shoes (subject to any material obtained under sec 44K(6)) to review the correctness of the decision, but made entirely new and different decisions without reference to the Minister's reasons at all.

72. It follows that the Tribunal erred in treating the applicant and the service providers as participants in a process equal, or akin, to an *inter partes* dispute. The Tribunal erred in considering that the "parties" (including in this the NCC) were entitled to put new material before the Tribunal. The Tribunal erred in receiving a body of material comprising 130 affidavits and approximately 70 lever arch folders of documents (Tribunal at [26]). The Tribunal erred in investigating matters not considered by the NCC in its declaration recommendation, such as whether a decision to declare would impel the development of duplicative facilities. The Tribunal likewise erred in considering matters outside the issues identified in the application for review.

**Availability of this point**

73. The appellants have acknowledged that the protest which was taken before the Tribunal to receiving this body of material was tailored to the "stage 1"/"stage 2" argument and accordingly the present point was not taken specifically (see Tribunal at [30]). Nevertheless, the point is available to be taken. One or both parties or "participants" cannot, either by express consent or by acquiescence, expand the jurisdiction of a court or a tribunal beyond that open to it in law; they cannot do what the body politic itself cannot do, even by consent: *Re Wakim; Ex p McNally* (1999) 198 CLR 511 at 543 [16], 547 [30], 557 [56], 572 [105].

**Practical effect of the above grounds**

74. In light of the above submissions, the Tribunal should have proceeded by way of a review on the record before the Minister, subject to any use of the power in sec 44K(6). That power adequately dealt with any possible changes in relevant factual circumstances between the Minister's decision and the time of the Tribunal's review, noting that at most four months and 21 days would have elapsed from that time of the decision to the time that the Tribunal should have made its determination.[12]

75. The appellants' submission is that, provided the Minister reached an evaluative judgment applying an available conception of the stated matters in sec 44H, the Tribunal's reconsideration should affirm the decision. The task of the review body is not simply to substitute its own opinion where there is scope for difference in evaluative judgment but to ensure that the Minister made no errors and that no extraneous concepts have crept in. The standard of review of the Minister's consideration of the matters before him is as set out in *House v The King* (1936) 55 CLR 499 at 505.

76. It would also permit, for example, review on the basis set out in *Minister for Aboriginal Affairs v Peko-Wallsend Pty Ltd* (1986) 162 CLR 24 at 39-42. As there noted at 42, where the decision is made by a Minister, due allowance may need to be made for a broader range of policy considerations than otherwise. It is for the Minister, not the Tribunal, to make the final evaluative judgment where there may be a conflict in the available range of policy considerations.

77. As the Tribunal itself accepted (at [1347]), the Minister's decision was correct on the material before him. The only basis upon which the Tribunal justified overturning or varying the Minister's declaration was on the basis of new material not before the Minister. Even if (contrary to the above submission) the standard of review is lesser than *House v The King* then, whatever that standard is, the Tribunal's own reasons indicate that such a standard would not have justified disturbing the Minister's declarations.

78. Specifically, in respect of criterion (a), the way in which the Minister dealt with and accepted the NCC's recommendations did not disclose any error. To the extent the Tribunal departed from the Minister, it was only by way of partially watering down the criterion (a) finding, and opening up an impermissible inquiry into whether the Dixon line would be built (eg Tribunal at [768], [904], [964], [1149], [1324]-[1331]).

79. In respect of criterion (b), while the Minister referred to a net social benefits test, which as already submitted is an overly broad conception for criterion (b), he ultimately found criterion (b) satisfied on the basis of a natural monopoly test and did so correctly (AB 1/8, 1/22).

80. In respect of criterion (f), while the Minister may have opened the frame more broadly

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[12] Comprising the 21 day period to make the application under sec 44K(3) plus the four month period prescribed in sec 44ZZOA(1), unless extended by true inability to decide under sec 44ZZOA(2).

than the appellants have contended is available in law, there was ultimately no error in his concluding that any of the potential costs of access raised by the incumbents would be properly considered at stage 2 under its mechanisms rather than at stage 1 under criterion (f) (AB 1/11-12, 25-26 ). There was no true public interest factor identified in the record which was discrete from the considerations in criteria (a) to (e) such that access would be contrary to it within criterion (f).

81. The Tribunal did not identify any error in the Minister's appreciation of the public interest. Its approach cannot stand unless (as is not the case) sec 44K authorises the Tribunal to set aside the Minister's identification and weighing of public interest factors; to ignore the NCC recommendation on this point; to conduct its own open-ended inquiry into the public interest, with reference to any material and any considerations that the Tribunal thought fit to engage with.

82. Finally, as to discretion, there was no error in the Minister declining to reopen the frame and identify discretionary matters, not otherwise considered, which could point against declaration. The Tribunal identified no such separate matters requiring consideration by the Minister.

**Sub-paragraph (f): The Tribunal erred in performing an impermissible review having regard to Chapter III of the Constitution**

83. The above construction of sec 44K is also mandated by considerations flowing from the operation of Chapter III of the Constitution. The Tribunal is a non-Chapter III body, exercising non-judicial power. In the present case, it included a person who is a Judge of the Federal Court of Australia. That fact exposed the Tribunal to a risk of incompatibility with the strictures of Chapter III. That risk is addressed by reading sec 44K in a manner such that no offence to Chapter III occurs.

