IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

Nos M155, M156 and M157 of 2011

BETWEEN

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

Appellants

and

AUSTRALIAN COMPETITION TRIBUNAL & ORS

Respondents

Nos M45 and M46 of 2011

BETWEEN

THE NATIONAL COMPETITION COUNCIL

Applicant

and

HAMERSLEY IRON PTY LTD (ACN 004 448 276) & ORS

Respondents

SUBMISSIONS OF THE BHP BILLITON RESPONDENTS

Part I – Certification for Internet Publication

1. The BHP Billiton respondents (**BHP Billiton**) certify that these submissions are suitable for publication on the internet.

Part II – Statement of Issues

2. What is the meaning of the criterion in paragraph 44H(4)(b) of the *Trade Practices Act* 1974 (Cth) (**Act**) (now the *Competition and Consumer Act* 2010 (Cth)) (**criterion (b)**) and particularly:

   (a) was the Full Court correct in concluding that criterion (b) will be satisfied if it is not economically feasible, in the sense of not profitable, for someone in the

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market place to develop an alternative to the facility in question;[1]

(b) should the Full Court have concluded that criterion (b) will be satisfied if the facility exhibits natural monopoly characteristics?[2]

3. What is the meaning of the criterion in paragraph 44H(4)(f) of the Act (**criterion (f)**) and particularly:

(a) was the Full Court correct in concluding that criterion (f) permitted the Minister (and the Tribunal on review) to assess the net costs and benefits resulting from access to the service;[3] or

(b) should the Full Court have concluded that criterion (f) only permitted the Minister (and Tribunal on review) to assess whether access to the service would result in concrete harm to an identified aspect of the public interest not otherwise dealt with under criteria (a) to (e)?[4]

4. Did the Full Court conclude that criterion (f) required the Minister (and the Tribunal on review) to assess the net costs and benefits resulting from declaration?[5]

5. If the Minister (and Tribunal on review) is satisfied that each criterion in subsection 44H(4) is satisfied in respect of a service, does section 44H confer a discretion on the Minister (and Tribunal on review) not to declare the service and, if so:

(a) is the Minister (and the Tribunal on review) permitted to assess the net costs and benefits resulting from access to the service in the exercise of that discretion;[6]

(b) is the discretion confined otherwise than by reference to the subject matter and purpose of section 44H?[7]

6. Did the Full Court conclude that the discretion conferred on the Minister by section 44H not to declare a service was not confined by the subject matter and purpose of section 44H?[8]

Part III – Section 78B Certification

7. BHP Billiton certifies that it has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice is necessary.

Part IV – Factual Issues in Contention

8. There are no factual issues in contention.

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[1] Full Court reasons [100] cf Fortescue Notices of Appeal ground 2(a)
[2] Fortescue Notices of Appeal ground 2(b)
[3] Full Court reasons [111] cf Fortescue Notices of Appeal grounds 3(a) and (b)
[4] Fortescue Notices of Appeal ground 3(c)
[5] Fortescue Notices of Appeal grounds 3(a) and (b)
[6] cf Fortescue Notices of Appeal ground 4(a)
[7] cf Fortescue Notices of Appeal ground 4(b)
[8] cf Fortescue Notices of Appeal ground 4(b)

Part V – Applicable Provisions

9. The Appellants' statement of applicable constitutional provisions, statutes and regulations is accepted.

10. The applicable provisions were those in force as at the date of the Tribunal's determination on 30 June 2010.[9]

Part VI – BHP Billiton's Argument

A. A plain and purposive reading of the declaration criteria in Part IIIA

11. The legislative history of Part IIIA is described in the decision of the Tribunal at first instance[10] and in the decision of the Full Court on appeal.[11] That history has also been discussed in a previous decision of this Court[12] and previous decisions of the Full Court of the Federal Court.[13] The important features of that history can be stated shortly.

12. The genesis of Part IIIA was the Report of the National Competition Policy Review dated 1993 (**Hilmer Report**). The Hilmer Report was the product of a request in October 1992 from the then Prime Minister to undertake an independent inquiry into a national competition policy, following an agreement by Australian Governments on the need for such a policy.[14] The Executive Overview of the Hilmer Report commences with a discussion of the importance of competition to economic growth and job creation.[15] One of the specific elements of competition policy considered in the review was *"[p]roviding third-party access to certain facilities that are essential for competition"* (emphasis added).[16] The Hilmer Report recommended the introduction of a third party access regime to redress a perceived competition problem. It observed that *"if effective competition is to be fostered in many sectors of the economy"*, *"[c]ompetitors may need to be assured of access to certain facilities that cannot be duplicated economically"*.[17] Thus, the identified competition problem was the overcoming of a bottleneck which precluded or reduced effective competition in dependent markets.

13. To address that competition problem, the Hilmer Report recommended the creation of a legislated right of access to "essential facilities". It proposed that the legislated right of access should be created by Ministerial declaration under legislation because *"the*

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[9] The Tribunal was required to apply the law as it stood at the time of the hearing, not the law as it stood at the time that Fortescue first applied for declaration of the rail services: *Victorian Stevedoring and General Contracting Co and Meakes v Dignan* (1931) 46 CLR 73 at 107-8 per Dixon J; *CDJ v VAJ* (1998) 197 CLR 172 at 201-2 [111] per McHugh, Gummow and Callinan JJ; *Allesch v Maunz* (2000) 203 CLR 172 at 180-1 [23] per Gaudron, McHugh, Gummow and Hayne JJ.

