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

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

Appellants

and

AUSTRALIAN COMPETITION TRIBUNAL & ORS

Respondents

APPELLANTS' SUBMISSIONS

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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: Issues

2. Whether the criterion in s 44H(4)(b) (**criterion (b)**) of the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)) (**Act**) imposes a test of private profitability, or a test applying economic principles, viz. whether the facility in question exhibits natural monopoly characteristics.

3. Whether the criterion in s 44H(4)(f) of the Act (**criterion (f)**) permits or requires a detailed factual and counterfactual analysis of the likely net balance of all social costs and benefits of access (including matters which may arise or be ascribed a degree of likelihood greater than speculation only after a declaration and particular requests for access by particular access seekers have been made), or is a confined test considering only whether there would be concrete harm to an identified aspect of the public interest not otherwise addressed under the criteria provided in ss 44H(4)(a)-(e) of the Act.

4. Whether, notwithstanding satisfaction of each of the declaration criteria provided in s 44H(4) of the Act there is a broad, general discretion not to declare (**residual discretion**).

Part III: Section 78B certification

5. The appellants certify that they have considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth) and have concluded that no such notice is necessary.

Part IV: Citations for judgments below

6. The decision of the Full Court of the Federal Court is reported at *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57.

7. The decision of the Australian Competition Tribunal is reported at *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256.

Part V: Narrative statement of relevant facts

8. Rio Tinto Ltd and its associated entities[1] (**Rio Tinto**) mine iron ore in the Pilbara for export through two ports: Dampier and Cape Lambert: T[289], [311]. Rio Tinto also operates two major railway lines in the Pilbara: the **Hamersley line**, which runs from Dampier to Rosella junction, with three further branch lines from Rosella junction to Brockman No 2, Paraburdoo and Yandicoogina; and the **Robe line**, which runs from

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[1] Including the second to tenth respondents in M155 of 2011 and the second to eighth respondents in M156 and M157 of 2011.

Cape Lambert to the Mesa J mine, and interconnects with the Hamersley line near Emu junction: FC[3]. A map showing the location of the various rail lines is Annexure "A" hereto.

9. On 16 November 2007, the first appellant (**TPI**) made application to the National Competition Council (**NCC**) under s 44F of the Act for a recommendation that the service provided by the use of the Hamersley line and associated infrastructure necessary to allow third party trains and rolling stock to move along the Hamersley line between points of interconnection (**Hamersley service**) be declared: T[15]. An application for a recommendation that an equivalent service provided by the use of the Robe line (**Robe service**) be declared was made by TPI to the NCC on 18 January 2008: T[18].

10. On 29 August 2008, the NCC published its final recommendations that the Hamersley service and Robe service be declared: T[20]. On 27 October 2008, the Treasurer of the Commonwealth of Australia, the Hon Wayne Swan MP, pursuant to s 44H of the Act, declared the Hamersley service (**Hamersley declaration**) and the Robe service (**Robe declaration**), each for a period of 20 years from 19 November 2008 to 19 November 2028: T[22].

11. On 13 November 2008, Rio Tinto applied to the first respondent (**Tribunal**) pursuant to s 44K of the Act for review of the Hamersley declaration and the Robe declaration. TPI and the second appellant, of which TPI is a wholly owned subsidiary (together, **Fortescue**), were parties to the review proceedings before the Tribunal.

12. On 30 June 2010, the Tribunal made a determination pursuant to s 44K(7) of the Act, setting aside the Hamersley declaration and varying the Robe declaration to limit it to the period until 19 November 2018. The Tribunal gave written reasons for its determination, recording the following relevant conclusions:

    (a) each of the criteria for declaration provided in s 44H(4)(c), (d) and (e) of the Act is satisfied for both the Hamersley and Robe services: T[795];

    (b) criterion (b) should be understood as adopting a test of natural monopoly rather than a test of private profitability: T[835], [838], [850];

    (c) so construed:

        (1) the Hamersley line was a natural monopoly, and there would be capital savings of up to $2.4 – 2.75 billion (T[930]-[937], [1000]) if the existing facility was used by third parties rather than duplicated; and

        (2) the Robe line was also a natural monopoly (T[929]), and there would be capital savings in the vicinity of $455-651 million if the Hamersley Service were not declared (T[1005]), and "large capital savings" if the Hamersley Service were also declared (T[1006]);

(d) had the relevant test under criterion (b) been a private profitability test, the test would not have been satisfied for either Hamersley or Robe (T[964]-[965]);

(e) criterion (a) is satisfied because access to each of the Hamersley and Robe services would promote a material increase in competition in the market for rail haulage services within the vicinity of the respective lines, being markets other than the markets for the services: T[1138]-[1159];

(f) however, declaration would be refused for Hamersley and truncated for Robe because of a particular view taken as to criterion (f), and the residual discretion under s 44H. The Tribunal approached criterion (f) on the footing that it permitted and required a complex and detailed inquiry into the likely net balance of social benefits and costs if a declaration is made rather than not made. This included a weighing up of calculations of financial benefits and costs, based on assumptions about the amount of access that would occur and the terms of access. A similar approach was taken to the residual discretion.

13. The Tribunal made the following critical findings:

(a) If access to the Hamersley Service were not granted, Fortescue would likely construct a 220 km rail line from the Solomon area to Anketell Point by 2013/14 duplicating much of the Hamersley line (the **Dixon line**): T[451]-[459]. Likewise, if the Robe line was not declared, it is likely that the API joint venture would build a line from south of the Pannawonica area to Anketell Point (the **Aquila line**): T[769].

(b) The proposed Dixon and Aquila lines could potentially unlock deposits that would otherwise be stranded in the absence of declaration (T[787], [790]-[792]).

(c) Access to the services would give rise to certain benefits, being:

(1) significant capital savings from accommodating third party demand on Rio Tinto's existing lines rather than on a new railway (T[1303], [1323], [1333], [1337]); and

(2) the unlocking of some stranded deposits (but limited because of (b) above: i.e. many deposits would be unlocked in any event because of the alternative lines that would be built absent access) (T[1301], [1303], [1321]).

(d) Access to the service would also give rise to certain costs, the most significant being:

(1) the likelihood that access will discourage the development of alternative lines, which the Tribunal viewed as an important cost because such access may be less constrained than access to the existing lines (T[1304], [1326]); and

(2) costs to Rio Tinto, caused by potential delays to expansion, to operational changes, and to technological improvements, because of the need to consult with third parties and possibly arbitrate any disputes: T[1239], [1247], [1262]-[1269], [1301], [1304], [1327]-[1328], [1337]. A three month average delay to Rio Tinto would cause it to lose revenue of $10 billion and the loss of GDP would be large (T[1328]), although this calculation did not take into account any potential gains in export volume from granting access (T[1298]).

(e) For the Hamersley service, the costs from access outweighed benefits of access, such that access would be contrary to the public interest: T[1331]. Criterion (f) was not satisfied for the Hamersley service. The Tribunal also concluded that it would exercise its residual discretion in any event not to declare the Hamersley service: T[1331]. The Tribunal determined that the Minister's decision to declare the Hamersley service be set aside.

(f) For the Robe service, the benefits outweighed the costs in the period to 2018 and access would not be contrary to the public interest for this period (i.e. criterion (f) was satisfied for this period). However, for any period beyond 2018 the Tribunal was "not satisfied" that access would not be contrary to the public interest: T[1337]. The Tribunal varied the decision of the Minister so that the period of the declaration commenced on 19 November 2008 and expired on 19 November 2018.

14. On 13 August 2010, Fortescue applied to the Full Court of the Federal Court of Australia for judicial review of the determination by the Tribunal to set aside the Hamersley declaration and of the determination by the Tribunal to vary the Robe declaration to limit it to the period until 19 November 2018. Fortescue argued, relevantly, that the Tribunal erred in its construction and application of criterion (f) and in its construction and exercise of the residual discretion and that the Tribunal breached the rules of procedural fairness in connection with the making of its findings as to the likelihood of construction of the Dixon line: FC[9], [19]-[20]. Rio Tinto argued[2] that the Tribunal erred in construing criterion (b) as a natural monopoly test rather than as a test of private profitability.

15. Before the Full Court, Fortescue succeeded in its argument that the adverse conclusions by the Tribunal under criterion (f) and the residual discretion in relation to Hamersley were invalid for breach of the rules of procedural fairness: FC[127]-[135]. Fortescue contended that the failure by the Tribunal to observe those rules meant that the exercise

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[2] By a notice of contention in Fortescue's application for judicial review of the determination by the Tribunal to set aside the Hamersley declaration and by Rio Tinto's own application for judicial review of the determination by the Tribunal not to set aside the Robe declaration in its entirety: FC[12]-[13], [18].

of the power by the Tribunal was invalid[3] and that relief for the breach could only be withheld if the Full Court reached an affirmative conclusion that compliance by the Tribunal with the requirements of procedural fairness could have made no difference to the result.[4] The Full Court expressly disavowed any such affirmative conclusion, accepting Fortescue's arguments on the procedural fairness ground: FC[135].

16. However, the Full Court accepted the contention by Rio Tinto as to the proper construction of criterion (b): FC[99]-[100]. It followed that, on the reasoning of the Full Court, Fortescue was bound to fail under criterion (b): FC[136]-[138]. Accordingly, the Full Court upheld the determination of the Tribunal to set aside the Hamersley declaration and set aside both the determination of the Tribunal to vary the Robe declaration and the Robe declaration itself: FC[139]-[140].

17. The Full Court also rejected Fortescue's construction and application argument as to criterion (f) and the residual discretion: FC[106]-[117].

18. Pursuant to special leave granted on 28 October 2011, Fortescue appeals to this Court as to the proper construction of criterion (b), and the proper construction and application of criterion (f) and the residual discretion.

Part VI: Argument

19. The Full Court erred in its approach to the construction, and thus application, of criterion (b) and criterion (f), and in relation to the existence and application of a residual discretion.

20. A proper approach to the construction of the relevant provisions requires a consideration of the scheme of Part IIIA of the Act. An outline of the scheme of Part IIIA, and the immediate background to its enactment (including parts of the Second Reading Speech), is provided in paras [13] – [20] of the decision of this Court in *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 (***BHP v NCC***).