84. **Provisions of the Act.** Section 31(1) of the Act provides that a person shall not be appointed as a presidential member of the Tribunal "unless he or she is a Judge of a Federal Court, not being the High Court or a court of an external Territory". A "presidential member of the Tribunal" is defined in sec 4 to mean "the President or a Deputy President". The entire presidential tier are Federal Court Judges.

85. Section 31A provides that service as a presidential member of the Tribunal shall be taken to be service as the holder of that presidential member's office as a Judge of the Federal Court, while sec 35(7) provides that a presidential member of the Tribunal ceases to hold office if he or she no longer holds office as a Judge of the Federal Court.

86. Section 37 provides that the Tribunal "shall, for the purpose of hearing and determining proceedings, be constituted by a Division of the Tribunal consisting of a presidential member of the Tribunal and two members of the Tribunal who are not presidential members."

87. **The *persona designata* doctrine.** The fact that the Tribunal in the present case included a Judge of the Federal Court of Australia enlivens the principles considered in *Hilton v Wells* (1985) 157 CLR 57 and *Grollo v Palmer* (1995) 184 CLR 348. These submissions proceed on the basis that, as no leave was granted in respect of considering the correctness of those decisions and that proposition was not canvassed in oral argument, it is not open to the appellant to challenge their correctness.

88. It is "beyond doubt" that there is a constitutional restriction on the availability of Chapter III judges to perform non-judicial functions: *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 8. The relevant restriction flowing from Chapter III is that "no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power (the incompatibility condition).": *Wilson* at 8-9.

89. It is also apparent from *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 that, in a related context, the determination of whether something is "contrary to the public interest" involves considerations "appropriate for the legislature itself to do if it had the time" (at 377), "an exercise of a legislative or administrative function of government" (at 400) or "an administrative or quasi-legislative function" (at 416). There is thus a potential, when considering criterion (f), for a Tribunal comprising a Chapter III judge to undertake a function that is legislative, or perhaps executive, or both, in nature. A similar problem could emerge if there is a broad, open-ended discretion.

90. No constitutional issue arises when the Minister performs his or her task under sec 44H. The Minister is required to consider the public interest (sec 44H(4)(f)) and, to the extent any such matters are relevant, they will appear in the Minister's reasons. Given the structure of sec 44, any declaration of a service by a Minister will have reasons; it is only in the case of a deemed refusal that no reasons will exist. In the present case, the Minister did consider the public interest and disclosed his consideration in his reasons: see eg AB1/11-2 and 24-6. The Minister is well placed, first, to identify such relevant matters and, secondly, to form an opinion upon them. He or she is answerable under Chapter II and ultimately to the electors for the decision.

91. However, it is at the stage of review by the Tribunal that potential incompatibility arises. The very identification of considerations that may affect the public interest is apt to engage a political exercise, as is the weighing up process needed to decide on such considerations one way or the other. There is a critical difference between reviewing a decision of the Minister on such matters for error, and making a decision afresh that is of an executive or legislative character. The difference is more stark if the new decision made ranges beyond the matters considered by the Minister, and involves the selection and weighing of new heads of public interest or considerations going to them. If a Judge of the Federal Court exercises such legislative or perhaps executive power in the course of their membership of the Tribunal, an incompatibility would arise with their status as a

Chapter III judge: *Wilson* at 17. Considerations of incompatibility will heighten still further if, and to the extent that, any of the trappings of federal judicial office are invoked in the consideration, delivery or justification of the Tribunal's determination.

92. The problem is well illustrated by the possibility (not arising on the facts here) that the Tribunal might consider that exercising the "same powers as" the designated Minister allowed it to call for reports from the relevant Department or consulting with the bureaucracy in a manner open to the Minister. That this is territory forbidden to a Chapter III judge is clear. Such a reading also illustrates the submission made above that the Tribunal's review task generally is to be conducted on the record before the Minister, supplemented only by sec 44K(6).

93. **Previous authority.** This question of potential invalidity on Chapter III grounds was not considered in the *Tasmanian Breweries* case, as the challenge underlying the writ of prohibition sought in that case was that federal judicial power had been conferred upon a non Chapter III body, a challenge repelled by an argument that the power conferred was of a legislative character (at 368). No point was taken that the conferral of this power upon a Tribunal comprised of a Federal judge was incompatible with Chapter III in the event that the power was held (contrary to the prosecutor's argument) not to be judicial. Relevantly, at the time, sec 10(1) of the 1965 Act provided that a person was not eligible to be a presidential member of the Tribunal unless "he is or has been a barrister or solicitor of the High Court or of the Supreme Court of a State of not less than five years' standing".[13]

94. Sec 8 of the *Restrictive Trade Practices Act* 1971 provided for membership of a new[14] Trade Practices Tribunal in terms equivalent to the present sec 31 of the Act, save for the reference in sec 8(1)(b) to a person "who has the status of a Judge of the Court"; "the Court" was defined in sec 5 to mean the Commonwealth Industrial Court. Section 31 of the TPA as originally enacted in 1974 was relevantly identical to sec 8(1), save that "the Court" was defined in sec 4(1) to mean "the Superior Court of Australia". That reference was removed by sec 21 of the *Trade Practices Amendment Act* 1977 (Act no 81 of 1977) to leave sec 31(1) in relevantly identical form to the present.

