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**

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APPELLANTS' SUPPLEMENTARY SUBMISSIONS IN REPLY

HIGH COURT OF AUSTRALIA
FILED
13 APR 2012
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Part I: Certification for internet publication

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

Part II: Reasons why leave to amend should be granted

2. The main arguments put against allowing an amendment to the notice of appeal are:

   (a) the point is of no importance beyond this case due to the 2010 amendments;

   (b) the point should have been taken earlier; and

   (c) if the matter is remitted, it can be left to the Tribunal to sort out later.

3. The first ground of opposition misstates the significance of the point. As seen in paragraphs 8-10, 13 and 29 below, even after the 2010 amendments there remains a fundamental question as to the nature of the task of the Minister and the Tribunal: is the Minister entitled in law to ignore the NCC recommendation; and is the Tribunal entitled in law to ignore the Minister's decision on the NCC recommendation? These questions will affect all present and future decisions by the Minister and reviews by the Tribunal.

4. As to the second ground, these proceedings are not private *inter partes* litigation. They involve statutory interpretation and constitutional issues with an impact upon the public: *Coulton v Holcombe* (1986) 162 CLR 1 at 9-11. Objection was taken before the Tribunal (while on a different ground) to the reception of the vast amounts of new material ultimately received, and the legal points taken as to the construction of sec 44K and the effect of Chapter III are not ones on which any evidence could have been called below (nor has Rio or BHP sought to identify any such evidence.) Contrary to Rio [4], had the Tribunal conducted its task in accordance with the Act, it would most likely have completed its determination over 15 months before it actually did (Fortescue [37]), and the irregularly provided "evidence" as at March 2010 that ultimately affected the Tribunal's deliberation could not and would not have existed.

5. As to the third ground, it is unsatisfactory to suggest that if the appellants otherwise succeed and there is a remitter, that the Court should leave undefined the principles on which remitter would occur. BHP correctly concedes as much: BHP [9], [13]. For example, whether the Tribunal is entitled to conduct a free-ranging inquiry into whether it thinks the Dixon line will or should be built absent declaration goes to the heart of any remitter and is critically affected by the issues raised here.

Part III: Submissions as to the merits of the subject matter of the amendments

Arguments of the respondents and intervener

6. In summary form, Rio, BHP and the NCC between them assert that the statutory tasks under secs 44H and 44K have the following features:

   (a) at the stage before the Minister under sec 44H, an NCC recommendation must exist but the Minister is not bound to consider it, nor is it the subject of decision;

(b) the task before the Tribunal under sec 44K is to conduct a re-hearing *de novo* of the question whether the service ought to be declared; in carrying out this task, the Tribunal must satisfy itself of the criteria in sec 44H(4); and critically the Tribunal is in no way bound to conduct an analysis of the Minister's decision, his/her reasons, or the NCC recommendation on which the decision was based;

(c) generally there is no limit on the material that the Tribunal can receive in satisfying itself of the preferable decision; indeed, if circumstances change, including over a period beyond the statutory time limit, the Tribunal can and should continue to receive further material on an ongoing basis before it reaches its final decision.

7. The main planks relied upon to reach these conclusions will be identified and then answered:

(a) a fairly summary assertion that the NCC recommendation plays no statutory role before the Minister other than to trigger his or her power to declare or not to declare under sec 44H;

(b) "re-consideration of the matter" under sec 44K(4) necessitates a rehearing *de novo*;

(c) the conferral upon the Tribunal of the same powers as the Minister by sec 44K(5) carries with it the incidental powers of the Minister, such that the Tribunal can obtain any material it likes in any way it sees fit;

(d) the review by the Tribunal has the character of an *inter partes* proceeding with the applicant for declaration and the service provider having the status of parties locked in the resolution of a controversy, and having rights to adduce evidence;

(e) the power of the Tribunal under sec 44K(4) effectively has the same width as a re-hearing under sec 101 of the Act and indeed a review under sec 43 of the AAT Act;

(f) the absence of express procedures for the transmission of "the record" indicates the irrelevance of the recommendation of the NCC and the decision of the Minister to the task of the Tribunal;

(g) Part 2 of Div IX applies of its own force to a sec 44K review; and sec 102A does not point against this result;

(h) reg 22 by reason of its location, background, history and general language applies to a review under sec 44K;

(i) by reason of (g) and/or (h), even if sec 44K does not authorise a rehearing *de novo*, that result is otherwise achieved;

(j) the 2010 amendments proceeded on an assumption that, prior to then, the task for the Tribunal was a re-hearing *de novo*, and this assumption informs the correct interpretation of the preceding legislation;

(k) there are otherwise undesirable practical consequences if the appellants' arguments are correct.