21. Section 44AA sets out the objects of Part IIIA, including relevantly:

> to 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.

22. The term "service" is relevantly defined in s 44B as "a service provided by means of a facility and includes… the use of an infrastructure facility such as a road or railway line".

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[3] Fortescue submissions in chief to the Full Court dated 12 November 2010 (**Fortescue submissions**) at [140]-[143], citing *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [13] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

[4] Fortescue submissions at [142], citing *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [4] per Gleeson CJ, 130-131 [131] per Kirby J, 153-155 [211] per Callinan J.

23. Pursuant to the statutory scheme, the first stage involves recommendation by the NCC and a decision by the Minister to declare or not declare a service. Both the NCC and the Minister must have regard to the objects of Part IIIA: ss 44F(2)(b), 44H(1A). Both the NCC and the Minister must be satisfied of six criteria before recommending declaration, or declaring, respectively: ss 44G(2), 44H(4).

24. Focussing on s 44H, s 44H(2) provides that the Minister must consider whether it would be economical for anyone to develop another facility that could provide *part* of the service. Section 44H(4) then provides that the Minister cannot declare a service unless he or she is satisfied of six criteria. In relation to those criteria:

(a) Criteria (a) to (c) are an instantiation of the general objects of the Part. Criterion (c) is clear – the facility must be of national significance. As discussed in greater detail below, criterion (b) requires that the facility is a natural monopoly. It correlates to the object of efficient use of, and investment in, infrastructure. If the facility is a natural monopoly then it can meet demand for the service at lower cost than duplicating the facility. In these circumstances, it is efficient to use the existing facility to supply demand (including by investing in it and enhancing it), and inefficient and wasteful to duplicate it by investing in another facility. Criterion (a) requires that access to the service would promote a material increase in competition in at least one market other than the market for the service, correlating to the object of promoting effective competition in upstream and downstream markets.

(b) Criteria (a) to (c) consist of three significant positive matters which must be satisfied. Once they are satisfied, there is a prima facie case for declaration on competition and efficiency grounds. That is, consistent with what this Court has described as the "large national and economic objectives of Part IIIA", declaration would ordinarily be appropriate in circumstances where there is a facility of national significance which is a natural monopoly, and access to which would promote a material increase in competition.

(c) The remaining criteria (d) to (f) are, as a matter of language, expressed as requiring satisfaction that an exclusion does not apply: i.e. not an undue risk to human health or safety, not already the subject of an effective access regime, and not contrary to the public interest.

25. The second stage of the process, if declaration is made, is for an access seeker and the facility owner to negotiate as to access and the terms of any access, or (failing agreement) for the Australian Competition and Consumer Commission (**ACCC**) to determine one or more issues concerning the particular access sought, including whether there should be access at all. Various protections for the incumbent operate as constraints at the second stage.

26. The Act contemplates that the first stage (i.e. the procedure leading to declaration) will be relatively rapid, and any Tribunal review will be conducted within a short time frame (s 44ZZOA). At the relevant time, s 44GA provided that the NCC must use its best endeavours to make a recommendation on an application within 4 months of receiving the application, and s 44H(9) provided (and still provides) that a Minister is taken to have decided not to declare the service if no decision is published within 60 days, with no power to extend this time period.[5]

Criterion (b)

27. Criterion (b) provides that the Minister cannot declare a service unless satisfied that it would be uneconomical for anyone to develop another facility to provide the service.

28. The Full Court, in contrast to the Tribunal, held that criterion (b) imposes a private profitability test, and that "uneconomical" means "unprofitable". In so doing, it overturned decisions of the Tribunal[6] and the approach hitherto adopted in relation to Part IIIA and analogous schemes.

29. Fortescue submits that criterion (b) is satisfied if the service is provided by a facility exhibiting natural monopoly characteristics, such that the facility can meet society's demand for the service at lower total cost than if that demand were met by two or more facilities (as concluded by the Tribunal at T[850]).

30. Part IIIA of the Act is concerned with economic regulation. The field of discourse is therefore economics, and the language used is the language of economics. In this field of discourse, the word "uneconomical" does not mean "unprofitable". It means "wasteful" (of society's resources). The Full Court has taken a meaning from a different context (business or accounting) and applied it to a context of economic regulation, where it is inapt. As discussed below, the Full Court's approach was dictated by an erroneous perception that the guiding principle of Part IIIA was to minimise any impact on private rights.

31. The natural monopoly test focuses on whether it is uneconomical to duplicate an existing facility because this will result in wasteful expenditure and higher total cost than would be the case if total demand for a good or service was supplied over a single facility. Such duplication is "uneconomical" because it is uneconomical for society's resources to be used in that way.

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[5] Section 44GA has since been replaced, with effect from 14 July 2010, altering the NCC's "best endeavours" obligation to a fixed time limit of 180 days. In announcing the amendments, the relevant Minister (the Hon Chris Bowen) stated that there was broad consensus that something needed to be done to speed up the processes under the National Access Regime (which could take years), and that the Regime needed to be improved to make decisions faster.

[6] *Re Sydney Airports Corporation Ltd* (2000) 156 FLR 10 (***Sydney Airports (No 1)***) at [204]; *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1 at [61], [64], [137], [144]; *Re Application by Services Sydney Pty Ltd* (2005) 227 ALR 140 ***(Services Sydney)*** at [102]–[105]; and the decision in the present case.

32. By contrast, the private profitability test focuses on a particular firm. Its satisfaction may depend upon the idiosyncratic position of that firm – for example, whether that firm has an integrated business that produces a valuable commodity. It considers whether the profit from the firm's activities, including related activities in upstream or downstream markets, may justify the construction of an alternative facility. The impact of this approach is exemplified by the circumstances of this case. Because there is significant profit to be made in iron ore (at least in the current circumstances), the Tribunal concluded that other companies could profitably duplicate the existing railway line, even though doing so would incur vastly greater costs than using the existing facility, because the profit from iron ore to be transported could more than cover the cost of the wasteful second facility.

33. For example, if there are 10 independently-owned mining tenements for mining a valuable commodity some 50 km from a port, then it might be privately profitable for each tenement owner to build a separate railway line to the port that carries one train per day, in circumstances where a single existing line could carry 10 trains per day. On the Full Court's approach, there would be no declaration and 9 unnecessary lines would be built. The Full Court correctly recognised (at [100]) that its construction "might occasion some wastage of society's resources in some cases".

34. The approach of the Full Court is inconsistent with what this Court has described as "the large national and economic objectives of Part IIIA, as revealed in the legislative text enacted by the Parliament, the report that preceded its enactment, and the Minister's Second Reading Speech": *BHP v NCC* at [42].

35. The approach is also inconsistent with the expressly stated objects of Part IIIA, set out earlier. These include an object to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided. The focus is thus on efficiency. The construction of a facility to duplicate a natural monopoly is not an efficient investment in infrastructure by which services are provided, and nor is it an efficient use of the existing infrastructure.

36. As well as encouraging wasteful and inefficient investment, the application of a private profitability test would not promote (and may in fact undermine) effective competition. As the Tribunal observed in the present case at T[818], circumstances may well exist in which a third party may be marginally profitable if it constructs an alternative facility, but cannot truly compete with an incumbent using a (much more profitable) existing facility with natural monopoly characteristics. An object of the Act is to enhance the welfare of Australians through the promotion of competition (s 2), and an object of Part IIIA is to promote effective competition in upstream and downstream markets (s 44AA).

37. Where competing constructions of the legislative text are open, the one to be preferred is that which is more appropriate to advancing the overall objects of Part IIIA: *BHP v NCC* at [42].

38. Further, the private profitability test gives rise to possible future anomalies. The application of the private profitability test may lead to a duplicate facility being constructed. A third party may subsequently desire access to one or other of the two facilities. On one approach, criterion (b) could never again be satisfied: it is not uneconomical for anyone to develop another facility because somebody did so profitably. On this approach, society would be stuck with two facility monopolists with neither providing access, no matter how much demand subsequently arose. On an alternative construction, criterion (b) would be reactivated or reset each time declaration was considered. On this approach, if it is unprofitable for anyone to build a third facility, then the third party could obtain access to either the first facility or the second facility (provided the other criteria were satisfied), and likewise the existing facility owners could presumably obtain access to each other's facilities. This is so notwithstanding that the initial application of criterion (b) required a duplicate facility to be built. These anomalies are avoided if a natural monopoly test is applied.

39. In construing "uneconomical" as meaning "unprofitable", the Full Court was apparently influenced by what it considered to be a guiding principle that Part IIIA should be construed to minimise the impact on private rights. The Full Court referred (at [87]) to:

> the philosophy which informs the enactment of Pt IIIA, and the philosophy reflected in the provisions of s 44H, which makes the granting of access to override the otherwise legitimate interests of incumbent owners a distinctly exceptional occurrence which is simply not justified by an evaluation by a regulator that economic efficiency from the point of view of society as a whole would be served by a declaration of access.

40. This statement of the "philosophy" behind Part IIIA is not able to be discerned from the text, or the surrounding materials. It is also inconsistent with the stated object of Part IIIA to promote the economically efficient operation of, use of and investment in infrastructure by which services are provided, and thereby promote competition. The granting of compulsory access to services provided by facilities of national significance of its nature will involve an impact on private rights of property. The legislation does not evince any intention that the declaration of access to such facilities be "distinctly exceptional". Further, as noted in the overview section above, the legislation deals with and protects the interests of access providers in other provisions of Part IIIA. This includes s 44ZZN, which confers an entitlement to payment of compensation by the Commonwealth where a determination would result in an acquisition of property. These matters were emphasised by this Court in *BHP v NCC*.[7]

41. The Full Court sought (at [90]ff) to support its conclusion that Part IIIA was "intended to minimise regulatory intervention in the market place" (at [89]) by quoting passages from the Hilmer Report. The passages were taken out of context. Thus the passage set out in FC[90], referring to the general freedom of an owner of property and/or supplier

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[7] (2008) 236 CLR 145 at [18]-[20]. Section 44ZZN proceeds on the (correct) footing that any acquisition would occur from ACCC determination rather than from declaration per se.

of services to choose when and with whom to conduct business dealings and on what terms and conditions, was immediately followed by this passage:

> The law has long recognised that this freedom may require qualification on public interest grounds in some circumstances, particularly where a form of monopoly is involved. Thus, for example, the natural monopoly character of certain transport functions gave rise to the common law notion of "common carriers", where such carriers have an obligation to carry certain goods.