95. That position is different from the AAT legislation as it stood at the time of the decision in *Drake v Minister for Ethnic Affairs* (1979) 24 ALR 577. In that case, challenge was only made to the appointment of the presidential member (ground (i) at 582). Section 7(1) as it stood at that time provided that "[a] person shall not be appointed as a presidential member unless he is or has been a Judge or is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or Territory and has been so enrolled for not less than 5 years." The holding of a commission as a Chapter III

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[13] See *Tasmanian Breweries* at 362: the then Presidential members were judges of the Commonwealth Industrial Court, but their qualifications arose as former barristers or solicitors.

[14] See sec 7(1).

judge was therefore not a necessary condition for appointment. The decision went on the basis that the appointment was "a personal appointment", and that Justice Davies' holding of office as a judge of the Federal Court was only "one of a number of designated qualifications" (at 584). Sec 7(1) therefore did not confer functions or duties upon "the court of which he was already a member". No separate constitutional point was taken whether the statutory function had to be limited to avoid Chapter III concerns.

96. Thus the issue presented in the current proceedings did not directly arise in either of the above cases.

97. It is apparent that a conscious decision was made in 1971, affirmed in 1974-5, to narrow the criteria for presidential membership of the Tribunal from the wording under review in the *Tasmanian Breweries* case (present or past qualified legal practitioners) to federal judges alone. Being a federal judge thus became a necessary and sufficient condition for presidential membership of the Tribunal.

98. The observation made by the majority in *Hilton v Wells* that goes to the *ratio decidendi*, and which appears also to underlie the majority's approval of *Drake* – that the functions are being conferred "on a particular individual who happens to be a member of a court" (at 68) – do not apply here. The remarks of Dixon J cited at 71 as to the resulting metaphysical distinctions are also in point. Moreover, the finding of a lack of incompatibility of the nature of the function conferred that was essential to the majority's reasoning (at 74) cannot be made in this case. While *Hilton v Wells* sets out criteria applicable to this case, it does not tell against the appellants' arguments.

99. **Construing sec 44K so as to comply with the Constitution.** The outcome must be that the Act must be read subject to the Constitution, in a manner that respects the limits of the *persona designata* doctrine. In order for that to occur, the powers conferred should if possible be read as not being legislative or political when they are being exercised by a Chapter III judge.

100. The consequence is that, if a broad reading of sec 44K is to be adopted, it is impermissible for a Chapter III judge to be a member of a Tribunal conducting an examination of criterion (f), or any discretion, that ranges beyond the construction urged above.

101. Alternatively, if a Chapter III judge is to be a member of the Tribunal, the Tribunal's task in considering the public interest element, and any discretion, must be read down to avoid such a person taking on a political (ie legislative or executive) role: see sec 15A of the *Acts Interpretation Act 1901*. Criterion (f) would thereby be limited to a review of whether the notion of the public interest that the Minister deployed was outside the available range (recognizing that that range will be a very broad one). As is evident from *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216, "the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment", which is the very kind of judgment to which *House v The King* applies.

102. Hence, while it may be for the Minister to evaluate the public interest in the broadest possible sense, including purely political questions (noting limitations which may arise from the structure of sec 44K as already advanced in argument), the Tribunal may only review that evaluation for correctness. Re-consideration will not extend to conducting a new weighing exercise. One reason for the standard of review urged above for the Tribunal – particularly a standard of *House v The King* – is that the Tribunal, as constituted, is not only ill-equipped to enter into a review of such a decision in any other way, but would contravene the principle set out in *Hilton v Wells* if it were to seek to do so.

103. **Application to the present case.** The Tribunal in the present case applied a very wide standard of review that resulted in it making political decisions. The Tribunal had regard to:

(a) "the welfare, particularly the economic welfare, of the Australian community as a whole", and the community's best interests: Tribunal at [1161], [1167];

(b) broader issues concerning social welfare and equity, and the interests of consumers: Tribunal at [1168];

(c) broad issues of policy: Tribunal at [1174], [1279], [1337];

(d) social and environmental benefits: Tribunal at [1203], [1234];

(e) the use of more efficient technology: Tribunal at [1235], [1243];

(f) economic growth and regional employment: Tribunal at [1236]; and

(g) the optimal development of infrastructure: Tribunal at [1324].

104. The Tribunal also described its task as "weighing up costs and benefits" (Tribunal at [966]), and being "concerned with the 'big picture' ": Tribunal at [1174].

105. It follows from *Wilson* that, (i) in departing from the record and opening up a wider series of investigations into and considerations of public interest, and (ii) in further considering and forming its own views on matters of a political nature when evaluating the public interest, the Tribunal acted on a construction of sec 44K that risked placing a Chapter III judge in a position of acting incompatibly with the proper performance by him of his judicial power. Such a result is apt to undermine public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is thereby diminished: *Grollo v Palmer* (1995) 184 CLR 348 at 365. Such a result cannot have been what Parliament intended by sec 44K.