8. **Task of the Minister.** It is significant that all of the submissions put against the appellants dealt most briefly and in conclusionary form with the statutory task given to the Minister under sec 44H. Their common conclusion, with very little reasoning, is that the existence of the NCC recommendation is a box to be ticked by the Minister but it otherwise in no way constrains or informs the Minister's statutory task. While the Minister may refer to it if desired, the Minister can comply with the law by making a decision without having given it any attention at all, let alone treating it as the central matter which must be considered (Rio [12], NCC [15]). As addressed in chief ([12]-[14]) this ignores the statutory language, which makes clear that the decision is one made "on the declaration recommendation".[1] It also undermines the entire point of secs 44F to 44GC, which is that the application for recommendation will be the subject of detailed expert consideration by the NCC, as a specialist body, addressing each of the criteria that the Minister will have to address, allowing also for a process of public submissions to be made to the NCC. The entirety of that process and reasoned advice becomes an elaborate exercise in futility if one adopts the opponents' contentions. This important point of difference between the parties remains even after the 2010 amendments.

9. **Centrality of the Minister's decision on a declaration recommendation.** Consistently with the point just made about sec 44H, the task for the Tribunal under sec 44K, which is a review of the declaration by way of re-consideration of the matter, requires the Tribunal to give central attention to the actual decision made by the Minister, the reasons for the decision (which must exist save for a deemed refusal), and, because it is a decision "on a declaration recommendation", also to the NCC recommendation as the substratum against which the decision was made. Indeed, in the case of a deemed refusal, the role of the declaration recommendation becomes if possible even more central. What the Tribunal must then review is the correctness of a decision made for reasons not disclosed either to accept or reject the specific advice in the recommendation.[2]

10. Against this view, consistent with their approach to sec 44H itself, those opposing the appellants are really contending that the task of the Tribunal is in no way constrained or informed by the declaration decision, the reasons or the NCC recommendation. Together, they become a matter for optional reference, but the entirety of the Tribunal procedure and decision can lawfully occur in complete disregard of them (Rio [21]). That

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1 Contrary to Rio [13] and BHP [20], sec 44HA was inserted by an Act that also made significant amendments to sec 44H (*Trade Practices Amendment (National Access Regime) Act* 2006 No. 92, 2006, Sch 1, Pt 1, items 19-27), including inserting into sec 44H(9) the words "his or her decision on the declaration recommendation". Both sections refer to the declaration recommendation.

2 Contrary to Rio [26], review of deemed refusals is commonplace: see eg *Freedom of Information Act* 1982 (Cth) sec 15AC, 54Y; *Environmental Planning and Assessment Act* 1979 (NSW) sec 82(1), 97(1)(b). The linguistic differences between sec 44K(1) and (2) (see BHP [19]) reflect the fact that sec 44K(2) must accommodate a deemed refusal.

argument does not sit well with the specific language of sec 44K, as referred to in chief, and in no way accommodates the deliberate choice not to use the language of "re-hearing" (Rio [28]). It also does not sit well with that which has gone before in secs 44F to 44JA. Not only does the whole process of reasoned expert advice after public consultation by the NCC serve no continuing utility, but also the deliberate decision to repose the power of declaration in the Minister is set at naught. As noted in chief, only in rare cases under the Act is a power vested in the Minister as opposed to a regulator such as the ACCC (Fortescue [50]). The opponents do not grapple with why it would be the statutory intention that the exercise of power by the Minister measured against specific criteria upon which there exists the advice of the specialist NCC would be given no role in the exercise of power by the Tribunal other than to be an historical fact. Finally, the Tribunal's powers under sec 44K(7) are to "affirm, vary or set aside the declaration", which can only properly be enlivened by reference to the correctness of the Minister's declaration and are not consonant with making a fresh decision in its place.

11. **"Re-consideration"**. Contrary to Rio [30], the cases in Rio n43 do not support the proposition that "re-consideration" should be read as "re-hearing". The *Esber* case is not in point, because it involved a review under the AAT Act, the language of which does not use "re-consideration". The other three cases concerned the task of a body to which something has been remitted for re-consideration following a finding of error in its process. None involves an Australian statute providing that the task of a reviewing body is a "re-consideration". However, Underwood J's remarks in the *Re Seablest* case ((1997) 6 Tas R 350 at 360) are apposite to the task of a reviewing body as well as the original decision-maker: *" 'Review' and 'reconsideration' do not have fixed meanings. What has to be done on a review or reconsideration will depend upon the statutory context in which the word is used. It may be restricted to a simple testing of the process by which a decision has been reached and an assessment of the correctness of that decision. ... It may mean a de novo examination of all the material upon which the decision is reached."* In the present case, the former is true.