And the passage set out in FC[91], referring to the consciousness of the committee of the need carefully to limit the circumstances in which one business is required by law to make its facilities available to another, was immediately followed by this passage:

> Nevertheless, there are some industries where there is a strong public interest in ensuring that effective competition can take place, without the need to establish any anti-competitive intent on the part of the owner for the purposes of the general conduct rules. The telecommunications sector provides a clear example, as do electricity, rail and other key infrastructure industries. Where such a clear public interest exists, but not otherwise, the Committee supports the establishment of a legislated right of access…

42. More generally, the Hilmer Report:

(a) does not suggest that access will or should be "distinctly exceptional", but that it should be mandated if and when certain criteria are met; and

(b) confirms that the concept of "economical" and "uneconomical" is based on economic theories of how to address the potential harm which arises in the context of facilities which exhibit natural monopoly characteristics.

43. For example, the relevant section of the Hilmer Report (section 11: Access to "Essential Facilities") commences:

> In some markets the introduction of effective competition requires competitors to have access to facilities which *exhibit natural monopoly characteristics*, and hence *cannot be duplicated economically*. For example, effective competition in electricity generation and telecommunications services requires access to transmission grids and local telephone exchange networks respectively. Facilities of this kind are referred to as 'essential facilities'. [Emphasis added]
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> An 'essential facility' is, by definition, a monopoly, permitting the owner to reduce output and/or service and charge monopoly prices, to the detriment of users and the economy as a whole. In addition, where the owner of the facility is also competing in markets that are dependent on access to the facility, the owner can restrict access to the facility to eliminate or reduce competition in the dependent markets. Mechanisms to guard against potential abuses of this kind are expected to play a vital part in pro-competitive reforms in network industries such as electricity, gas and rail.

Section A point 1 on page 240 commences as follows:

> The "Essential Facilities" Problem
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> Some economic activities exhibit *natural monopoly characteristics, in the sense that they cannot be duplicated economically.* While it is difficult to define precisely the term 'natural monopoly', electricity transmission grids, telecommunications networks, rail tracks, major pipelines, ports and airports are often given as examples. Some facilities that exhibit these characteristics occupy strategic positions in an industry, and are thus 'essential facilities' in the sense that access to the facility is required if a business is to be able to compete effectively in upstream or downstream markets. For example, competition in electricity generation and in the provision of rail services requires access to transmission grids and rail tracks respectively. [Emphasis added]

44. The Report sets out recommended principles for access. As the Tribunal observed,[8] the legislation which followed adopted different language. However, in light of the approach of the Full Court, it is relevant that one of the recommended protections for the legitimate interests of the owner of the facility was (pp 252, 261):

> the imposition of an access fee and other terms and conditions that are fair and reasonable, including recognition of the owner's current and potential future requirements for the capacity of the facility.

45. The "philosophy" discerned by the Full Court is also inconsistent with the Second Reading Speech in the Senate on the Bill for the 1995 Act which introduced Part IIIA. Relevant passages are set out in the decision of this Court in *BHP v NCC* at [13]. The speech included the following:

> A new legal regime will be created which facilitates businesses obtaining access to the services of certain essential infrastructure facilities…. The bill inserts a new Part into the [Act], to establish a legal regime to facilitate third parties obtaining access to the services of certain essential facilities of national significance. The notion underlying the regime is that access to certain facilities with natural monopoly characteristics, such as electricity grids or gas pipelines, is needed to encourage competition in related markets, such as electricity generation or gas production. Access to such facilities can be achieved if a person seeking access is successful in having the service 'declared' and then negotiates access with the service provider.

The last sentence of this passage is also relevant to criterion (f), discussed below.

46. The approach to be discerned from the Second Reading Speech and the Hilmer Report is to the opposite effect of that stated by the Full Court.

47. A critical aspect of the Full Court's reasoning relied upon the phrase "uneconomical for anyone" in criterion (b). The Full Court stated (at [76]) that Parliament chose to frame criterion (b) so that it directed attention not to whether the NCC or the Minister or the Tribunal judged that it would be "economically efficient" from the perspective of society

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[8] T[566].

as a whole for another facility to be developed to provide the service, but whether "it would be uneconomical for anyone" to do so. The Full Court considered that the perspective of this phrase was that of a participant in the market place who might be expected to choose to develop another facility in that person's own economic interest.

48. However, the words "for anyone" do not require or suggest a private profitability perspective. The relevant phrase is not "uneconomical for anyone". Rather, these words are part of a larger composite phrase "uneconomical for anyone to develop another facility to provide the service". What must be "uneconomical" is the development of another facility. The words "for anyone" serve to focus on what would be true for anyone: that is, one does not take into account the unique circumstances of a particular firm that happens to be integrated with another profitable business.

49. At [78]-[79], the Full Court dealt with a further argument of Rio Tinto that s 44H(4)(b) must be read consistently with clause 6 of the Competition Principles Agreement of 1995. Rio Tinto's argument is set out in the Tribunal's decision at T[830]. Clause 6 of the Competition Principles Agreement provides, inter alia, that for a State or Territory access regime to conform to the principles set out in clause 6, it should apply to services provided by means of significant infrastructure facilities where "it would not be economically feasible to duplicate the facility…". The clause does not include the words "for anyone". The Tribunal said that it was not too strained to read "economically feasible" as economically efficient, in the sense that something that is inefficient may be economically unfeasible when looked at from society's perspective. In rejecting this approach, the Full Court said (at [79]):

> In our respectful opinion, it is indeed to strain too far to treat "economically feasible" as "economically efficient". The "perspective" of s 44H(4)(b) is not that of "society as a whole"; it is that of participants in the market place.

50. There are two difficulties with the Full Court's approach. First, it is not the case, as a matter of construction, that the meaning of criterion (b) has to conform to the meaning of a differently worded provision in the Competition Principles Agreement. This is particularly so if the meaning sought to be carried over from the Agreement is a meaning not in conformity with the stated objects of Part IIIA. There is no necessary rigid correlation between the Competition Principles Agreement and the express statutory criteria in s 44H(4). This is emphasised by the fact that s 44H(5) provides that in deciding whether another scheme is an effective access regime, the Minister must have regard both to the principles in the Competition Principles Agreement and the objects of Part IIIA. On Rio Tinto's argument, the latter requirement has no scope of operation.

51. Secondly, the reasoning of the Full Court relies upon a "perspective" of "participants in the market place" rather than "society as a whole"[5], which is said (at [76]) to come from the words "for anyone" in s 44H(4)(b). Those words do not appear in clause 6 of the Competition Principles Agreement. The Full Court thus relies upon words in s 44H(4)(b),

but not in clause 6, to construe clause 6, which construction is then used to construe s 44H(4)(b). The reasoning is circular, and invalid.

52. For the reasons set out above, the approach of the Tribunal to criterion (b) is to be strongly preferred to the approach of the Full Court. The Tribunal also correctly applied a facility-based natural monopoly test, rather than a broader "net social benefit" test. The application of a natural monopoly test is consistent with the Hilmer Report and the Second Reading Speech, including the passages identified above. Further, any broader test confuses the economics of the facility (which is the subject of criterion (b)) with the economics of upstream, downstream or unrelated markets in which the owner of the facility or an access seeker might happen to participate.

Criterion (f)

53. Criterion (f) provides that the Minister cannot declare a service unless satisfied that access (or increased access) to the service would not be contrary to the public interest.

54. Fortescue submits that criterion (f) operates, along with criteria (d) and (e), as a check requiring satisfaction that a particular factor warranting exclusion of declaration does not apply to the prima facie case established pursuant to criteria (a) – (c). The question under criterion (f) is whether there is some aspect of the public interest not otherwise addressed under (a) – (e) (examples might be national security or sovereignty) which is raised on the facts and might be harmed by access. If such an issue arises, the decision maker must come to satisfaction that such (particular) contemplated harm will not occur. In short, Fortescue submits that the construction of criterion (f) requires a straightforward inquiry: is there any distinct aspect of the public interest not otherwise addressed under the other criteria, and which would arise irrespective of the ultimate terms and conditions or other details of access to be determined during the second stage.

55. Criterion (f) does not invite a complex inquiry into overall benefits, costs or impacts which may or may not arise depending upon the extent or terms of access established at the second stage.

56. Such an approach, adopted by the Tribunal and the Full Court, is erroneous because:

57. First, it renders criteria (a) – (e) largely redundant. Essentially it turns the whole of s 44H(4) into a different test: Do I think on balance that declaration would be better for society than non-declaration? The application of criterion (f) is not an occasion to undertake a reassessment through a different open-ended prism of the three competition factors addressed in criteria (a) – (c).[9]

58. Secondly, the approach of the Full Court and the Tribunal is not a necessary or logical requirement of the staged scheme of Part IIIA. Declaration will only be made of services provided by means of facilities of national significance with natural monopoly

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[9] *Re Virgin Blue Airlines Pty Ltd* (2005) 195 FLR 242 (***Virgin Blue***) at [587]-[588].

characteristics where access would promote a material increase in competition. In the absence of declaration, the incumbent can refuse to treat with those who would like to obtain the service but who otherwise may have little bargaining power. Instead of leaving such access seekers with the difficulty of pursuing conventional claims under Part IV after the event, the purpose of declaration is to open a gateway, assisting an access seeker to treat with an incumbent. This may lead to an agreement between access seeker and incumbent on a potentially unlimited range of possible terms. It may lead to arbitration. It may or may not lead to any access at all, a matter emphasised by this Court in *BHP v NCC* at [18]. Previous Tribunal decisions have consistently respected the delineation between the two stages of the process, emphasising that a declaration had the effect merely of "opening the door" to access and that whether (and on what terms) any party is able to or chooses to go through the door is to be determined during the second stage.[10]

59. Thirdly, the approach of the Full Court is inconsistent with the language of the criterion. As observed by an earlier Full Court in *Sydney Airport Corporation Ltd v ACT* (2006) 155 FCR 124 (***Sydney Airport (No 2)***) at [82]-[86] (a case about criterion (a)), the language used (in criteria (a), (e) and (f)) is "access" not "declaration" and there is no occasion to "engage in an inquiry based on assessing the future with and without declaration" (at [86]). Rather (to adapt the *Sydney Airport (No 2)* approach to criterion (f)), the question is whether access per se, i.e. any access, is contrary to the public interest. The Tribunal cited *Sydney Airport (No 2)* (at [1164]), but then elided the distinction between access and declaration (at [1166], [1171], [1172]) and ultimately engaged in a detailed counterfactual analysis. The Full Court did not recognise the distinction (at [108], [115]-[117]) and its decision is inconsistent with the earlier Full Court decision in *Sydney Airport (No 2)*. In accordance with the language of criterion (f), the harm to the public interest must be inevitable (caused by any access) and therefore clear.