106. The matter can be tested thus: Chapter III would forbid a statute directly authorising a federal court judge to engage in an evaluation of the public interest for himself/herself of the breadth of paragraph 103 as the basis for the judge exercising a legislative or perhaps executive power to create new rights by declaration of a facility. The judge cannot indirectly be conferred a power of such unconstrained breadth through his or her necessary membership of a Tribunal reviewing a Minister's decision on that question.

107. These propositions hold at least where: (a) the exercise of power is not incidental to the resolution of a justiciable controversy and/or (b) the exercise of power is not some well recognized exception identified at federation.

108. **The Full Court.** Although an argument of this type was adverted to in the written submissions before the Full Federal Court – see Fortescue's Submissions in Chief [61]-[70] (at AB 5/2324-2325 and the Supplementary Appeal Book[15]); Rio Tinto's submissions dated 1 December 2010 at [3.18]-[3.24] (see the Annexure); and Fortescue submissions in reply dated 22 December 2010 at [18]-[24] (at AB 5/2333-2334 and the Annexure) – the Full Federal Court reached its conclusions without addressing the argument. If leave is granted to amend the notices of appeal to raise this ground, it is proposed to serve a sec 78B notice.[16]

109. **Conclusion on this ground.** The Full Court should have concluded that the Tribunal failed to perform its assigned task, but that on its own consideration of the Minister's decisions in [1347], the Tribunal would have upheld the Minister's decisions had it approached its task correctly.

**Part V: Relief**

110. The appellants' primary position is that the matters in these submission confirm that the appropriate relief in this Court, making the orders which the Full Court should have made on judicial review, are to set aside the Tribunal's determination and reinstate the Minister's decisions. Particular reasons for this conclusion arising from these submissions are found in paragraphs 19, 77 and 109 above. The Court has all necessary material to make such an order: *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 36 [31].

111. At a minimum, these submissions demonstrate that there should be a remitter to the Tribunal to carry out its task in accordance with law.

Dated: 22 March 2012

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[15] As not all of the relevant pages of submissions appear in the appeal books, they will be reproduced in a supplementary appeal book as set out in Mr Uthmeyer's affidavit.

[16] The proposed sec 78B notices are at Exhibit B to Mr Uthmeyer's affidavit.

Annexure – Pages of submissions before the Full Court that are referred to in paragraph 108 of Fortescue's further submissions dated 22 March 2012

From Fortescue's Submissions in Chief

- page AB 5/2323 as it appears in the appeal book
- page AB 5/2324 as it appears in the appeal book
- page AB 5/2325 as it appears in the appeal book
- page 14 of Fortescue's Submissions in Chief

(and which are not costs necessarily arising from access under Part IIIA) can be considered under criterion (f) and weighed against the benefits of access.[22] For example:

51.1 Fortescue's Outline of Opening Submissions (Annexure D) contained a table referring to Rio Tinto's and BHP Billiton Iron Ore Pty Ltd and BHP Billiton Minerals Pty Ltd (**BHPB**)'s evidence on the alleged costs of access and how the asserted impacts could be eliminated, or at least reduced significantly by the terms of access in stage two of the process. That Annexure was also referred to in Fortescue's Closing Submissions on Law and Economics.[23]

51.2 Fortescue also submitted that any costs or other impacts from delays to expansions were matters for stage two of the process.[24]

52 The Tribunal also found that the NCC had failed to identify, even in broad categories, which material should be disregarded as being irrelevant to the first stage.[25] This was also incorrect. Prior to the case management conference on 17 July 2009, the NCC filed an outline of submissions alerting the Tribunal to the fact that much of the material filed by the parties dealt with issues that were irrelevant to stage one of the process.[26] At Annexure B to the submissions, the NCC identified all of the affidavits containing evidence relating to stage two that were included in the lists filed by the parties prior to the case management conference which identified the evidence which they intended to rely on at the hearing. In addition, in its Closing Submissions dated 7 December 2010, the NCC identified the kinds of costs which it considered were relevant to criterion (f) and the residual discretion.[27]

53 The Tribunal's findings in this regard were wrong. They suggest that the Tribunal misunderstood what was being contended and accordingly proceeded on an erroneous basis. They suggest that the Tribunal also failed to take into account relevant considerations and explain why the Tribunal fell into the error of taking into account irrelevant considerations.

## B CRITERION (F) AND RESIDUAL DISCRETION TO BE PROPERLY CONSTRUED

### Proper construction of criterion (f) and residual discretion

54 Criterion (f) calls for a narrow inquiry into any clear and obvious harms flowing from access, which could not be resolved by fair and reasonable terms of access, and which would outweigh the benefits flowing from access indicated by criteria (a) to (e).

55 In that context, findings made in evaluating the other criteria can be taken into account but issues considered in the assessment of the other criteria cannot be re-agitated.[28] Given that criterion (f) can only be relevant in circumstances where criteria (a) to (e) are already satisfied, it must be assumed for the purposes of the criterion (f) analysis that access would generate at least the public benefits of a material increase in competition and of avoiding uneconomical development of another facility.