12. For completeness, two further sections in which the word "reconsideration" appears have been located.[3] Each deals with the capacity of the original decision maker, rather than a review body, to "re-consider" their decision; neither appears to be the subject of relevant authority, nor is of real assistance here.

13. **The significance of "the same powers".** The opponents seize upon the Tribunal being conferred with "the same powers" as the Minister, including (it is said) an implied power to seek any information the Minister desires (NCC [18]). The correct position is that sec 44K(5) operates only upon powers expressly conferred upon the Minister under Part IIIA. The ability of the Minister, if desired, to make inquiries such as a site inspection or to rely upon advice from government departments is not a power conferred by Part IIIA and is not transmuted to the Tribunal. Indeed, were sec 44K(5) to be read as purporting

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3 *Radiocommunications Act* 1992 (Cth) sec 289; *Seafarers Rehabilitation and Compensation Act* 1992 (Cth), sec 78.

to confer upon the Tribunal, including a Chapter III judge, all those powers of a Minister flowing from Chapter II of the Constitution, then the constitutional point raised would have very particular bite. No doubt fetters under Part IIIA on the Minister carry over to the Tribunal, but this does not produce the result for which the opponents contend.

14. **Not an *inter partes* proceeding**. Rio and BHP implicitly, and the NCC explicitly at [25], assert that the review before the Tribunal is an *inter partes* proceeding. That submission sits uneasily with reliance upon "the same powers" under sec 44K(5) – is it also said that before the Minister there is an *inter partes* proceeding between the applicant and the service provider? Clearly the statute does not erect any such *inter partes* proceeding before the Minister. No explanation is offered as to why a public interest decision by the Minister against the content of an NCC recommendation is transmuted into an *inter partes* controversy before the Tribunal that is supposed to exercise "the same powers". Further, the NCC submissions are unsatisfactory in failing to identify what role it or its recommendation plays before the Tribunal. It does not explain how it had the power or right to adduce evidence absent a request by the Tribunal under sec 44K(6). It appears however to put the odd proposition that the one piece of conduct which it did engage in under the statutory framework – namely its decision recommendation – has no statutory role before the Minister or the Tribunal other than as an historical fact.

15. **The "record".** Rio's argument about the mechanics of the "record" (Rio [39]) should not be accepted: as set out above, the Minister is obliged to give reasons for his or her conclusion to declare (or to decide not to declare) a service. Those reasons will display the considerations at play and the material relied upon. The NCC recommendation – which the appellants contend must be considered by the Minister but which Rio asserts may be utterly ignored – must be published and must be given to the applicant for declaration and the service provider, subject only to redaction of confidential material (sec 44GC). Rio's suggestion that there might not be a full record for review by the Tribunal is thus a chimera. And if the Tribunal considers that the Minister's reasons require the Tribunal to consider any further material or refers to information that is not sufficiently available to it, it may request the NCC to provide it under sec 44K(6).

16. **"Proceedings"**. The opponents hardly engage with *why* it is they assert that sec 44K reviews are aptly described as "proceedings".[4] Rio's only argument (Rio [54]) – that the Tribunal can only act by conducting a proceeding – must fail: sec 42(1) speaks of a "matter" before the Tribunal, while sec 42(2) speaks of a "proceeding", suggesting the former is broader than the latter.[5] The heading of sec 37 ("particular matters") shows that "proceedings" are a subset of "matters" (noting also the validation provision in sec 38 in cases of error). The clear statutory intent that not all "matters" before the Tribunal constitute "proceedings" also disposes of the argument made in Rio fn 81 relating to the

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4 eg Rio [53] and BHP [48] contradict by way of assertion only.

5 A similar distinction appears in reg 28(3).

regulations. Decisions and reviews may be "matters" before the Tribunal without being "proceedings". For the reasons given below relating to sec 102A, sec 29P also demonstrates that sec 44K reviews are not "proceedings".

17. **Sec 101 and the AAT Act.** The opponents urge that sec 44K re-consideration should be assimilated to a "rehearing" under sec 101 or to a "review" under secs 25-43 of the AAT Act. None of their submissions grapple with the deliberate choice not to use the word "re-hearing" in sec 44K or the important points of distinction with the AAT Act identified and dealt with by the appellants in [32]-[33] in chief.