60. The Tribunal correctly recognised at T[1165] that many consequences will only arise if access is actually taken up, which in turn will depend upon the terms and conditions upon which access is obtained. However, the Tribunal went on (at T[1166]ff) to analyse the position by making some assumptions about the nature of access on reasonable terms, which it said "necessarily involves some speculation" (at T[1172], endorsed by the Full Court at [117]). Fortescue submits that criterion (f) does not invite such speculation.

61. Following declaration, Part IIIA contemplates that the access provider and the access seeker will either agree upon some or all of the terms of access, or else will require some or all aspects of access to be resolved by ACCC determination. Section 44S commences: "If a third party is unable to agree with the provider on one or more aspects of access to a declared service, either the provider or the third party may notify the Commission in writing that an access dispute exists…". The importance of negotiation was emphasised in the passages from the second reading speech set out in paragraph 45 above.

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[10] *Services Sydney* at [99]; *Sydney Airports (No 1)* at [7].

62. The range of terms that may be agreed between the parties is at large. Likewise, the provisions governing arbitrations confer considerable discretion on the ACCC as to the matters it may consider. Thus, the ACCC's determination may deal with any matter relating to access by the access seeker, including matters that were not the basis for notification of the dispute.[11] The ACCC may require the access provider to extend the facility.[12] The ACCC may require the access provider to permit interconnection of the facility. The ACCC does not have to require the provider to provide any access at all.[13] One of the matters which the ACCC must take into account is the value to the provider of extensions whose cost is borne by someone else,[14] which recognises that such extensions may well confer a benefit on the access provider.

63. The approach adopted by the Tribunal and the Full Court requires the NCC and the Minister to undertake a complex analysis in order to attempt to predict the likely outcome of any negotiation or subsequent arbitration. This requires the Minister to determine in advance the likely pattern of commercial investment, based on inadequate information, and the outcome of what is likely to be the interplay of complicated commercial dynamics, and assess whether the outcome is good or bad in some broad sense.

64. The difficulties with this approach are exemplified by the process adopted by the Tribunal in the present case. The Tribunal's Reasons contain references to the process being difficult or uncertain or necessarily involving "some speculation": e.g. T[696], [984], [1169], [1172], [1234], [1322]. The Tribunal also referred to the iron ore industry being "dynamic", to the fact that "little of what we see today will exist in a few years time", and to matters having moved on from the original Ministerial decisions made a year before the Tribunal hearing: T[1347].

65. The Tribunal concluded that both the Hamersley line and the Robe line were natural monopolies. The Tribunal also concluded that expanding the Hamersley and Robe lines rather than duplicating them would lead to very significant capital savings for Fortescue, of up to around $3 billion.

66. In any negotiation or arbitration, there would be a wide range of possible outcomes. One possible outcome would be to use some of the very significant capital savings from avoiding duplication to fund a greater, and/or earlier, expansion of the existing facility to the benefit of all users, including the incumbent. There are many other possible outcomes.

67. The Tribunal did not, and could not, assess each of the myriad possible outcomes of the stage 2 process. Rather, the Tribunal proceeded to assess the overall impact of one

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11 s 44V(2).

12 s 44V(2)(d). This may include requiring the access provider to expand the capacity of the facility: T[730], not challenged in the Full Court or in this Court.

13 s 44V(3).

14 s 44X(1)(e).

particular outcome. The Tribunal proceeded by: (a) assessing the level of demand at a particular time, (b) assessing how much expansion this would require, (c) concluding that this much expansion would still leave Fortescue and the junior miners with undesirable constraints, and inferior access to what could be achieved on a duplicate line,[15] and (d) concluding that it would also cause delayed expansion or innovation to the facility, which would result in a loss of revenue to Rio Tinto in the order of $10 billion (because it would obtain a lesser amount or lower standard of rail use than would be the case in the absence of declaration).[16]

68. The Tribunal concluded that the benefits in form of capital savings from avoiding duplication would be outweighed by the costs, being the inferior access to Fortescue and the junior miners ((c) above), and the loss of revenue to Rio Tinto ((d) above).

69. The Tribunal thus concluded that the outcome of the stage 2 process would be a limited and delayed expansion that would constrain Fortescue, Rio Tinto and third parties, with significant delay costs as a result. The Tribunal's conclusion as to the likely outcome was, on one view, the worst of the possible outcomes.

70. In so concluding, the Tribunal foreclosed the possibility that Fortescue and Rio Tinto could reach an accommodation that benefited both of them, and thus the national economy. For example, it foreclosed the possibility that the parties could negotiate for substantial capital savings to be put towards an early and extensive expansion to the existing facility, rather than a later and lesser expansion that disadvantaged both parties. It also foreclosed the possibility that a similar result could be achieved by ACCC arbitration. More generally, it anticipated the resolution of the terms of access, or the possibility that the ACCC could determine not to grant the access sought.

71. The process undertaken by the Tribunal in the present case highlights the very considerable, indeed almost insuperable, difficulties of forecasting the terms of access, various actions of the parties, and the effects on revenue and costs in a hypothesised and rapidly changing world. The Tribunal was driven to do this in the present case by a particular construction of criterion (f), and an understanding that it was necessary to perform a complex, predictive analysis as to what is likely to follow from declaration, to assess how those likely outcomes were to be weighed in some overall calculus of future good outcomes and future bad outcomes. This was contrary to the previously orthodox position that it would be "unnecessary and unhelpful for the [T]ribunal to speculate as to the possible terms and conditions of access when considering the question of declaration".[17]

72. Fortescue submits that whether particular types of access which may or may not ensue under stage 2 have particular positive or negative effects on the interests of the

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15 T[1304], [1326].

16 T[1296], [1304], [1327], [1337].

17 *Services Sydney* at [100]; *Sydney Airport (No 2)* at [82]-[83].

incumbent or the public is to be considered at stage 2, when these particular effects can be ascribed a level of likelihood greater than speculation, including because terms of access, extent of access, and likely changes to the facility are known. These effects include potential delay costs to the incumbent affecting its revenues in downstream markets.

73. Likewise, whether some access seekers might prefer there to be a second wasteful facility (because, for example, access might be simpler) is not part of the criterion (f) inquiry. The judgment on whether to pursue investment in the facility identified as duplicative and wasteful under criterion (b) is not for the Minister to anticipate under (f). It is left to the decision of the rival, but against the background of the right to deal with the incumbent flowing from declaration.

74. The approach of the Tribunal and the Full Court involves the Minister pre-determining investments and commercial judgments, rather than leaving those matters to the market, modified by at least the right to negotiate.

75. The approach of the Full Court is also inconsistent with the intention of the Parliament that the declaration process be a rapid one, as outlined above. In the present case, the parties filed 130 affidavits from 73 witnesses, together with a large number of documents, which material filled 70 large lever arch files: T[26]. The hearing occupied 42 sitting days over 5 months and produced Reasons of 1351 paragraphs, concluding (T[1351]) with special thanks for the effort involved. Fortescue submits that this complex inquiry is not consistent with the statutory scheme, pursuant to which the question of whether there is any access at all and the terms of access are not to be determined until stage 2.

76. By contrast, the construction advanced by Fortescue requires a straightforward inquiry. It requires consideration of whether there is any distinct aspect of the public interest not otherwise addressed under the other criteria, and which would arise irrespective of the ultimate terms and conditions or other details of access to be determined during the second stage.

The discretion

77. The matters identified above as beyond the scope of criterion (f) cannot be reintroduced under the rubric of a residual discretion.

78. The form of the relevant provision – "cannot declare… unless he or she is satisfied" – in s 44H(4) may properly be construed as specifying the particular matters to which the Minister may have regard when making a decision, together with the specific matter identified in s 44H(2), thus precluding any scope for the exercise of a general discretion to have regard to a range of other matters not identified in the section.[18]

79. To the extent that any exercise of residual discretion is permitted, one would start at the point that any considerations taken into account in the exercise of a discretion ought not

[18] Cf. *Central Regional Council v B* 1985 SLT 413, considering s 16(8) of the *Social Work (Scotland) Act 1968* (UK).

be irrelevant in the sense discussed in *Minister for Aboriginal Affairs v Peko-Wallsend Pty Ltd*,[19] in particular having regard to the purposes, text and structure of the Act. Moreover, any discretion ought not to be exercised upon grounds which go beyond the scope and object of the relevant provision conferring the discretion.[20] The correct application of this general proposition of law in the present case is that the satisfaction of criteria (a) – (f) would at the very least give rise to a powerful if not overwhelming case for declaration. The Tribunal has previously stated:[21]

> 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).

80. In particular, no discretion is then available to be exercised to undertake some overall "effects" analysis so as to contradict or set at naught the outcome of the significant competition analysis pursuant to criteria (a) – (c).

81. The exercise undertaken by the Tribunal in the present case was not an exercise of discretion within the scope and object of s 44H, for the reasons discussed above in the context of criterion (f).