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[22] Fortescue's Outline of Opening Submissions dated 25 September 2009 (AB B264, [142]); Fortescue's Closing Submissions on Law and Economics dated 1 December 2010 (AB B268, [101]); Fortescue's oral opening submissions (AB B308, T95.11-29), Fortescue's oral closing submissions (AB B310, T2591.1-5, T2653-2657).
[23] Fortescue's Closing Submissions on Law and Economics dated 1 December 2010 (AB B268, [107]).
[24] Fortescue's closing address (AB B310, T2505.10-15 (3 December 2009), T2533.35-45 (3 December 2009), T2653.18-40 (7 December 2009) and T2936.40-2937.4 (17 December 2009)); Annexure D to Fortescue's Outline of Opening Submissions (AB B264).
[25] Hamersley ground 2(m) of Fortescue's Application. Reasons (AB A6, [30], [1171]).
[26] NCC's outline of submissions on case management dated 14 July 2009 (AB B263, [10], [20] [32]).
[27] NCC's Closing Submissions dated 7 December 2010 (AB B274, [185], [190]-[198] and [204]-[213]).
[28] *Virgin Blue* at [587]-[588]; see also at [608]-[609]. *Re Sydney Airports Corporation Ltd* (2000) 156 FLR 10 (***Re Sydney Airports (No 1)***) at [218], [220].

56 Criterion (f) does not mandate any detailed or even "order of magnitude" quantitative cost/benefit analysis of access of the type engaged in by the Tribunal. Such a quantitative analysis cannot have been intended because it would be unworkable for the Minister within the decision making timeframes and unduly speculative given the paucity of information at stage one as to the circumstances of specific access seekers and the nature and extent of the access they may seek. Similar and even stronger limitations apply to the residual discretion.

57 It is correct to observe that, even upon satisfaction of each of the criteria in s44H(4), the Minister (and therefore the Tribunal) has a residual discretion nevertheless to withhold declaration. But the nature and scope of this discretion is narrower even than the scope of the inquiry under criterion (f).

58 The objects of Part IIIA are to:[29]

58.1 promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and

58.2 provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

59 A broad discretion not to declare in circumstances where each of the declaration criteria has been satisfied would undermine, rather than encourage, consistency in the approach to access regulation. Moreover, in circumstances where each of the declaration criteria has been satisfied, a promotion of effective competition and of the economically efficient operation of and use of and investment in infrastructure must be assumed. Accordingly, the scope of the residual discretion must necessarily be narrow.

60 The limited nature and scope of the residual discretion not to declare has (up until the present case) been recognised consistently by the Tribunal. In *Re Sydney Airports (No 1)* at [223], the Tribunal said:

> *"The Tribunal is prepared to accept that the statutory scheme is such that it does have a residual discretion. However, when one has regard to the nature and content of the specific matters in respect of which the Tribunal must be satisfied pursuant to s 44H(4) of the Act, that discretion is extremely limited. The matters therein specified cover such a range of considerations that the Tribunal considers there is little room left for an exercise of discretion if it be satisfied of all the matters set out in s 44H(4)."*

The Tribunal in *Virgin Blue* at [611]-[612] agreed with these observations.

61 This limited nature and scope of the residual discretion is also consistent with constitutional boundary conditions. The second limb of the principle in *R v Kirby; Ex parte Boilermakers' Society of Australia*[30] would prohibit a conferral upon the Tribunal of non-judicial power with a Judge of this Honourable Court as one of its members. The relevant exception to this principle, persona designata, may apply only in circumstances where the non-judicial power or function is conferred subject to the Judge's consent and is not incompatible with the Judge's performance of his or her judicial functions nor with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power.[31] Incompatibility is recognised as being able to consist (inter alia) in the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in

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[29] Section 44AA of the TPA.
[30] (1956) 94 CLR 254.
[31] *Grollo v Palmer* (1995) 184 CLR 348 (***Grollo***) at 364-365 per Brennan CJ, Deane, Dawson and Toohey JJ and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 (***Wilson***) at 8-9 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

the capacity of the individual Judge to perform his or her judicial functions with integrity is diminished.[32]

62 The majority in *Wilson*[33] set down the following three questions as the test for determining whether a statutory regime gives rise to public confidence incompatibility:

62.1 is the function an integral part of or closely connected with the functions of the Legislature or Executive;

62.2 is the function required to be performed independently of any non-judicial instruction; and

62.3 is any discretion to be exercised by the judge on political grounds, that is, grounds not confined by factors expressly or impliedly prescribed by law?

63 Significantly for present purposes, the majority in *Wilson*[34] found that the determination of competing interests of Aboriginal applicants and of others whose proprietary and pecuniary interests were liable to be affected was essentially a political function (thus falling foul of the question posed in paragraph 62.3).[35]

**Errors by the Tribunal**

64 The Tribunal in its Reasons adopted the broadest interpretation of the public interest. The Tribunal agreed with expert evidence adduced on behalf of BHPB that "*what must be considered is the welfare, particularly the economic welfare, of the Australian community as a whole*" (Reasons at [1161]). In an almost quintessentially political determination of competing proprietary and pecuniary interests, the Tribunal said:

> *"On close analysis it may be that access will be manifestly unjust to a section of the community while, at the same time, benefiting the community as a whole. In that circumstance access may nevertheless be contrary to the public interest."*

65 Further, the Tribunal departed from its earlier decisions regarding the limited nature and scope of the residual discretion. The Tribunal said that those earlier decisions were not consistent with the decision of this Court in *Sydney Airport (No 2)*, noting the dictum in that case (at 137) that the decision whether or not to declare "*may be affected by a wide range of considerations of a commercial, economic or other character not squarely raised by, nor falling within, the necessary preconditions in s44H(4)*" (Reasons at [1163]).