[10] At [551]-[565]

[11] At [62]-[72]

[12] *BHP Billiton v NCC* (2008) 236 CLR 145

[13] *Rail Access Corporation v New South Wales Minerals Council Ltd* (1998) 87 FCR 517 at 518–20 per Black CJ, Wilcox and Goldberg JJ; *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124 at 125–132 per French, Finn and Allsop JJ

[14] Letter of transmittal dated 25 August 1993; Hilmer Report at p iii

[15] Hilmer Report at p xv

[16] Hilmer Report at p xvii, Box 1

[17] Hilmer Report at p xxviii. See also p xxxi.

decision to provide a right of access rests on an evaluation of important public interest considerations".[18] It recommended that the Minister could only make such a declaration where 4 conditions were met. Relevantly for present purposes, the first was that "*[a]ccess to the facility in question is essential to permit effective competition in a downstream or upstream activity*" (emphasis added).[19] In that context, the Report added that "*access to the facility should be essential, rather than merely convenient*".[20]

14. The Council of Australian Governments (COAG) responded to the Hilmer Report by releasing a Draft Legislative Package during 1994. The package included a draft Competition Policy Reform Bill to amend the Trade Practices Act to give effect to the accepted recommendations of the Hilmer Report (including the proposed legislated access regime) and two Inter-governmental agreements, comprising the Competition Principles Agreement (**CPA**) and the Conduct Code Agreement. The Outline to that package described the object of the proposed access regime in the same terms as the Hilmer Report, stating that: "*It is also appropriate that an access regime would only apply where access to the facility is essential to permit effective competition in a dependent market (that is, one downstream or upstream from the facility) given that such linkages would provide the prime anticompetitive motive for denying or impeding access. The practical effect of these parameters is that the number of instances where such a right is expected to be created is likely to be small and mostly confined to facilities traditionally owned by governments.*"[21]

15. In April 1995, the Commonwealth, States and Territories entered into the CPA. By clause 6(1) of the CPA, the Commonwealth Government agreed to put forward legislation to establish a regime for third party access to services provided by means of significant facilities where, amongst other things:

    (a) it would not be economically feasible to duplicate the facility;

    (b) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and

    (c) the facility is of national significance having regard to the size of the facility, its importance to constitutional trade or commerce or its importance to the national economy.

16. The Commonwealth Government fulfilled the obligation in clause 6(1) by enacting Part IIIA.

17. As observed by the Full Court of the Federal Court in *Sydney Airport Corporation Ltd v Australian Competition Tribunal*, there is no complexity in the concepts underlying the object of Part IIIA. The access regime is directed at an important competition problem: the existence of a nationally significant facility that cannot be duplicated

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[18] Hilmer Report at p250
[19] Hilmer Report at p251
[20] Hilmer Report at p251
[21] National Competition Policy, Draft Legislative Package, page 1.12

economically, access to which is necessary to permit effective competition in an upstream or downstream market.[22]

18. The declaration criteria in subsection 44H(4), read plainly and purposively, define the circumstances in which the relevant Minister may activate the access regime in respect of a service provided by means of a particular facility by declaration. For there to be a competition problem warranting declaration:

    (a) access to the service provided by means of the facility must promote a material increase in competition in an upstream or downstream market (criterion (a)) - if the upstream and downstream markets are effectively competitive, access is unnecessary to address a competition problem;

    (b) it must be uneconomical for anyone to develop another facility to provide the service (criterion (b)) - if it is economically feasible, ie profitable, to develop another facility to provide the service, access is unnecessary to address the competition problem;

    (c) the facility must be of national significance in a physical, commercial or economic sense (criterion (c)) – if the facility is not significant, regulatory intervention is not warranted;

    (d) access to the service must not be the subject of an effective access regime already (criterion (e)) - if such a regime applies, any competition problem concerning access to the service will have been resolved; and

    (e) access to the service must not be contrary to the public interest (criterion (f)) – if broader public interest considerations outweigh the benefits achieved from redressing the competition problem through access, the access regime should not be applied.

19. So read, the declaration criteria have a logical relationship to each other and collectively define circumstances in which regulatory intervention may be justified to achieve the objectives of Part IIIA.

B. Criterion (b)

The Tribunal's natural monopoly test

20. Fortescue and the NCC advance the natural monopoly meaning of criterion (b) as stated by the Tribunal at first instance.[23] The Tribunal stated the natural monopoly test in the following way:

> *"Whether a firm's facility has natural monopoly characteristics involves determining whether the firm's cost function in relation to that facility is subadditive at all levels of output. This is a purely technical inquiry which looks at a firm's production costs. That is, the cost function to which regard*

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[22] (2006) 155 FCR 124 at 136 [36] and [37]

[23] Fortescue submissions at [29]; NCC submissions at [49]-[57]

must be had is the cost of the inputs (eg labour, operating costs, capital costs, co-ordination costs) incurred in producing the relevant good or service."[24]