Appropriate disposition

82. Assuming that Fortescue's proposed approach to criterion (b) is accepted, there is no dispute that criterion (b) was satisfied in the present case.

83. As to criterion (f) and the residual discretion (if any), neither the Tribunal nor the Full Court identified any matter that was properly within the scope of criterion (f) or the discretion (if it existed) which was even arguably adverse to declaration.

84. Accordingly, if Fortescue succeeds on all of the arguments above, the correct result is that there was no basis in law for the Tribunal to set aside or vary the Minister's decisions.

85. If Fortescue's submissions on (f) or the residual discretion are not accepted, then it would be necessary to remit the Hamersley matter (M155 of 2011) to the Tribunal, in light of the Full Court's conclusion as to procedural fairness. The Robe declaration, as varied by the Tribunal below, would be reinstated.

Part VII: Applicable provisions

86. See Annexure "B" hereto.

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[19] (1986) 162 CLR 24 at 39-42.

[20] *Ward v Williams* (1955) 92 CLR 496 at 508 per Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ.

[21] *Sydney Airports (No 1)* at [223]; *Virgin Blue* at [611]-[612].

Part VIII: Orders sought

87. See Notices of Appeal filed 11 November 2011 in each of M155, M156 and M157 of 2011.

Dated: 25 November 2011

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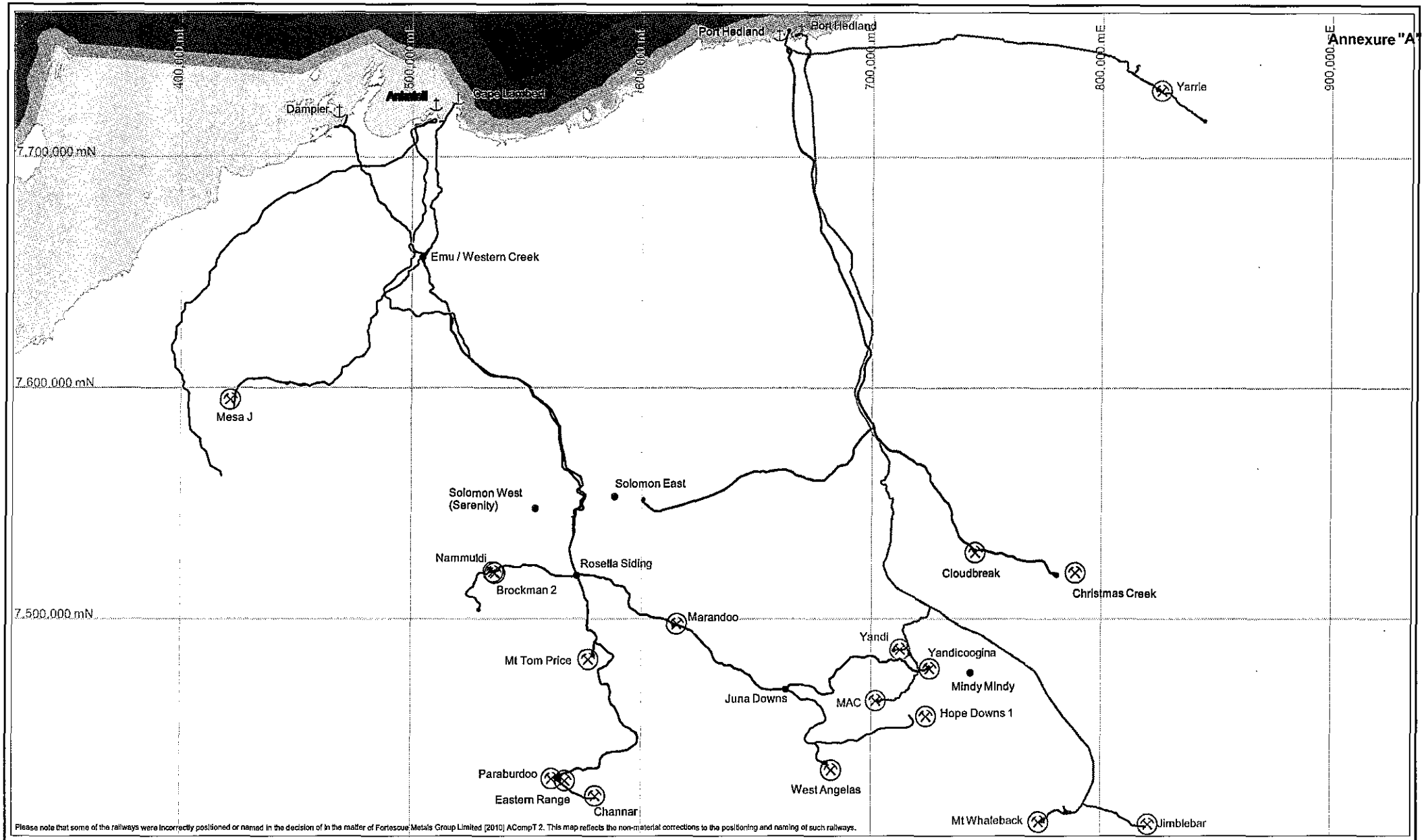
Annexure "A"



Please note that some of the railways were incorrectly positioned or named in the decision of In the matter of Fortescue Metals Group Limited [2010] ACompT 2. This map reflects the non-material corrections to the positioning and naming of such railways.

Location Map

Rio Tinto
- Mine
- Port
- Hamersley Line
- Robe Line
- Hamersley Line Spurs (not the subject of application)

BHPB
- Mine
- Port
- Rail

FMG
- Mine
- Deposit
- Port
- Rail - Cloudbreak and Kennedy
- Rail - Solomon, called Kennedy by the Tribunal
- Rail - Dixon

API
- Rail - Aquila

N

0 20 40 60
Kilometres

Fortescue Metals Group Ltd

Central Pilbara Railways

Author: J. Tapp	Date: 22/06/2011
Drawn By: DN/FH	Revision: 2
Dwg No: 109_MP_GN_0010.1	Report No:
Projection: MGA Zone 50 (GDA 94)	Scale: 1:1,500,000

Annexure "B"

Applicable provisions of the *Trade Practices Act 1974* (Cth) as at 30 June 2010

Annexed to this Annexure "B" is a copy of relevant amending, repealing and transitional provisions from the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth). The *Trade Practices Amendment (Infrastructure Access) Act 2010* (*Cth*) amended the following applicable provisions with effect from 14 July 2010: sections 44F, 44G, 44GA, 44H, 44K, 44V, 44W and 44ZZOA.

The applicable provisions, as amended by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth), are still in force at the date of making the appellants' submissions.

The applicable provisions as they existed at the relevant date (30 June 2010) were as follows:

44AA Objects of Part

The objects of this Part are to:

(a) 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

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

44B Definitions

In this Part, unless the contrary intention appears:

...

service means a service provided by means of a facility and includes:

(a) the use of an infrastructure facility such as a road or railway line;

(b) handling or transporting things such as goods or people;

(c) a communications service or similar service;

but does not include:

(d) the supply of goods; or

(e) the use of intellectual property; or

(f) the use of a production process;

except to the extent that it is an integral but subsidiary part of the service.

...

44F Person may request recommendation

(1) The designated Minister, or any other person, may make a written application to the Council asking the Council to recommend that a particular service be declared.

(2) After receiving the application, the Council:

(a) must tell the provider of the service that the Council has received the application, unless the provider is the applicant; and

(b) must, after having regard to the objects of this Part, recommend to the designated Minister:

(i) that the service be declared; or

(ii) that the service not be declared.

(3) If the applicant is a person other than the designated Minister, the Council may recommend that the service not be declared if the Council thinks that the application was not made in good faith. This subsection does not limit the grounds on which the Council may decide to recommend that the service not be declared.

(4) In deciding what recommendation to make, the Council must consider whether it would be economical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the Council may decide to recommend that the service be declared or not be declared.

(5) The applicant may withdraw the application at any time before the Council makes a recommendation relating to it.

44G Limits on the Council recommending declaration of a service

(1) The Council cannot recommend declaration of a service that is the subject of an access undertaking in operation under Division 6.

(1A) While a decision of the Commission is in force under subsection 44PA(3) approving a tender process, for the construction and operation of a facility, as a competitive tender process, the Council cannot recommend declaration of any service provided by means of the facility that was specified under paragraph 44PA(2)(a).

(2) The Council cannot recommend that a service be declared unless it is satisfied of all of the following matters:

(a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;

(b) that it would be uneconomical for anyone to develop another facility to provide the service;

(c) that the facility is of national significance, having regard to:

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy;

(d) that access to the service can be provided without undue risk to human health or safety;

(e) that access to the service is not already the subject of an effective access regime;

(f) that access (or increased access) to the service would not be contrary to the public interest.

(3) In deciding whether an access regime established by a State or Territory that is a party to the Competition Principles Agreement is an effective access regime, the Council:

(a) must, subject to subsection (5), apply the relevant principles set out in that agreement; and

(aa) must have regard to the objects of this Part; and

(b) must, subject to section 44DA, not consider any other matters.

(4) If there is in force a decision of the Commonwealth Minister under section 44N that a regime established by a State or Territory for access to the service is an effective access regime, the Council must follow that decision, unless the Council believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement.

(5) In deciding whether a regime is an effective access regime, the Council must disregard Chapter 5 of a National Gas Law.

(6) The Council cannot recommend declaration of a service provided by means of a pipeline (within the meaning of a National Gas Law) if:

(a) a 15-year no-coverage determination is in force under the National Gas Law in respect of the pipeline; or

(b) a price regulation exemption is in force under the National Gas Law in respect of the pipeline.

44GA Target time limits on Council recommendation

(1) The Council must use its best endeavours to make a recommendation on an application under section 44F within:

(a) the period (the standard period) of 4 months beginning on the day it received the application; or

(b) if the standard period is extended—that period as extended.

Extensions

(2) If the Council is unable to make a recommendation within the standard period, or that period as extended, it must, by notice in writing, extend the standard period by a specified period.

(3) The Council must give a copy of the notice to:

(a) the applicant; and

(b) if the applicant is not the provider of the service—the provider.