66 Full consideration of what the Full Court said on this topic in fact reveals a far more tentative position than that cited by the Tribunal. The Full Court added the qualification that "*any such additional considerations must not be irrelevant in the sense discussed in Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-42, in particular having regard to the purposes, text and structure of the Act*". This is an important qualification, in view of the objects of Part IIIA militating clearly in favour of consistency and a limited discretion.

67 It is unsurprising that the Full Court expressed this dictum as tentatively as it did. The Court in *Sydney Airport (No 2)* was not being asked to decide the scope of the residual discretion. It was a case about the proper construction of criterion (a). In that regard, the passage fastened upon by the Tribunal (without due acknowledgment to the important qualification which immediately followed) did not form part of what the Court was required to decide. Alternatively, insofar as *Sydney Airport (No 2)* was authority, binding upon the Tribunal, for the proposition that the discretion not to declare "*is a very broad one*" (Reasons at [1163]), then Fortescue respectfully submits that it was, to that extent, wrongly decided.

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[32] *Grollo* at 365 per Brennan CJ, Deane, Dawson and Toohey JJ.
[33] *Wilson* at 17 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.
[34] *Wilson* at 19 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.
[35] Ibid.

68 The consequence of the Tribunal's erroneously broad construction of criterion (f) and the residual discretion was that the Tribunal could (and did) have regard to all of the following:

68.1 the community's best interests (Reasons at [1167]);

68.2 broader issues concerning social welfare and equity, and the interests of consumers (Reasons at [1168]);

68.3 broad issues of policy (Reasons at [1174]); and

68.4 economic growth and regional employment (Reasons at [1236]).

69 Each of these is a political ground, unconfined by factors expressly or impliedly prescribed by law.

70 Accordingly, acceptance of such a broad construction would give rise to incompatibility with the persona designata exception to separation of powers and thus place the exercise of power by the Tribunal under s44K beyond constitutional competence. Plainly, this cannot have been what Parliament intended. Section 15A of the *Acts Interpretation Act 1901* requires that ss44H and 44K of the TPA are to be "read and construed subject to *the Constitution*". The Tribunal erred in law in giving an impermissibly broad reading to criterion (f) and the residual discretion.

## C FINDINGS AS TO PROPOSED DIXON LINE NOT JUSTIFIED

### Tribunal errors

71 In its Reasons, the Tribunal made reviewable errors when it found that:

71.1 It is highly likely that:

71.1.1 the proposed Dixon Line will be constructed within the short to medium term, if Fortescue does not obtain access to the Hamersley Service (Reasons at [451] to [459] and [768]);

71.1.2 the proposed Dixon Line would be an open access railway available to accommodate third party (ie non-Fortescue) users' tonnages (Reasons at [753], [1129], [1196] and [1301]);

71.2 The proposed Dixon Line would, in all likelihood, offer a much more attractive arrangement than access to the Hamersley Service for many potential access seekers (Reasons at [1326] and [1330]).

71.3 Construction and utilisation of the proposed Dixon Line would be a more optimal and economically efficient rail infrastructure development than access to the Hamersley Service (Reasons at [1324]).

72 These findings and conclusions by the Tribunal in relation to future construction of the proposed Dixon Line were of central importance to its ultimate decision to set aside the Hamersley Declaration. Each was a part of a chain of reasoning upon which the decision of the Tribunal depended.[36] Each of the findings involved reviewable error.

73 The central importance of the findings to the Tribunal's conclusions in relation to declaration of the Hamersley Service can be seen in the discussion of, and conclusions reached by, the Tribunal in relation to criterion (a) and criterion (f) and in relation to the Tribunal's exercise of the residual discretion.

[36] See *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at [33] per Gleeson CJ and at [116]-[118] per Kirby J (citing with approval *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 (***Curragh***) at 220-221 per Black CJ, with whom Spender and Gummow JJ agreed); see also at [55]-[58] per Gaudron and McHugh JJ.

From Rio Tinto's Submissions in Response dated 1 December 2010

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3.12 FMG's further submission that criterion F does not *mandate* any detailed, or even 'order of magnitude', quantitative cost/benefit analysis of the type engaged in by the Tribunal[70] (emphasis added) is not to the point – relevantly, criterion F certainly does not *prohibit* the Tribunal performing such an analysis if it considers it necessary or desirable to do so in the context of the particular application which it is being asked to determine.