18. **Sections 90 and 101.** Rio's arguments in respect of the interpretation of sec 101 (Rio [29]) are not correct. In the TPA as originally enacted, the only decision of the Commission that was reviewable by the Tribunal was a decision to grant an authorization under Part VII (which could operate in respect of secs 45, 47 or 50). As today, Part IX contained the mechanism for this review, including providing that it was by way of re-hearing. Contrary to Rio [29], the *Trade Practices Amendment Act* 1977 did not leave sec 101(2) "unaltered;" it repealed and replaced it: see sec 64(b) of the 1977 Act. It did so as part of a series of amendments which vested additional powers of review by the Tribunal of decisions of the Commission, such as review under the new sec 101A of notices issued under the new sec 93(3) (both inserted by the 1977 Act). The use of "re-hearing" was thus deliberate and not, as Rio suggests, some kind of relic.

19. **Sec 102A.** None of the opponents has addressed squarely the separate question raised by the Court. Contrary to Rio [58], the fact that the definition within sec 102A that was inserted in 2006 does not list a review under sec 44K supports the appellants. At the same time as sec 102A, an identical inclusive definition of "proceedings" was added as sec 29P (noted above), and a new sec 170(3)(b) was added, also dealing with the meaning of "proceedings". The failure to include within sec 102A a review under sec 44K (or indeed under a cognate provision, as set out in Fortescue [46]) manifests a continued intention not to apply Part IX to those provisions in Part IIIA. The only exception would be if such reviews (by their very nature) necessarily constituted "proceedings"; but as noted above and in the appellant's supplementary submissions, this is not the case. Even the broader definition of "proceedings" given in sec 170(3)(b) (for the purpose of grants of assistance) still does not include any of the relevant reviews under Part IIIA.

20. **Regulations.** Contrary to Rio [46]-[52], while sec 44ZZP(1) empowers the making of regulations, as a machinery provision it (and regulations under it) cannot confer upon the Tribunal an evidence-gathering power the Tribunal does not already have. In any event, no such regulation has been (or purports to have been) made here. No respondent has demonstrated the existence of a power in the Tribunal to receive new material beyond sec 44K(6). Their assumption is that silence in the Act as to what material may be obtained or considered equates to plenary power to do so; the better view is that such power is only as expressly and specifically conferred.

21. Rio's argument that reg 22 applies to a review under sec 44K is based upon the order of the regulations together with the so-called generality of reg 22 (Rio [49]). One fallacy in that argument is that the regulations are not arranged in an order such that that inference may be drawn. Rather, the regulations appear to be grouped thematically.

22. For example, reg 7 (dealing with sec 44AAF(3)(e)) follows reg 6J (sec 44ZZAA) and precedes reg 7A (dealing with sec 4(1)(c)(ii)), and then regs 7B (dealing with "merits review" under sec 44ZZR(2)) to 7D (dealing with sec 44ZZR(2)). All, however, prescribe certain subject matter for the Act. Similarly, reg 20 deals with secs 101 and 101A and reg 20A deals with secs 44K, 44L, 44O, 44ZX, 152AV and 152CS; but all deal with the required form for various applications for review to the Tribunal.

23. Reg 21 deals with addresses for service and reg 22 with directions as to procedural matters in terms (as noted in Fortescue [68]) that mirror sec 104. Reg 22A deals with evidence of persons not attending the Tribunal. The fact that reg 22B, dealing with participation in reviews, then appears (and, contrary to Rio [49], deals also with sec 44K, 44L, 44ZX, 152AV and 152CE) does not suggest that intervening material must apply to sec 44K. If Rio's argument were correct, one would have to read regs 21 and 22 as only applying to sec 44K (and presumably the other sections dealt with in regs 20 and 22B).

24. The better view is to construe the content of the regulations against the sections of the Act empowering the making of regulations. As shown in Fortescue [68], reg 22 matches verbatim the regulations empowered by sec 104. It also contains matters not empowered by sec 44ZZP but empowered by sec 104 (entitlement to representation in proceedings: reg 22(1)(b)). It is made under sec 104 and not sec 44ZZP, and operates where sec 104 does.