Multiple extensions

(4) The Council may extend the standard period more than once.

Publication

(5) If the Council extends the standard period, it must publish a notice in a national newspaper:

(a) stating that it has done so; and

(b) specifying the day by which it must now use its best endeavours to make a recommendation on the application.

44H Designated Minister may declare a service

(1) On receiving a declaration recommendation, the designated Minister must either declare the service or decide not to declare it.

(1A) The designated Minister must have regard to the objects of this Part in making his or her decision.

(2) In deciding whether to declare the service or not, the designated Minister must consider whether it would be economical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the designated Minister may make a decision whether to declare the service or not.

(3) The designated Minister cannot declare a service that is the subject of an access undertaking in operation under Division 6.

(3A) While a decision of the Commission is in force under subsection 44PA(3) approving a tender process, for the construction and operation of a facility, as a competitive tender process, the designated Minister cannot declare any service provided by means of the facility that was specified under paragraph 44PA(2)(a).

(4) The designated Minister cannot declare a service unless he or she is satisfied of all of the following matters:

(a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;

(b) that it would be uneconomical for anyone to develop another facility to provide the service;

(c) that the facility is of national significance, having regard to:

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy;

(d) that access to the service can be provided without undue risk to human health or safety;

(e) that access to the service is not already the subject of an effective access regime;

(f) that access (or increased access) to the service would not be contrary to the public interest.

(5) In deciding whether an access regime established by a State or Territory that is a party to the Competition Principles Agreement is an effective access regime, the designated Minister:

(a) must, subject to subsection (6A), apply the relevant principles set out in that agreement; and

(aa) must have regard to the objects of this Part; and

(b) must, subject to section 44DA, not consider any other matters.

(6) If there is in force a decision of the Commonwealth Minister under section 44N that a regime established by a State or Territory for access to the service is an effective access regime, the designated Minister must follow that decision, unless the designated Minister believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement.

(6A) In deciding whether a regime is an effective access regime, the designated Minister must disregard Chapter 5 of a National Gas Law.

(6B) The designated Minister cannot declare a service provided by means of a pipeline (within the meaning of a National Gas Law) if:

(a) a 15-year no-coverage determination is in force under the National Gas Law in respect of the pipeline; or

(b) a price regulation exemption is in force under the National Gas Law in respect of the pipeline.

(8) If the designated Minister declares the service, the declaration must specify the expiry date of the declaration.

(9) If the designated Minister does not publish under section 44HA his or her decision on the declaration recommendation within 60 days after receiving the declaration recommendation, the designated Minister is taken, at the end of that 60-day period, to have decided not to declare the service and to have published that decision not to declare the service.

44K Review of declaration

(1) If the designated Minister declares a service, the provider may apply in writing to the Tribunal for review of the declaration.

(2) If the designated Minister decides not to declare a service, an application in writing for review of the designated Minister's decision may be made by the person who applied for the declaration recommendation.

(3) An application for review must be made within 21 days after publication of the designated Minister's decision.

(4) The review by the Tribunal is a re-consideration of the matter.

(5) For the purposes of the review, the Tribunal has the same powers as the designated Minister.

(6) The member of the Tribunal presiding at the review may require the Council to give information and other assistance and to make reports, as specified by the member for the purposes of the review.

(7) If the designated Minister declared the service, the Tribunal may affirm, vary or set aside the declaration.

(8) If the designated Minister decided not to declare the service, the Tribunal may either:

(a) affirm the designated Minister's decision; or

(b) set aside the designated Minister's decision and declare the service in question.

(9) A declaration, or varied declaration, made by the Tribunal is to be taken to be a declaration by the designated Minister for all purposes of this Part (except this section).

44S Notification of access disputes

(1) If a third party is unable to agree with the provider on one or more aspects of access to a declared service, either the provider or the third party may notify the

Commission in writing that an access dispute exists, but only to the extent that those aspects of access are not the subject of an access undertaking that is in operation in relation to the service.

(2) On receiving the notification, the Commission must give notice in writing of the access dispute to:

(a) the provider, if the third party notified the access dispute;

(b) the third party, if the provider notified the access dispute;

(c) any other person whom the Commission thinks might want to become a party to the arbitration.

44V Determination by Commission

(1) Unless it terminates the arbitration under section 44Y or 44ZZCB, the Commission:

(a) must make a written final determination; and

(b) may make a written interim determination;

on access by the third party to the service.

(2) A determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute. By way of example, the determination may:

(a) require the provider to provide access to the service by the third party;

(b) require the third party to accept, and pay for, access to the service;

(c) specify the terms and conditions of the third party's access to the service;

(d) require the provider to extend the facility;

(da) require the provider to permit interconnection to the facility by the third party;

(e) specify the extent to which the determination overrides an earlier determination relating to access to the service by the third party.

(3) A determination does not have to require the provider to provide access to the service by the third party.

(4) Before making a determination, the Commission must give a draft determination to the parties.

(5) When the Commission makes a determination, it must give the parties to the arbitration its reasons for making the determination.

(6) A determination is not a legislative instrument for the purposes of the Legislative Instruments Act 2003.

44W Restrictions on access determinations

(1) The Commission must not make a determination that would have any of the following effects:

(a) preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified;

(b) preventing a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet the person's actual requirements;

(c) depriving any person of a protected contractual right;

(d) resulting in the third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility, without the consent of the provider;

(e) requiring the provider to bear some or all of the costs of extending the facility or maintaining extensions of the facility;

(f) requiring the provider to bear some or all of the costs of interconnections to the facility or maintaining interconnections to the facility.

(2) Paragraphs (1)(a) and (b) do not apply in relation to the requirements and rights of the third party and the provider when the Commission is making a determination in arbitration of an access dispute relating to an earlier determination of an access dispute between the third party and the provider.

(3) A determination is of no effect if it is made in contravention of subsection (1).

(4) If the Commission makes a determination that has the effect of depriving a person (the second person) of a pre-notification right to require the provider to supply the service to the second person, the determination must also require the third party:

(a) to pay to the second person such amount (if any) as the Commission considers is fair compensation for the deprivation; and

(b) to reimburse the provider and the Commonwealth for any compensation that the provider or the Commonwealth agrees, or is required by a court order, to pay to the second party as compensation for the deprivation.

(5) In this section:

existing user means a person (including the provider) who was using the service at the time when the dispute was notified.

pre-notification right means a right under a contract, or under a determination, that was in force at the time when the dispute was notified.

protected contractual right means a right under a contract that was in force at the beginning of 30 March 1995.

44X Matters that the Commission must take into account

Final determinations

(1) The Commission must take the following matters into account in making a final determination:

(aa) the objects of this Part;

(a) the legitimate business interests of the provider, and the provider's investment in the facility;

(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);

(c) the interests of all persons who have rights to use the service;

(d) the direct costs of providing access to the service;

(e) the value to the provider of extensions whose cost is borne by someone else;

(ea) the value to the provider of interconnections to the facility whose cost is borne by someone else;

(f) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(g) the economically efficient operation of the facility;

(h) the pricing principles specified in section 44ZZCA.

(2) The Commission may take into account any other matters that it thinks are relevant.

Interim determinations

(3) The Commission may take the following matters into account in making an interim determination:

(a) a matter referred to in subsection (1);

(b) any other matter it considers relevant.

(4) In making an interim determination, the Commission does not have a duty to consider whether to take into account a matter referred to in subsection (1).

44ZZCA Pricing principles for access disputes and access undertakings or codes

The pricing principles relating to the price of access to a service are:

(a) that regulated access prices should:

(i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and

(ii) include a return on investment commensurate with the regulatory and commercial risks involved; and

(b) that the access price structures should:

(i) allow multi-part pricing and price discrimination when it aids efficiency; and

(ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

(c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

44ZZN Compensation for acquisition of property

(1) If:

(a) a determination would result in an acquisition of property; and

(b) the determination would not be valid, apart from this section, because a particular person has not been sufficiently compensated;

the Commonwealth must pay that person:

(c) a reasonable amount of compensation agreed on between the person and the Commonwealth; or

(d) failing agreement—a reasonable amount of compensation determined by a court of competent jurisdiction.

(2) In assessing compensation payable in a proceeding begun under this section, the following must be taken into account if they arise out of the same event or transaction:

(a) any damages or compensation recovered, or other remedy, in a proceeding begun otherwise than under this section;

(b) compensation awarded under a determination.

(3) In this section, acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

44ZZOA Target time limits for Tribunal decisions

(1) The Tribunal must use its best endeavours to make a decision on a review under this Part within:

(a) the period (the standard period) of 4 months beginning on the day it received the application for review; or

(b) if the standard period is extended—that period as extended.

Extensions

(2) 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.

Multiple extensions

(3) The Tribunal may extend the standard period more than once.

Publication

(4) If the Tribunal extends the standard period, it must publish a notice in a national newspaper:

(a) stating that it has done so; and

(b) specifying the day by which it must now use its best endeavours to make a decision on the review.

Trade Practices Amendment (Infrastructure Access) Act 2010

No. 102, 2010

An Act to amend the *Trade Practices Act 1974*, and for related purposes

Note: An electronic version of this Act is available in ComLaw (http://www.comlaw.gov.au/)

Contents

Trade Practices Amendment (Infrastructure Access) Act 2010

No. 102, 2010

An Act to amend the *Trade Practices Act 1974*, and for related purposes

[*Assented to 13 July 2010*]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Trade Practices Amendment (Infrastructure Access) Act 2010*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information

Column 1	Column 2	Column 3
Provision(s)	**Commencement**	**Date/Details**
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	13 July 2010
2. Schedules 1 to 4	The day after this Act receives the Royal Assent.	14 July 2010
3. Schedule 5, items 1 to 11	The day after this Act receives the Royal Assent.	14 July 2010
4. Schedule 5, item 12	Immediately after the commencement of the provision(s) covered by table item 3.	14 July 2010
5. Schedule 5, items 13 to 25	The day after this Act receives the Royal Assent.	14 July 2010

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

(2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Binding time limits and limited merits review

Part 1—Amendments

Trade Practices Act 1974

1 Subparagraph 44F(2)(b)(i)

After "declared", insert ", with the expiry date specified in the recommendation".