**FMG's contention that the Tribunal impermissibly departed from its earlier decisions regarding the limited nature and scope of the residual discretion, and relied instead on the dictum of the Full Federal Court in *Sydney Airport (No. 2)***

3.13 FMG submits that the Tribunal erred by departing from its earlier decisions regarding the limited nature and scope of the residual discretion.[71]

3.14 There is no substance to this submission. As the Tribunal in the present case held, the earlier decisions in which the Tribunal said that the discretion is extremely limited are not consistent with the Full Federal Court's more recent decision in *Sydney Airport (No. 2)*.[72] FMG refers to that holding of the Tribunal in its submissions.[73]

3.15 Rather, FMG's real complaints in relation to this issue seem to be that:

(a) what the Full Court said in relation to the discretion in *Sydney Airport (No. 2)* in fact reveals a far more tentative position than that cited by the Tribunal in the present case;[74] and

(b) the passage about the discretion in *Sydney Airport (No. 2)* was wrongly decided.[75]

3.16 RTIO submits that a fair reading of the relevant passage from the Full Court's decision in *Sydney Airport (No. 2)* discloses that, contrary to FMG's submission, what the Full Court said on this topic was positive, not 'tentative'.[76]

3.17 RTIO submits that the observation made by the Full Court as to the breadth of the discretion is correct, and that the Tribunal correctly applied the *Sydney Airport (No. 2)* approach to the discretion (and to criterion F). For example, as the Tribunal recognised, it follows that if criterion F is limited to a consideration of the consequences of access (on reasonable terms and conditions), then other issues which arise because of the specific operation of Part IIIA are to be considered under the discretion.[77]

**FMG's contention that the Tribunal impermissibly had regard to political grounds**

3.18 FMG submits that:

(a) in construing and applying criterion F and the residual discretion, the Tribunal had regard to the following (allegedly) political grounds: (1) the community's best interests; (2) broader issues concerning social welfare and equity, and the interests of consumers; (3) broad issues of policy; (4) economic growth and regional employment;[78] and

(b) acceptance of such a broad construction of criterion F and the discretion would give rise to incompatibility with the persona designata exception to separation of powers, and thus place the exercise of power by the Tribunal under s.44K beyond constitutional competence.[79]

3.19 The matters referred to above are said to be political grounds because they are unconfined by factors expressly or impliedly prescribed by law.[80]

3.20 First, those submissions do not assist FMG in seeking to establish that the Tribunal erred in its approach to the construction and application of criterion F and the discretion. If FMG's submissions are

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70 FMG's Outline, [56].

71 FMG's Outline, [60] and [65].

72 Reasons, [1163].

73 FMG's Outline, [65].

74 FMG's Outline, [66].

75 FMG's Outline, [67].

76 *Sydney Airport (No. 2)* at [38]-[39].

77 Reasons, [1166].

78 FMG's Outline, [68]-[69], and see also [64].

79 FMG's Outline, [70].

80 FMG's Outline, [69].

accepted it means that aspects of the Minister's decision would not be able to be reviewed by the Tribunal.

3.21 Second, criterion F expressly requires the Tribunal to consider 'the public interest'. The legislature chose to use a very broad (and undefined) expression. By making reference to matters such as those referred to by FMG as political grounds, the Tribunal was simply seeking to apply criterion F (and the statutory discretion), which did not (and would not be thought to) diminish either the actual or perceived independence of the President of the Tribunal from the 'political' arms of government, namely the legislature and the executive.

3.22 Third, it is clear from a review of the Reasons that the Tribunal's decision not to declare the Hamersley Service did not in any event turn upon any of the allegedly political grounds identified by FMG. The issue is therefore entirely academic.

3.23 Finally, the application of the incompatibility doctrine to different factual situations is far from clear.[81]

3.24 In the present case, there is no incompatibility problem of the type contended for by FMG, since:

(a) the President of the Tribunal is required to be a Judge of the Federal Court;[82]

(b) the conduct about which FMG complains occurred as part of the Tribunal's review of the Minister's declaration pursuant to s.44K of the TPA;

(c) in conducting that review, the Tribunal was required to re-consider the matter,[83] and thus 'stand in the shoes' of the Minister;[84]

(d) the Tribunal was therefore required to (and did) address the matters laid down by s.44H, including the criteria in s.44H(4);

(e) the Tribunal's statutory obligation to re-consider the matter addressed by the Minister was a function that:

(i) was not closely connected with the legislature or the executive government; and

(ii) was required to be performed independently of any instruction, advice or wish of the legislature or the executive government, because the Tribunal was considering the matter afresh; and

(f) the Tribunal's reconsideration was conducted in a quasi-judicial manner, without bias and by a public procedure that gave each interested person an opportunity to be heard and to deal with the cases presented by those with opposing interests.

## 4. FMG'S CONTENTION THAT THE TRIBUNAL'S FINDINGS AS TO THE PROPOSED DIXON LINE INVOLVED REVIEWABLE ERRORS

### FMG's complaints

4.1 FMG claims that four findings of the Tribunal as to the likelihood that the Dixon Line will be constructed, and the availability of that line to third parties, involved reviewable errors:

(a) that it is 'highly likely' that if FMG does not obtain access to the Hamersley Service, the proposed Dixon Line will be constructed 'in the short to medium term';[85]

(b) that it is highly likely that the proposed Dixon Line will be an open access railway available to accommodate third party users' product;[86]

(c) that in all likelihood the Dixon Line would be a more attractive arrangement for access seekers than access to the Hamersley Service;[87] and

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81 *Hussain v. Minister for Foreign Affairs* (2008) 169 FCR 241 at [71] per Weinberg, Bennett and Edmonds JJ.