21. In its application to the Pilbara rail lines, the Tribunal concluded that the costs that access may impose on the facility owner's upstream and downstream activities (mine, above rail and port operations) were irrelevant to the assessment of the natural monopoly test. The costs that were relevant were only those costs that related directly to the rail track (so-called below rail activities).[25] The Tribunal concluded, however, that the broader categories of costs imposed by access were relevant to criterion (f) and the exercise of the discretion under s44H to declare or not declare the service.[26]

10 22. The Tribunal's construction of criterion (b) differed from the "net social cost" construction adopted by the Tribunal on earlier occasions.[27] Under that test, it is uneconomical for anyone to develop another facility to provide the service if it would be more efficient, in terms of costs and benefits to the community as a whole, for one facility to provide the service than more than one. [28] To determine that, all costs that access may impose on society (including the costs that access may impose on the facility owner's upstream and downstream activities) are taken into account in assessing whether it is uneconomical for anyone to develop another facility.

The reasoning of the Full Court

23. The Full Court concluded that criterion (b) will not be satisfied if it is economically
20 feasible (in the sense of profitable) for someone in the market place to develop an alternative to the facility in question.[29] Profitable means being able to earn revenue that exceeds the capital and operating costs of the alternative facility, including an economic rate of return on the capital deployed.

24. The reasoning of the Full Court is correct. It involved the following elements:

(a) The construction of the provisions of Part IIIA is a matter of law for decision by the court and is not a matter of fact to be resolved by a preference for one body of (economic) expert evidence over another (albeit the evidence of economists might assist the court with an understanding of the economic concepts used in the statute).[30]

30 (b) The extrinsic materials preceding the enactment of Part IIIA shed light on the thinking which informs the legislation, but it is the text of paragraph 44H(4)(b) which is decisive.[31]

(c) Criterion (b) directs attention to whether it would be uneconomical for anyone to develop another facility to provide the service. Parliament chose not to

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[24] Tribunal reasons at [841]
[25] Tribunal reasons at [845] and [847]
[26] Tribunal reasons at [846]
[27] *Re Sydney International Airport* [2000] ACompT 1 at [204] – [206] and followed and explained in *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2 at [64] and [137]
[28] Tribunal reasons at [838]
[29] Full Court reasons [100]
[30] Full Court reasons [60]
[31] Full Court reasons [75]

frame criterion (b) in terms whether it would be economically efficient from the perspective of society as a whole for another facility to be developed to provide the service.[32]

(d) Both the text of criterion (b) and the extrinsic materials direct attention to the question whether it would be economically feasible for anyone in the marketplace to develop another facility to provide the service.[33] While the terms of Part IIIA should be construed so as to promote the objectives of the Act, it is necessary to look to the text, considered within its context, to ascertain the manner in which Parliament has chosen to pursue those objectives.[34]

(e) Paragraph 44H(4)(e) and subsection 44H(5) of the Act[35] apply the principles set out in the CPA to determine whether an access regime established by a State will be an "effective access regime" for the purposes of Part IIIA, precluding the making of a declaration under section 44H. Those principles include a criterion for the grant of access that "it would not be economically feasible to duplicate the facility". It is difficult to attribute to Parliament the intention that the criteria for recognition of a State-based access regime should differ from the criteria for declaration under Part IIIA.[36]

Alternative meanings of uneconomical

25. The New Shorter Oxford Dictionary[37] gives each of the noun "economic" and corresponding adjective "economical" two relevant meanings: (i) maintained for profit, on a business footing, paying (at least) the expenses of its operation and (ii) careful of resources, not wasteful, sparing, thrifty. Parliament's intended meaning must be discerned from the full text of criterion (b), its context within the legislative scheme and the object of the legislative scheme.

26. The contention that the Act is concerned with economic regulation and uses economic language and that, in the field of economics, the word uneconomical means wasteful, not unprofitable,[38] cannot withstand close scrutiny. Economics is the branch of knowledge concerned with the production and distribution of wealth. Prices and profitability are the signals and drivers of economic activity within a competitive market economy, which the Act seeks to promote. Further, while the Act undoubtedly seeks to achieve economic goals, it does so through business regulation. The Act must be applied by the Minister in real world business settings and for that reason its language is not exclusively devoted to the articulation of economic theory but uses a

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[32] Full Court reasons [76]
[33] Full Court reasons [73], [76] and [77]
[34] Full Court reasons [95]
[35] Those provisions were amended with effect from 14 July 2010 by the Trade Practices Amendment (Infrastructure Access) Act 2010, but the amendments do not alter the principles underlying paragraph 44H(4)(e) and subsection 44H(5) prior to the amendment.
[36] Full Court reasons [97]
[37] As published in 1993 (prior to the enactment of Part IIIA). The definitions are relevantly unaltered in the Shorter Oxford Dictionary, 6th ed, published in 2007.
[38] Fortescue submissions at [30]; NCC submissions at [19]

mixture of economic, commercial and social concepts (as observed by the Full Court of the Federal Court in *Sydney Airport Corporation Ltd v Australian Competition Tribunal*[39]).