2 Subsection 44F(2) (note 1)

Omit "target".

3 Subsection 44F(2) (note 2)

Repeal the note, substitute:

Note 2: The Council may request information and invite public submissions on the application: see sections 44FA and 44GB.

4 After section 44F

Insert:

44FA Council may request information

(1) The Council may give a person a written notice requesting the person give to the Council, within a specified period, information of the kind specified in the notice that the Council considers may be relevant to deciding what recommendation to make on an application under section 44F.

(2) The Council must:

(a) give a copy of the notice to:

(i) if the person is not the applicant—the applicant; and

(ii) if the person is not the provider of the service—the provider; and

(b) publish, by electronic or other means, the notice.

(3) In deciding what recommendation to make on the application, the Council:

(a) must have regard to any information given in compliance with a notice under subsection (1) within the specified period; and

(b) may disregard any information of the kind specified in the notice that is given after the specified period has ended.

5 Section 44GA

Repeal the section, substitute:

44GA Time limit for Council recommendations

Council to make recommendation within the consideration period

(1) The Council must make a recommendation on an application under section 44F within the consideration period.

(2) The consideration period is a period of 180 days (the ***expected period***), starting at the start of the day the application is received, unless the consideration period is extended under subsection (7).

Stopping the clock

(3) In working out the expected period in relation to a recommendation on an application under section 44F, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:

(a) starting on the day referred to in column 2 of the item; and

(b) ending on the day referred to in column 3 of the item.

Stopping the clock

Item	Column 1 Situation	Column 2 Start day	Column 3 End day
1	An agreement is made in relation to the application under subsection (5)	The first day of the period specified in the agreement	The last day of the period specified in the agreement

Stopping the clock			
Item	**Column 1** **Situation**	**Column 2** **Start day**	**Column 3** **End day**
2	A notice is given under subsection 44FA(1) requesting information in relation to the application	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information

(4) Despite subsection (3):

(a) do not disregard any day more than once; and

(b) the total period that is disregarded under that subsection must not exceed 60 days.

Stopping the clock by agreement

(5) The Council, the applicant and the provider of the service (if the provider is not the applicant) may agree in writing that a specified period is to be disregarded in working out the expected period.

(6) The Council must publish, by electronic or other means, the agreement.

Council may extend time for making recommendation

(7) If the Council is unable to make a recommendation within the consideration period (whether it is the expected period or the consideration period as previously extended under this subsection), it must, by notice in writing to the designated Minister, extend the consideration period by a specified period.

(8) The notice must:

(a) specify when the Council must now make a recommendation on the application; and

(b) include a statement explaining why the Council has been unable to make a decision on the recommendation within the consideration period.

(9) The Council must give a copy of the notice to:

(a) the applicant; and

(b) if the applicant is not the provider of the service—the provider.

Publication

(10) If the Council extends the consideration period under subsection (7), it must publish a notice in a national newspaper:
(a) stating that it has done so; and
(b) specifying the day by which it must now make a recommendation on the application.

Failure to comply with time limit does not affect validity

(11) Failure by the Council to comply with a time limit set in this section does not affect the validity of a recommendation made under this section.

6 Subsection 44GB(3)

Repeal the subsection, substitute:

Consideration of submissions

(3) Subject to subsection (6), in deciding what recommendation to make on the application, the Council:
(a) must have regard to any submission made on or before the day specified in the notice; and
(b) may disregard any submission made after the day specified in the notice.

8 Subsection 44J(3) (note)

Repeal the note.

9 At the end of section 44J

Add:

(7) If the designated Minister does not publish under subsection (4) his or her decision on the revocation recommendation within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day, the designated Minister is taken, immediately after the end of that 60-day period:
(a) to have made a decision that the declaration be revoked; and

(b) to have published that decision in accordance with this section.

10 Section 44JA

Repeal the section.

11 At the end of subsection 44K(4)

Add "based on the information, reports and things referred to in section 44ZZOAA".

12 Subsection 44K(4) (note)

Repeal the note, substitute:

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).

13 Subsection 44K(6)

Repeal the subsection, substitute:

(6) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review.

(6A) Without limiting subsection (6), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(6B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) the provider of the service; and

(iii) the person who applied for the declaration recommendation; and

(iv) any other person who has been made a party to the proceedings for review by the Tribunal; and

(b) publish, by electronic or other means, the notice.

14 At the end of subsection 44L(3)

Add "based on the information, reports and things referred to in section 44ZZOAA".

(ii) any information given to the Tribunal in accordance with a notice given under subsection 44ZZOAAA(5); and

(iii) any thing done as mentioned in subsection 44K(6), 44L(5), 44LJ(5), 44LK(5), 44O(5), 44PG(5), 44PH(5), 44ZP(5), 44ZX(5) or 44ZZBF(5); and

(iv) any information or report given to the Tribunal in relation to the review under subsection 44K(6A), 44L(5A), 44LJ(6), 44LK(6), 44O(5A), 44PG(5A), 44PH(5A), 44ZP(5A), 44ZX(5A) or 44ZZBF(5A) within the specified period; and

(b) may disregard:

(i) any information given to the Tribunal in response to a notice given under subsection 44ZZOAAA(5) after the period specified in the notice has ended; and

(ii) any information or report of the kind specified in a notice under subsection 44K(6A), 44L(5A), 44LJ(6), 44LK(6), 44O(5A), 44PG(5A), 44PH(5A), 44ZP(5A), 44ZX(5A) or 44ZZBF(5A) that is given to the Tribunal after the specified period has ended.

71 Section 44ZZOA

Repeal the section, substitute:

44ZZOA Time limit for Tribunal decisions

(1) The Tribunal must make a decision on a review under this Part within the consideration period.

(2) The consideration period is a period of 180 days (the ***expected period***), starting at the start of the day the application for review is received, unless the consideration period is extended under subsection (7).

Stopping the clock

(3) In working out the expected period in relation to an application for review, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:

(a) starting on the day referred to in column 2 of the item; and

(b) ending on the day referred to in column 3 of the item.

Stopping the clock			
Item	**Column 1** **Situation**	**Column 2** **Start day**	**Column 3** **End day**
1	An agreement is made in relation to the application under subsection (5)	The first day of the period specified in the agreement	The last day of the period specified in the agreement
2	A notice is given under subsection 44ZZOAAA(5) requesting information in relation to the decision to which the application relates	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information
3	A notice is given under subsection 44K(6A), 44L(5A), 44LJ(6), 44LK(6), 44O(5A), 44PG(5A), 44PH(5A), 44ZP(5A), 44ZX(5A) or 44ZZBF(5A) requiring information or a report to be given in relation to the review	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information or the report

(4) Despite subsection (3), do not disregard any day more than once.

Stopping the clock by agreement

(5) The following may agree in writing that a specified period is to be disregarded in working out the expected period:
  (a) the Tribunal;
  (b) the person who applied for review;
  (c) if the application is made under section 44K, 44L, 44LJ, 44LK or 44O—the Council;
  (d) if the application is made under section 44PG, 44PH, 44ZP, 44ZX or 44ZZBF—the Commission;
  (e) any other person who has been made a party to the proceedings for review by the Tribunal.

(6) The Tribunal must publish, by electronic or other means, the agreement.

Extension of time for making decision

(7) If the Tribunal is unable to make a decision on an application for review within the consideration period (whether it is the expected period or the consideration period as previously extended under this subsection), it must, by notice in writing to the designated Minister, extend the consideration period by a specified period.

(8) The notice must:
  (a) specify when the Tribunal must now make its decision on the application for review; and
  (b) include a statement explaining why the Tribunal has been unable to make a decision on the review within the consideration period.

(9) The Tribunal must give a copy of the notice to:
  (a) the person who applied for review; and
  (b) if the application for review is made under section 44K, 44L, 44LJ, 44LK or 44O—the Council; and
  (c) if the application for review is made under section 44PG, 44PH, 44ZP, 44ZX or 44ZZBF—the Commission; and
  (d) any other person who has been made a party to the proceedings for review by the Tribunal.

Publication

(10) If the Tribunal extends the consideration period under subsection (7), it must publish a notice in a national newspaper:

(a) stating that it has done so; and

(b) specifying the day by which it must now make a decision on the application for review.

Failure to comply with time limit does not affect validity

(11) Failure by the Tribunal to comply with a time limit set in this section does not affect the validity of a decision made by the Tribunal under this Part.

Part 2—Application of amendments

72 Application of amendments

(1) The amendments made by items 1, 2, 3, 4, 5, 6, 17, 18, 19, 23, 24, 25, 26, 27, 31 and 33 of this Schedule apply in relation to applications made to the Council after the commencement of those items.

(3) The amendments made by items 8, 9 and 10 of this Schedule apply in relation to revocation recommendations made to the designated Minister after the commencement of those items.

(4) The amendments made by items 11, 12, 13, 14, 15, 16, 34, 35, 36, 42, 43, 45, 46, 47, 48, 51, 52, 54, 55, 56, 57, 66, 67, 68, 69, 70 and 71 of this Schedule apply in relation to applications for review made to the Tribunal after the commencement of those items.

(5) The amendments made by items 20, 21, 22, 28, 29, 30 and 32 of this Schedule apply in relation to recommendations received by the Commonwealth Minister after the commencement of those items.

(6) The amendments made by items 37, 38, 39, 40 and 41 of this Schedule apply in relation to applications made to the Commission after the commencement of those items.

(7) The amendments made by items 49 and 50 of this Schedule apply in relation to access disputes notified after the commencement of those items.

(8) The amendments made by items 58, 59, 60, 61, 62, 63, 64 and 65 of this Schedule apply in relation to access undertaking applications and access code applications made to the Commission after the commencement of those items.

Schedule 2—Services that are ineligible to be declared services

Trade Practices Act 1974

1 Section 44B

Insert:

ineligibility recommendation means a recommendation made by the Council under section 44LB.