82 TPA, s. 31(1).

83 TPA, s.44K(4).

84 TPA, s.44K(5).

85 FMG's Outline, [71.1.1], which refers to the Reasons at [451] – [459] and [768].

86 FMG's Outline, [71.1.2], which refers to the Reasons at [753], [1129], [1196] and [1301].

From Fortescue submissions in reply dated 22 December 2010

- page AB 5/2333 as it appears in the appeal book

- page AB 5/2334 as it appears in the appeal book

**Proper construction of criterion (f) and residual discretion**

18 The limited nature and scope of the residual discretion not to declare has (up until the present case) been consistently recognised by the Tribunal[30] and the decision of the Full Court in *Sydney Airport (No 2)* at 137 [39] does not support the broad construction adopted by the Tribunal.

19 Rio Tinto has mounted no argument to address the important qualification to the *Sydney Airport (No 2)* dictum as to the residual discretion added by the Full Court but not acknowledged by the Tribunal. The Full Court said that any considerations affecting a declaration decision in addition to the necessary preconditions in s44H(4) of the TPA "*must not be irrelevant in the sense discussed in Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-42, in particular having regard to the purposes, text and structure of the Act*".[31] As Fortescue noted in its submissions in chief,[32] a broad discretion not to declare in circumstances where each of the declaration criteria has been satisfied would undermine consistency in the approach to access regulation (contrary to an express object of Part IIIA).[33]

20 Rio Tinto has also mounted no argument in response to the observation by Fortescue that the dictum of the Full Court did not form part of what the Court was required to decide because *Sydney Airport (No 2)* was a case about the proper construction of criterion (a) and not about the scope of the residual discretion.

21 The authority cited by Rio Tinto in response to Fortescue's submissions as to the political nature of the grounds to which the Tribunal had regard on its construction of criterion (f) and the residual discretion does not assist Rio Tinto. Rio Tinto submits that the application of the incompatibility doctrine to different factual situations is far from clear and cites *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 at 261 [71] in support of that proposition. In fact, that passage says that what is "*far from clear*" is what functions (other than as members of the Administrative Appeals Tribunal) Chapter III judges can validly perform.

22 If anything, uncertainty in this area attends the persona designata exception itself,[34] without which separation of powers principles would render the exercise of power by the Tribunal under s44K of the TPA beyond constitutional competence.

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address (AB B310, T2505.10-15 (3 December 2009), T2533.35-45 (3 December 2009),T2653.18-40 (7 December 2009) and T2936.40-2937.4 (17 December 2009).

[30] *Re Sydney Airports (No 1)* at [223]; *Virgin Blue* at [611]-[612]. See, further, Fortescue submissions in chief at [60].

[31] *Sydney Airport (No 2)* at 137 [39].

[32] Fortescue submissions in chief at [59].

[33] Section 44AA(b) of the TPA.

[34] The persona designata exception to separation of powers has attracted significant criticism. It has been labelled "distinctly artificial" (The Hon Sir Anthony Mason, AC, KBE, "A New Perspective on Separation of Powers" (1996) 82 *Canberra Bulletin of Public Administration* 1 at 5), relying on "unreal distinctions" (*Medical Board of Victoria v Meyer* (1937) 58 CLR 62 at 97 per Dixon J), and even perhaps "violating [the] spirit" of the Constitution (*Boilermakers'* at 330 per Webb J). See, further, *Hilton v Wells* (1985) 157 CLR 57 at 81-84 per Mason and Deane JJ.

23 The observation by Rio Tinto that the Tribunal conducted its proceedings in a quasi-judicial manner in accordance with the rules of procedural fairness is not to the point. The majority of the High Court in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 (***Wilson***) held that an obligation to observe the requirements of procedural fairness was not significant to the question of incompatibility.[35]

24 In reply to the submissions by Rio Tinto as to close connection with or independence from the Legislature or Executive, Fortescue notes:

24.1 The majority in *Wilson* (at 12) emphasised the importance not only of the creation of separate institutions (some judicial and others political) but also of separating the judges from those who perform executive and legislative functions. Citing Windeyer J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 390, the majority endorsed the principle that "*the judicial power is to be exercised separately from the exercise of the other two powers, and by different people*" (emphasis in original).[36]

24.2 The majority in *Wilson* also expressed concern (at 18-19) about the possibility of removal by the Minister of a reporter before a report was made. There was no suggestion of any such removal in *Wilson* being likely or even contemplated and nor is there in the present case. It was the mere existence of the legislative power in *Wilson* to remove a reporter before the reporter discharged his or her functions that fuelled a concern about the judge being too closely connected with the Executive branch.

24.3 The removal power of concern in *Wilson* was one merely implied by s33(4) of the *Acts Interpretation Act 1901* (Cth). That provision has no application to members of the Tribunal: s35 of the TPA. But there exists another power of similar concern in this context—the power to make appointments of acting presidential members under s34 of the TPA. Acting presidential members do not have even the (limited) tenure enjoyed by permanent appointees under s32 of the TPA. The Executive is empowered to make short-term acting appointments and, at its discretion (including discretion exercised specifically by reason of pending proceedings), direct that individual acting appointees continue even after the resumption of duty by the permanent presidential member in whose place the acting appointment was appointed to act: s34(4) of the TPA.

24.4 The breadth of this discretion reposed in the Executive places a judge appointed as a presidential member of the Tribunal as much in the echelons of administration and liable to removal by the Executive as was considered by the majority in *Wilson*.

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[35] *Wilson* at 19 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

[36] *Wilson* at 12 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.