25. In contrast, the only provision in Part IIIA which expressly empowers the Tribunal to receive evidence is in its review (by way of re-arbitration) under sec 44ZP(1) and (3) of access arbitrations, where sec 44ZP(4) picks up sec 44ZF(3) and 44ZH). Unsurprisingly, regs 28B to 28Q make provision for such reviews[6] in terms that reflect sec 44ZZP: compare for example 44ZZP(1)(c) with reg 28J, or 44ZZP(1)(d) with reg 28I. Reg 28Q operates as does sec 44ZQ, to avoid any doubt about the interplay between a re-arbitration and Part IX. Rio's only other submission on the regulations (Rio [50]) is circular, in that it requires the assumption that the sec 44K process is a proceeding.

26. **The role of Part IX.** For its arguments to survive, Rio is driven to suggest that the heading to Part IX – which is part of the Act – is somehow "overtaken" by later legislative change and is "no longer accurate" (Rio [64]). This is a recognition that Rio's interpretation of the interaction between Parts IIIA and IX strains the text of the Act such that parts must be ignored or given no work to do. The better approach is the appellants', in which no such conflict occurs and the Act operates as a harmonious whole: Div 1 of Part IX operates according to its terms, enabled by Div 2, as does Div 3.

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[6] They also make provision for re-arbitrations under sec 152DO, which was repealed in 2002.

Outside of the specific reviews nominated in those operative sections, other sections within the Act may expressly apply parts of Part IX; this occurs in sec 44ZZR.

27. **The 2010 amendments.** Contrary to Rio [40]-[44], NCC [29]-[33], the 2010 amendments do not assist the respondents. The proposition that, prior to those amendments, sec 44K involved a full re-hearing *de novo* conducted upon any new material does not appear to have emerged until late December 2005 (see e.g. *Re Services Sydney Pty Limited* (2005) 227 ALR 140 at [9]; *Virgin Blue Airlines Pty Limited* [2005] ACompT 5 at [13]). In the face of those Tribunal statements, Parliament may have acted upon the assumption that amendments were necessary. As Lord Buckmaster said in *Ormond Investment Co v Betts* (1928) AC 143 (in a speech cited from with approval by Dixon, Evatt and McTiernan JJ in *Elders* at 57 CLR 610 at 626) the first Act was the subject of decision and the "second Act proceeded on the hypothesis that the decision was correct" (at 155).

28. However, that is not the end of the matter: that statement immediately preceded his Lordship's statement (at 156), cited by Dixon, Evatt and McTiernan JJ at 626, that "subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation". As NCC [30] points out, the impetus for what became the 2010 amendments arose with a COAG agreement on 10 February 2006, less than two months after the *Re Services Sydney* and *Virgin Blue* decisions.

29. Contrary to Rio [43]-[44] and NCC [29], even if Parliament incorrectly perceived itself to be narrowing the scope of review in making the amendments, a consideration of their effect as against the appellants' construction leads simply to the results that: it is now made clear beyond argument what are the limitations upon the material the Tribunal may receive; that material gives central although not exclusive weight to the material that was before the decision-maker, which will include the NCC recommendation (sec 44ZZOAAA(3)); and the central function of the Tribunal remains – the appellants contend – a review for correctness of the Minister's decision in the light of such material. While the opponents are not explicit, they hint at the competing position that the Tribunal conducts a rehearing *de novo* against a confined base of material. Accordingly, the nature of the Tribunal's function remains a critical question for resolution irrespective of the 2010 amendments.

30. **"Practical consequences".** The *in terrorem* argument posed by Rio at [65] falls away once it is appreciated that, if the Tribunal properly conducts its task, it will complete its review within a maximum of four months and 21 days from the date of the Minister's decision. The scope for obtaining "current information" differing from that at the time of the Minister's decision is dealt within in sec 44K(6). In any event, the process at issue is only the declaration of the service ("stage one"). A process of negotiation (and if necessary, arbitration) may then follow. The various matters at Rio [66] only go to illustrate the injustice to the appellants from the manner in which the Tribunal misapprehended its task. The material in sub-paragraphs (a) to (d) and (f) stems from matters pre-dating the Minister's decision, and does not comprise new or changed information as at the date of

the Tribunal's decision. The material in sub-paragraph (g) revisits material that the Full Court found was provided to the Tribunal irregularly by Rio (Full Court [133]) and was relied upon by the Tribunal in breach of procedural fairness.