Textual considerations

27. A number of observations can be made about the text of criterion (b).

28. First, unlike the language of criterion (a) and (f), the language of criterion (b) does not posit an enquiry about access, and does not invite a counterfactual comparison of the future with and without access. Rather, criterion (b) asks whether development of another facility would be economical. Read plainly, the enquiry is directed to the economic feasibility, ie profitability, of developing another facility; the criterion is not concerned with access as an alternative. In contrast, the natural monopoly test (and the net social cost test) requires a counterfactual comparison of the future with and without access. As formulated by the Tribunal, the natural monopoly test is whether access to the incumbent facility would result in lower costs of producing the service in comparison to constructing a second facility. If Parliament had intended such an enquiry to be made under criterion (b), it would have adopted similar language to criterion (a) and (f); for example, that access to the service would promote economic efficiency.

29. Secondly, as observed by the Full Court, the words "for anyone" direct attention to the circumstances of market participants rather than the economic characteristics of the existing facility.[40] If the focus of the criterion was the latter, the words "for anyone" would not have been included.[41] Those words have been correctly construed not to include the incumbent facility owner, consistently with the object of Part IIIA.[42] The competition problem to which Part IIIA is addressed is not resolved by a conclusion that the incumbent facility owner can economically develop another facility. Accordingly, the NCC's contention that the natural monopoly test enables the words "for anyone" to include the incumbent facility owner[43] is not a reason to favour the natural monopoly test.

30. Thirdly, the language of the criterion as a whole is broad and practical. Its concern is the development of another facility to provide the service. The language does not prescribe the type or size of the other facility; the only circumscription is that the other facility can provide the service for which declaration is sought.

31. Taken as a whole, the criterion asks a practical question: is a market participant able to bypass the facility in question by developing an alternative that is economical? The practical sense of the criterion, having regard to the underlying object of Part IIIA, supports the Full Court's construction.

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[39] (2006) 155 FCR 124 at 136 [35]
[40] Full Court reasons at [76]
[41] cf Fortescue submissions at [48]; NCC submissions at [20]
[42] *Re Sydney International Airport* [2000] ACompT 1 at [201]; Full Court reasons at [83]
[43] NCC submissions at [21]

Contextual considerations

32. The place of criterion (b) alongside criteria (a), (c), (e) and (f) as part of a coherent series of preconditions to declaration has been discussed earlier.

33. A further contextual consideration arising from the legislative history is the language of clause 6(1) of the CPA. Contrary to Fortescue's submission that "*[t]here is no necessary rigid correlation between the Competition Principles Agreement and the express statutory criteria in s44H(4)*",[44] criterion (b) plainly implements clause 6(1)(a). It is to be presumed that in enacting Part IIIA, including the declaration criteria in s44H(4), Parliament intended to give effect to the principles in clause 6(1) of the CPA. In other words, Parliament intended that the expression "would be uneconomical for anyone to develop another facility to provide the service" in criterion (b) should have the same meaning as "would not be economically feasible to duplicate the facility" in clause 6(1).

34. This view is strengthened by a further feature of clause 6 of the CPA. It is apparent from the terms of clause 6(1) and (3) of the CPA that the Commonwealth, States and Territories intended that the declaration criteria for the Commonwealth's access regime would be consistent with the declaration criteria for any State or Territory regime. That intent has been carried into Part IIIA by the terms of s44H(4)(e) and 44H(5). One of the declaration criteria in s44H is that access to the service is not already the subject of an effective access regime (s44H(4)(e)). In deciding whether an access regime established by a State or Territory that is a party to the CPA is an effective access regime, the designated Minister must, amongst other things, apply the principles set out in the CPA (s44H(5)). Clause 6(3) of the CPA provides that the State or Territory regime must apply in the same circumstances as specified in clause 6(1), i.e. in circumstances where it would not be ***economically feasible*** to duplicate the facility. It would be inconsistent with the apparent intention of Parliament if criterion (b) were interpreted as a "natural monopoly" test while State or Territory regimes, recognised as effective access regimes for the purposes of Part IIIA, applied a "privately economical" test.

35. Feasible means capable of being done. The phrase "economically feasible" naturally means capable of deriving a profit. The NCC's contention that that phrase means capable of being done without waste is a strained rendering.[45] If the criterion was intended to focus upon waste as the discrimen, Parliament would have used language directed to the comparative costs of access and developing another facility. As noted earlier, the language of criterion (b) differs from criteria (a) and (f) in that it does not invite a counterfactual comparison of the future with and without access.

36. The absence of the words "for anyone" from clause 6(1) of the CPA does not alter its plain meaning.[46] The use of the word "feasible" in clause 6(1) directs attention to market participants in the same manner as "for anyone". It provides a clear indication

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[44] Fortescue submissions at [50]
[45] NCC submissions at [22]
[46] Cf Fortescue submissions at [51]

that the word "uneconomical" means not profitable or not on a business footing rather than wasteful.

37. Clause 1(3)(j) of the CPA does not assist the NCC's argument.[47] Clause 1(3) is definitional and, on its terms, has no application to clause 6 of the CPA (in contrast to clauses 3(6), 5(1) and 5(9) of the CPA).

The objects of Part IIIA

38. Section 44AA, inserted into Part IIIA by the *Trade Practices Amendment (National Access Regime) Act* 2006 (**2006 Amendment Act**), provides that the objects of Part IIIA are:

10 (a) 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; and

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

39. As is clear from the text of section 44AA(a) and confirmed by the Revised Explanatory Memorandum that accompanied the enactment of the 2006 Amendment Bill (referred to above), that object is directed not only to the incumbent facility but also to new facilities to be developed.[48]

40. The Full Court's construction of criterion (b) best promotes the competition and
20 efficiency objectives underlying Part IIIA.