2 Section 44B

Insert:

proposed facility means a facility that is proposed to be constructed (but the construction of which has not started) that will be:

(a) structurally separate from any existing facility; or

(b) a major extension of an existing facility.

3 Subsection 44D(1)

Omit "(2) or (3)", substitute "(2), (3), (4) or (5)".

4 At the end of section 44D

Add:

(4) In relation to deciding whether a service is ineligible to be a declared service in a case where:

(a) a person who is, or expects to be, the provider of the service is a State or Territory body; and

(b) the State or Territory concerned is a party to the Competition Principles Agreement;

the responsible Minister of the State or Territory is the designated Minister.

(5) In relation to revoking a decision:

(a) that a service is ineligible to be a declared service; and

(b) that was made by the responsible Minister of a State or Territory;

the responsible Minister of that State or Territory is the designated Minister.

5 At the end of section 44G

Add:

(7) The Council cannot recommend that a service be declared if there is in force a decision of the designated Minister under section 44LG that the service is ineligible to be a declared service.

6 After subsection 44H(6B)

Insert:

(6C) The designated Minister cannot declare a service if there is in force a decision of the designated Minister under section 44LG that the service is ineligible to be a declared service.

7 After Division 2 of Part IIIA

Insert:

Division 2AA—Services that are ineligible to be declared

Subdivision A—Scope of Division

44LA Constitutional limits on operation of this Division

This Division does not apply in relation to a service unless:

(a) the person who is, or expects to be, the provider of the service is a corporation (or a partnership or joint venture consisting wholly of corporations); or

(b) access to the service is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

Schedule 5—Other amendments

Part 1—Amendments

Trade Practices Act 1974

1 After section 29L

Insert:

29LA Resolutions without meetings

(1) If all Councillors (other than those that must not sign a document because of subsection (3)) sign a document containing a statement that they are in favour of a resolution in terms set out in the document, then a resolution in those terms is taken to have been passed at a duly constituted meeting of the Council held on the day the document was signed, or, if the members sign the document on different days, on the last of those days.

(2) For the purposes of subsection (1), 2 or more separate documents containing statements in identical terms each of which is signed by one or more Councillors are together taken to constitute one document containing a statement in those terms signed by those Councillors on the respective days on which they signed the separate documents.

(3) A Councillor must not sign a document containing a statement in favour of a resolution if the resolution concerns a matter in which the Councillor has any pecuniary interest, being an interest that could conflict with the proper performance of the Councillor's functions in relation to any matter.

2 Paragraphs 44DA(1)(a) and (b)

Repeal the paragraphs.

3 Paragraph 44DA(1)(c)

Omit "Agreement", substitute "Competition Principles Agreement".

4 At the end of section 44F

Add:

(6) The applicant may request, in writing, the Council to vary the application at any time before the Council makes a recommendation relating to it.

(7) If a request is made under subsection (6), the Council must decide to:
  (a) make the variation; or
  (b) reject the variation.

(8) An instrument making a decision under subsection (7) is not a legislative instrument.

(9) The Council may reject the variation if it is satisfied that the requested variation is of a kind, or the request for the variation is made at a time or in a manner, that:
  (a) would unduly prejudice the provider (if the provider is not the applicant) or anyone else the Council considers has a material interest in the application; or
  (b) would unduly delay the process for considering the application.

5 Paragraph 44G(2)(d)

Repeal the paragraph.

6 Paragraph 44G(2)(e)

Repeal the paragraph, substitute:

(e) that access to the service:
  (i) is not already the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or
  (ii) is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), but the Council believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement;

7 Subsections 44G(3), (4) and (5)

Repeal the subsections.

8 Paragraph 44H(4)(d)

Repeal the paragraph.

9 Paragraph 44H(4)(e)

Repeal the paragraph, substitute:

(e) that access to the service:

(i) is not already the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or

(ii) is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), but the designated Minister believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement;

10 Subsections 44H(5), (6) and (6A)

Repeal the subsections.

11 Subsection 44I(2)

Repeal the subsection, substitute:

(2) If:

(a) an application for review of a declaration is made within 21 days after the day the declaration is published; and

(b) the Tribunal makes an order under section 44KA staying the operation of the declaration;

the declaration does not begin to operate until the order is no longer of effect under subsection 44KA(6) or the Tribunal makes a decision on the review to affirm the declaration, whichever is the earlier.

12 At the end of subsection 44K(6)

Add "(including for the purposes of deciding whether to make an order under section 44KA)".

13 After section 44K

Insert:

44KA Tribunal may stay operation of declaration

(1) Subject to this section, an application for review of a declaration under subsection 44K(1) does not:
  (a) affect the operation of the declaration; or
  (b) prevent the taking of steps in reliance on the declaration.

(2) On application by a person who has been made a party to the proceedings for review of a declaration, the Tribunal may:
  (a) make an order staying, or otherwise affecting the operation or the taking of steps in reliance on, the declaration if the Tribunal considers that:
    (i) it is desirable to make the order after taking into account the interests of any person who may be affected by the review; and
    (ii) the order is appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review; or
  (b) make an order varying or revoking an order made under paragraph (a) (including an order that has previously been varied on one or more occasions under this paragraph).

(3) Subject to subsection (4), the Tribunal must not:
  (a) make an order under subsection (2) unless the Council has been given a reasonable opportunity to make a submission to the Tribunal in relation to the matter; or
  (b) make an order varying or revoking an order in force under paragraph (2)(a) (including an order that has previously been varied on one or more occasions under paragraph (2)(b)) unless:
    (i) the Council; and
    (ii) the person who requested the making of the order under paragraph (2)(a); and
    (iii) if the order under paragraph (2)(a) has previously been varied by an order or orders under paragraph (2)(b)—

the person or persons who requested the making of the last-mentioned order or orders;

have been given a reasonable opportunity to make submissions to the Tribunal in relation to the matter.

(4) Subsection (3) does not prohibit the Tribunal from making an order without giving to a person referred to in that subsection a reasonable opportunity to make a submission to the Tribunal in relation to a matter if the Tribunal is satisfied that, by reason of the urgency of the case or otherwise, it is not practicable to give that person such an opportunity.

(5) If an order is made under subsection (3) without giving the Council a reasonable opportunity to make a submission to the Tribunal in relation to a matter, the order does not come into operation until a notice setting out the terms of the order is given to the Council.

(6) An order in force under paragraph (2)(a) (including an order that has previously been varied on one or more occasions under paragraph (2)(b)):

(a) is subject to such conditions as are specified in the order; and

(b) has effect until:

(i) if a period for the operation of the order is specified in the order—the expiration of that period or, if the application for review is decided by the Tribunal before the expiration of that period, the decision of the Tribunal on the application for review comes into operation; or

(ii) if no period is so specified—the decision of the Tribunal on the application for review comes into operation.

44KB Tribunal may order costs be awarded

(1) If the Tribunal is satisfied that it is appropriate to do so, the Tribunal may order that a person who has been made a party to proceedings for a review of a declaration under section 44K pay all or a specified part of the costs of another person who has been made a party to the proceedings.

(2) However, the Tribunal must not make an order requiring the designated Minister to pay some or all of the costs of another party to proceedings unless the Tribunal considers that the designated

Minister's conduct in the proceedings was engaged in without due regard to:

(a) the costs that would be incurred by the other party to the proceedings as a result of that conduct; or

(b) the time required by the Tribunal to make a decision on the review as a result of that conduct; or

(c) the time required by the other party to prepare their case for the purposes of the review as a result of that conduct; or

(d) the submissions or arguments made during the proceedings to the Tribunal by the other party or parties to the proceedings or by the Council.

(3) If the Tribunal makes an order under subsection (1), it may make further orders that it considers appropriate in relation to the assessment or taxation of the costs.

(4) The regulations may make provision for and in relation to fees payable for the assessment or taxation of costs ordered by the Tribunal to be paid.

(5) If a party (the ***first party***) is ordered to pay some or all of the costs of another party under subsection (1), the amount of the costs may be recovered in the Federal Court as a debt due by the first party to the other party.

14 Subsection 44V(1)

Omit "or 44ZZCB", substitute ", 44YA, 44ZZCB or 44ZZCBA".

15 After subsection 44W(4)

Insert:

(4A) If an application for review of a declaration of a service has been made under subsection 44K(1), the Commission must not make a determination in relation to the service until the Tribunal has made its decision on the review.

16 At the end of Subdivision C of Division 3 of Part IIIA

Add:

Part 2—Application of amendments

20 Application—resolutions without meetings

The amendment made by item 1 of this Schedule applies in relation to documents signed by all Councillors (other than those that must not sign a document because of subsection 29LA(3) of the *Trade Practices Act 1974* as inserted by item 1 of this Schedule) after the commencement of that item.

21 Application of effective access regime criterion amendments

(1) The amendments made by items 2 (to the extent that it repeals paragraph 44DA(1)(a) of the *Trade Practices Act 1974*), 6 and 7 of this Schedule apply in relation to applications received after the commencement of those items.

(2) The amendments made by items 2 (to the extent that it repeals paragraph 44DA(1)(b) of the *Trade Practices Act 1974*), 9 and 10 of this Schedule apply in relation to declaration recommendations received after the commencement of those items (where the applications for declaration recommendations were also made after commencement).

22 Application of health and safety criterion amendments

(1) The amendment made by item 5 of this Schedule applies in relation to applications made after the commencement of that item.

(2) The amendment made by item 8 of this Schedule applies in relation to declaration recommendations received after the commencement of that item (where the applications for declaration recommendations were also made after commencement).

23 Application—variations to declaration applications

The amendment made by item 4 of this Schedule applies in relation to applications made to the Council after the commencement of that item.

24 Application—stay of declarations and costs

The amendments made by items 11, 12, 13 and 15 of this Schedule apply in relation to applications for review made to the Tribunal after the commencement of those items.

25 Application—arbitration while review underway

The amendments made by items 14, 16, 18 and 19 of this Schedule apply in relation to access disputes notified after the commencement of those items (where applications for review were also made after commencement).

[*Minister's second reading speech made in—*
House of Representatives on 29 October 2009
Senate on 2 December 2009]

(215/09)