Chapter III of the Constitution

31. **Task of the Tribunal.** Rio's submissions assume their conclusion (that the Tribunal simply decides afresh) and ignore the fact that only criterion (f) potentially involves the use of legislative (or executive) power (eg [72]). It is when making a decision on criterion (f) that a potential for incompatibility arises; and the opponents' construction, requiring the Tribunal to identify issues of public policy and canvass wide-ranging material to reach an unconstrained conclusion, leads to a high risk of incompatible conduct occurring.

32. **Incompatibility.** None of the opponents' submissions in respect of the presence of incompatibility rises above assertion as to the ultimate issue. A consideration of specifics supports the appellants' arguments. *First*, contrary to BHP [89], the opponent's construction of the task under sec 44K (i.e. a re-hearing *de novo*) – unlike the appellants' construction – invites a risk of a diversion of significant amounts of the time of Presidential members away from being a Ch III judge: *Wainohu v NSW* (2011) 243 CLR 181 at 200-1 [27]. It would make membership of the Tribunal a substantial non-judicial function that is very likely to involve the use of the facilities and services of the Court (*Wainohu* at 204 [36]). In the present proceedings, the Tribunal sat for 42 days.

33. *Secondly*, the requirement that a Presidential member be a judge of the Federal Court gives a close connection and therefore an association with the person's role as a judge: *Wainohu* at 210 [47]; there is no "detachment" (*Wainohu* at 218 [66]). The background against which potential incompatibility is judged is thus heightened (*Wainohu* at 221-2 [78]), 229 [106]).

34. *Thirdly*, and crucially, the opponents have not detailed their view of the task under sec 44K as it involves criterion (f) nor fairly contrasted it with the tasks urged as examples against the appellants' arguments. In particular, the political nature of the criterion (f) inquiry under the opponents' view has not been analysed. The opponents' view of the Tribunal's task under sec 44K must require the Tribunal (in holding a re-hearing *de novo*) to open up a wide-ranging inquiry that is far from the judicial task of "ascertaining the facts and the law and applying the law as it is to the facts as they are": *Wainohu* at 225 [94]. That open-ended inquiry into political considerations required by the opponents' view is very different from the specific statutory tasks which the opponents assert are equivalent to sec 44K and unobjectionable – on examination, they are not equivalent but are narrow inquiries constrained by identified matters of fact.[7]

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7 Sec 90 (activated by sec 101(1) speaks of "benefit to the public" and "detriment to the public constituted by any lessening of competition", invoking economic concepts routinely decided upon by Ch III judges. Similarly, sec 93(3) (activated by sec 102(5A)) deals with conduct actually (or likely) "substantially lessening competition within the meaning of section 47", and whether any benefit to the public exists that "would not outweigh the detriment

35. Finally, no opponent has dealt with the differences in the statutory regimes given by way of example: no member of Fair Work Australia need be a Ch III judge (sec 627); and no deputy president, senior member or non-presidential member of the AAT need be a Ch III judge. Sec 604(2) requires FWA to give leave to appeal a decision if it "is satisfied that it is in the public interest to do so". That is not criterion (f) territory. So far as the AAT is concerned, Rio tellingly does not identify any specific decisions reviewable by the AAT which involve a weighing of public interest akin to criterion (f), such that upon review a similar potential for incompatibility will be presented. Any such case would be dealt with on its merits, if one exists.

10 36. **Consequences.** None of the consequences threatened in Rio [78] will come to pass if the appellants succeed. On the appellants' construction, all that would follow is the conclusion that – *in this particular case* – the Tribunal acted incompatibly with Ch III. The present Court, in making the order that the Full Court should have made, could settle the controversy completely by restoring the Minister's decisions. But even if the matters had to be remitted to the Tribunal, a Tribunal containing a Ch III judge could still review the Minister's decisions so long as the Tribunal did not embark upon the exercises of legislative (or executive) power previously undertaken. If Rio's argument were right, even a *House v The King*-style review of the Minister's exercise of discretion on such matters could not be conducted; such a proposition only has to be stated to be rejected.

20 37. Finally, even if the opponents' construction of the Tribunal's task were accepted, a Tribunal which included a Ch III judge could act validly so long as it did not attempt to undertake a decision on criterion (f) issues that ranged beyond review of the Minister's decision on that criterion and into identifying and considering additional issues of public policy. The opponents' broad task for the Tribunal would have to be read down so far as criterion (f) were concerned. That is the result of the choice to have the task undertaken by a Tribunal containing a Ch III judge. There is, for example, no corresponding limit on the NCC undertaking its task under sec 44G(2).

Dated: 19 April 2012

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to the public constituted by any lessening of competition". Neither involves the kinds of public interest factors encapsulated by criterion (f).