41. Considering the competition objective first, in cases in which an alternative facility can be profitably developed, access to the existing facility may be "convenient"[49] but such access is not "essential to permit effective competition in a downstream or upstream activity".[50] Nor is access to the service it provides "necessary in order to permit effective competition in a downstream or upstream market".[51] In these circumstances, the existing facility does not constitute a bottleneck (that is, the facility does not erect a barrier to entry which impedes or prevents effective competition in the other markets). The profitability test therefore uniquely fastens on the specific feature which causes the competition problem which Part IIIA addresses.

30 42. The Full Court's construction of criterion (b) furthers the competition objective of Part IIIA since it encourages investment in new facilities which will compete with the incumbent's infrastructure. If it is profitable to develop another facility, the development of the alternative facility is likely to lead to more intense competition between the facility owner and the access seeker than would arise under access. There are substantial benefits from facilities based competition including the expansion of

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[47] NCC submissions at [23]

[48] The Revised Explanatory Memorandum described paragraph (a) of section 44AA in the following terms: *"The first objective, set out in paragraph 44AA(a), explicitly recognises the importance of fostering efficient investment in <u>new</u> infrastructure."* (emphasis added).

[49] Hilmer Report at p251

[50] Hilmer Report at p251

[51] Competition Principles Agreement cl. 6(1)

overall capacity in the market, technological innovation and experimentation with different operational methodologies and the avoidance of coordination costs and other diseconomies.[52] Conversely, if it is unprofitable to develop another facility, access to the original facility will redress the bottleneck which impedes competition.

43. The Tribunal's natural monopoly construction of criterion (b) does not promote facilities based competition: it chills investment in new facilities that would compete with the incumbent facility, since access is afforded under its auspices even where a new facility can be profitably constructed.

44. Fortescue's contention that the profitability test would not promote effective competition because the test would be satisfied even if it would be only marginally profitable to develop another facility is incorrect.[53] The contention distorts the meaning of uneconomical advanced by BHP Billiton (and Rio) before the Tribunal and the Full Court. Fortescue's use of the expression "marginally profitable" conveys a notion that the revenue to be earned from operating the alternative facility barely covers the costs of building and operating the alternative facility. In contrast, profitable in the economic sense (being the sense advanced by BHP Billiton and Rio) conveys an ability to earn revenue that exceeds the capital and operating costs of the alternative facility, including an economic rate of return on the capital deployed in constructing the facility. Profitability in that sense affords a substantial basis for effective competition.

45. Secondly, as to the efficiency objective, the refusal of declaration in circumstances where it is profitable for market participants to develop alternative facilities is likely to result in the development of alternative facilities only where it is efficient to do so. Where it is profitable for market participants to develop alternative facilities, commercial (unregulated) access arrangements will be negotiated between the incumbent facility owner and access seekers. The negotiation will occur in circumstances where the incumbent knows that it is economically feasible for the access seeker to bypass the incumbent facility by developing an alternative facility. The access negotiation will then be based on an assessment of the total costs to the incumbent of providing access (including all diseconomies and inefficiencies experienced by the incumbent in providing access) and the total costs to the access seeker in developing an alternative facility. If the former is less costly than the latter, it can be expected that a commercial agreement on access will be reached. Conversely, if the former is more costly than the latter, it can be expected that no agreement will be reached and the access seeker will develop the alternative facility as it is the less costly option. Accordingly, applying the profitability test, whether alternative facilities are ultimately developed, or a commercial (unregulated) access arrangement is made, will depend on the costs that arise from those alternatives, as assessed by the market participants.

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[52] The benefits of facilities based competition in the context of the Pilbara rail lines were discussed by the Tribunal at section 18.5 – see particularly [1230]-[1243] and [1246]ff.

[53] Fortescue submissions at [36]. In rejecting the profitability meaning of criterion (b), the Tribunal also referred to "marginally profitable alternative facilities": Tribunal reasons at [818] and [823].

46. Contrary to the arguments advanced by Fortescue and the NCC,[54] the natural monopoly test adopted by the Tribunal may create, rather than avoid, economic waste and costs. This is because the Tribunal's test of natural monopoly excludes consideration of all costs other than construction and operation costs of the relevant facility.[55] Significantly, the test excludes additional costs (and therefore economic inefficiencies) arising from the shared use of the facility such as, in this case, delays to iron ore production and delays to expansion of capacity which would limit increases in iron ore production.[56]

47. This is illustrated by the Tribunal's factual findings in this proceeding, which are not challenged. The Tribunal concluded that both the Robe and Hamersley lines were natural monopolies.[57] However, the Tribunal also found (when considering criterion (f)) that shared access to those railways lines would be likely to generate additional economic costs through delayed production of iron ore and expansion of productive capacity that would dwarf the capital and operating costs savings that would be generated from developing another facility.[58]

48. A further problem with the natural monopoly test is that it addresses only a part of the concept of economic efficiency. Economic efficiency is a multi-faceted concept, encompassing at least the concepts of productive efficiency (the production of goods or services at the least cost), allocative efficiency (the production of the types and quantities of goods and services to satisfy society's demand) and dynamic efficiency (the production of new and better goods and services to satisfy society's demand).[59] The natural monopoly test is concerned only with productive efficiency and ignores the allocative and dynamic components of economic efficiency.

49. It may be accepted that, in some instances, commercial negotiations may not produce the least cost solution; in other words, the development of the alternative facility may be more costly than access (taking all costs of production into account). This was recognised by the Full Court.[60] However, that does not lead to the conclusion that development of the alternative facility is inefficient. It is necessary to consider also the allocative and dynamic efficiency effects of developing another facility when compared with shared use of an existing facility. For example, in the present context, the development of an alternative facility may result in improvements to heavy haul railway technology, to the overall quantity of iron ore transported using railways and to the overall rate at which iron ore is transported using railways.[61]

50. The pursuit of competition and efficiency as economic goals requires a balancing of a range of considerations. The means chosen by Parliament to pursue those goals

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[54] Fortescue submissions at [31]-[33]; NCC submissions at [25]
[55] Tribunal reasons at [841] and [907]
[56] Tribunal reasons at [842] and [1304]
[57] Tribunal reasons at [929] and [937]
[58] Tribunal reasons at [1319]ff
[59] The meaning of economic efficiency was explained by the Tribunal in a related context in *Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [1].
[60] Full Court reasons at [100]
[61] The Tribunal discussed these considerations in the context of criterion (f) at section 18.5 of its reasons.

through Part IIIA is reflected, in part, in the declaration criteria. The profitability construction of criterion (b) achieves a logical balance which is most likely to solve the competition problem to which the access regime is directed whilst also promoting the economically efficient operation of, use of and investment in the infrastructure by which services are provided.

The NCC's reliance on posterior extrinsic materials

51. The NCC places substantial reliance on the Productivity Commission's 2001 Review of the National Access Regime and the Government's response to that Review and contends that the Full Court erred in failing to consider and take into account that material (as extrinsic material aiding the interpretation of criterion (b)).[62] The NCC contends that Parliament's intention with respect to the meaning of criterion (b) has been revealed by a deliberate decision not to amend criterion (b) in the 2006 Amendment Act.[63] That approach to statutory construction should be rejected.

52. In some cases, a subsequent amendment to a statutory provision may assist in the construction of the original provision.[64] However, criterion (b) has not been amended since it was first enacted. Accordingly, the materials on which the NCC seeks to rely merely constitute discussion papers prepared by a governmental authority and by the Executive Government itself. They do not reveal the intent of Parliament at the time those papers were written, far less the intent of Parliament at the time that criterion (b) was enacted. It is not possible to infer from the fact that Parliament has not amended criterion (b) that the interpretation given to that criterion by earlier decisions of the Tribunal was the interpretation originally intended by Parliament.[65] The NCC's reliance on the reasons of Dawson J in *Hunter Resources Ltd v Melville*[66] is misplaced; his Honour's opinion on the use of posterior extrinsic materials was, in the context of that case, solitary[67] and not supported by usual principles of statutory construction.[68]

Miscellaneous criticisms of the Full Court's reasons

53. Fortescue and the NCC advance various criticisms of the Full Court's reasons which are unjustified.

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[62] NCC submissions at [40]
[63] NCC submissions at [39]-[40]
[64] *Grain Elevators Board (Vic) v Dunmunkle Corporation* (1946) 73 CLR 70 at 85 – 86 per Dixon J
[65] cf *Zickar v MGH Plastic Industries* (1996) 187 CLR 310 at 329 per Toohey, McHugh and Gummow JJ and at 351 per Kirby J; *Flaherty v Girgis* (1987) 162 CLR 574 at 594 per Mason ACJ, Wilson and Dawson JJ; *R v Reynhoudt* (1962) 107 CLR 381 at 388 per Dixon J
[66] (1998) 164 CLR 234 at 254
[67] Although in dissent in *Hunter Resources* on the principal issue, Mason CJ and Gaudron J stated the orthodox position that a subsequent report of a governmental or statutory body or the Government itself cannot be used as an aid to construction as such materials are (at best) *"nothing more than an expression of opinion of what the relevant legislation means"* (at 241). Wilson J (as part of the majority), while agreeing generally with the reasoning of Dawson J, did not agree with the reliance upon the posterior extrinsic materials (at 245).
[68] *Hepples v Commissioner of Taxation* (1992) 173 CLR 492 at 539 per McHugh J; *Allina Pty Ltd v FCT* (1991) 28 FCR 203 at 212; *Interlego AG v Croner Trading Pty Ltd* (1992) 39 FCR 348 at 382 per Gummow J.

54. The supposed anomaly postulated by Fortescue,[69] concerning the application of criterion (b) where two facilities exist or have been constructed, is not an anomaly at all. In *Re Duke Gas Pipeline*, the Tribunal concluded that criterion (b) should be applied in a manner that takes account of the existence of multiple facilities.[70] As observed by Fortescue, this might lead to a result in which a second facility is developed (because it is economically profitable to do so), but one or other of the facilities may be declared subsequently if, at that time, it is not profitable to develop a third facility. There is nothing anomalous about that conclusion. Further, the same outcome could result from the application of a natural monopoly test according to differing assessments of reasonably foreseeable demand over intervals of time.[71]

55. Contrary to Fortescue's contention,[72] the Full Court did not give undue emphasis to the protection of private rights in its reasons for judgment. The Full Court rightly identified that the enacting history of Part IIIA (at [89] to [94]) indicated that Part IIIA was intended to minimise regulatory intervention in the marketplace. Tellingly, Fortescue's citation of [87] omits the last sentence, which is the culmination of the Full Court's reasoning in that paragraph, namely that if the intention of the legislature had been to establish a regime embodying the economic efficiency test "*it could have been expected to express its intentions in very different terms*".

56. Fortescue's and the NCC's criticism of the Full Court's statement that the grant of access will be an exceptional occurrence is unjustified.[73] The declaration criteria are narrow. This was expressly recognised in the relevant extrinsic materials. For example, the Hilmer report stated that the "*[access] regime would only be applied to the limited category of cases where access to the facility was essential to permit effective competition...*";[74] the COAG legislative package stated that "*[t]he practical effect of these parameters is that the number of instances where such a right is expected to be created is likely to be small*".[75]

57. The NCC's contention that the Full Court misunderstood the mischief that Part IIIA sought to address, believing it to be a test of market failure, is unfounded.[76] The Full Court observed correctly that "*the 'essential facility' mischief at which Part IIIA of the Act was aimed concerned a facility which a competitor could not duplicate economically*".[77]

58. The NCC's criticism of the Full Court's reference to the phrase "economically efficient" in paragraph 44X(1)(g) is also unjustified.[78] It is significant to observe that

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[69] Fortescue submissions at [38]
[70] [2001] ACompT 2 at [57]
[71] The relevance of that factor to the natural monopoly test is explained by the Tribunal at [850] – [855]
[72] Fortescue submissions at [39]
[73] Fortescue submissions at [40]ff; NCC submissions at [41]ff
[74] Hilmer Report at p xxxii
[75] National Competition Policy, Draft Legislative Package, page 1.12
[76] NCC submissions at [26]
[77] Full Court reasons [68]
[78] NCC submissions at [48]

Parliament did not use the same phrase in criterion (b). The NCC fails to explain the distinctive choice of words used by Parliament in criterion (b).

Consistency of approach

59. The NCC also supports the Tribunal's construction of criterion (b) on the basis that it "was not inconsistent" with the approach of the Tribunal in *Re Sydney International Airport,*[79] *Re Duke Eastern Gas Pipeline*[80] and *Re Services Sydney.*[81] [82] The NCC contends that those earlier decisions of the Tribunal did not require consideration of any costs resulting from access other than the costs of operating the facility on a shared basis, including any necessary expansion costs.[83] Somewhat inconsistently, the NCC concludes with the contention that if those earlier decisions did require all costs of access to be taken into account, they were in error.[84]

60. The NCC's attempt to show consistency between the construction of criterion (b) adopted by the Tribunal in this proceeding and the Tribunal on earlier occasions should be rejected. The Tribunal in this proceeding was aware of, and explained the reasons for, its departure from the construction adopted by the Tribunal on earlier occasions. It correctly described the construction adopted by the Tribunal on earlier occasions as a "net social benefit" test.[85] The calculus of the net social benefit test is the total costs and benefits of developing an alternative facility compared with sharing the existing facility.[86] In contrast, under a natural monopoly test, the calculus is confined to the costs of producing the service in question through developing an alternative facility compared with sharing the existing facility.[87]

B. Criterion (f)

The construction of criterion (f)

61. The construction of criterion (f) adopted by the Tribunal at first instance, and which was approved by the Full Court on appeal, is correct.

62. The Tribunal construed criterion (f) in the following manner:

    (a) Public interest refers to the welfare, particularly the economic welfare, of the Australian community as a whole, including particular sections of the community.[88] Those considerations are not confined to strict cost-benefit issues, but include broader issues concerning social welfare and equity and the interests of consumers.[89]

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[79] [2000] ACompT 1 at [204] – [206]
[80] [2001] ACompT 2 at [64] and [137]
[81] (2005) 227 ALR 140 at [101]-[106]
[82] NCC submissions at [49]ff
[83] NCC submissions at [50]-[53]
[84] NCC submissions at [57]
[85] Tribunal reasons at [836]
[86] *Re Sydney International Airport* at [205] and *Re Duke Eastern Gas Pipeline* at [137] (which was followed in *Re Services Sydney* at [103])
[87] Tribunal reasons at [840]-[845]
[88] Tribunal reasons at [1161]
[89] Tribunal reasons at [1168]

(b) Criterion (f) should not be used to call into question the results obtained by the application of the earlier criteria. It is concerned with other considerations, not caught by earlier criteria, which bear upon the public interest. The satisfaction of criteria (a) and (b) indicates that benefits will occur from access and those benefits must be taken into account under criterion (f).[90]

(c) It is relevant to consider consequences that are likely to arise as a result of access, giving them a weight that pays regard to their degree of likelihood.[91]

63. The Full Court rejected Fortescue's argument on appeal that the Tribunal's approach to the construction of criterion (f) involved legal error. The Full Court's reasoning included the following elements:

(a) It is relevant to consider under criterion (f) all costs that are likely to arise as a result of access, particularly where those costs have not been considered under criterion (b).[92]

(b) There is no reason to restrict or read down the scope of the criteria in subsection 44H(4) merely because the ACCC is entitled to consider the same or similar matters in deciding whether to make a determination concerning access. Such an approach would radically reduce the power and responsibility of the Minister to reject applications for declaration which appear to the Minister to be contrary to the public interest.[93]

64. The expression "public interest" is of the widest import[94] and is without a fixed and precise content.[95] It typically imports a discretionary value judgment to be made by reference to undefined factual matters confined only by the subject matter, scope and purpose of the statutory provisions.[96]

65. The construction of "public interest" adopted by the Tribunal and the Full Court is consistent with the overall object of the Act, to enhance the welfare of Australians. This construction is also consistent with previous Tribunal decisions. In *Re Services Sydney Pty Ltd*, the Tribunal said that criterion (f) "*enables the consideration of the overall costs and benefits likely to result from declaration and the consideration of other public interest issues which do not fall within criterion (a) – (e)*".[97] It is also consistent with the Tribunal's construction of the "public benefit" test for

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[90] Tribunal reasons at [1162]
[91] Tribunal reasons at [1172]
[92] Full Court reasons at [108]
[93] Full Court's reasons at [111], [115] and [116]
[94] *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 376 per Kitto J and at 400 per Windeyer J
[95] *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at [57] per Gleeson CJ, Gummow, Heydon and Kiefel J and at [110] per Kirby J
[96] *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ; *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at [137] – [138] per Kirby J; *ICM Agriculture v The Commonwealth* (2009) 240 CLR 140 at [20] per French CJ, Gummow and Crennan JJ; *Osland v Secretary, Department of Justice* (2010) 241 CLR 320 at [13] per French CJ, Gummow and Bell JJ
[97] (2005) 227 ALR 140 at [192]

authorisation of conduct that would otherwise be in contravention of Part IV of the Act.[98]

Relationship between criterion (f) and criteria (a) to (e)

66. Fortescue's first contention, that the construction of the Tribunal and the Full Court renders criteria (a) to (e) largely redundant,[99] is without foundation.

67. The Tribunal accepted that criterion (f) should not be used to call into question the results obtained by the application of the earlier criteria.[100] The Tribunal considered whether the costs that were likely to be imposed on Rio and the public by access led to the conclusion that access would be contrary to the public interest. The Tribunal had not taken such costs into account when considering any other criteria in subsection 44H(4) (the Tribunal formed the view that such costs were not relevant to criterion (b)).

The two stage process under Part IIIA

68. Fortescue's second contention, that the approach of the Tribunal and the Full Court is not a necessary or logical requirement of the staged scheme of Part IIIA,[101] does not demonstrate error in the Full Court's construction of criterion (f).

69. Underlying Fortescue's argument appears to be a view that less power or discretion ought to be afforded the Minister at the declaration (first) stage and greater power and discretion ought to be afforded the ACCC at the arbitration (second) stage. That view was rightly rejected by the Full Court.[102] There is nothing in the text, structure or object of the Act that supports diminishing the responsibility of the Minister to make a decision whether or not to declare a service.

70. The premise underlying Fortescue's argument is that the role of the Minister under section 44H and the role of the ACCC under section 44X are the same and that duplication could not have been intended by Parliament. That premise is incorrect. The purpose of the Minister's power is to determine whether the particular service (and facility) in question should be subjected to the regulated access regime under Part IIIA (with the result that any person may apply for access). The purpose of the ACCC's power is to arbitrate a specific dispute between the access provider and a particular access seeker concerning access pursuant to the regulated access regime. The focus of the ACCC's role therefore differs from the Minister's role.

71. Criterion (f) is concerned with the effect of access on the welfare of Australians; it is not directly concerned with the question of who will bear the costs caused by access as between a specific access seeker and the access provider. A decision by the ACCC

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[98] In *QCMA* (1976) 8 ALR 481 at 510, the Tribunal stated that the "public benefit" included *"anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress"*. In *Re 7-11 Stores Pty Ltd* (1994) ATPR 41 – 357 at 42,677, the Tribunal expanded the definition of "public benefit" and stated *"Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources"*.

[99] Fortescue submissions at [57]

[100] Tribunal reasons at [1162]

[101] Fortescue submissions at [58]

[102] Full Court reasons at [111]-[116]

under Division 3 of Part IIIA to require an access seeker to reimburse the access provider for the costs caused by access does not extinguish those costs. It merely transfers the incidence of the costs from the access provider to the access seeker. That transfer of costs is irrelevant to criterion (f). It is a threshold criterion that requires the Minister to be satisfied that access will not be contrary to the public interest: in other words, it requires the Minister to be satisfied that access will not be detrimental to the welfare of Australians. Under that criterion, it is permissible to undertake a cost-benefit analysis of the likely effects of access. The analysis is undertaken from society's perspective, not from the perspective of the access provider.

The language of criterion (f)

72. Fortescue's third contention, that the approach of the Full Court is inconsistent with the language of the criterion,[103] is incorrect.

73. Criterion (f) asks whether access to the service would be contrary to the public interest. As stated by the Full Court in *Sydney Airport Corporation*, the word "access" in subsection 44H(4) is used in its ordinary sense: a right or ability to use the service.[104] Neither the Full Court nor the Tribunal substituted the word "declaration" for "access".[105]

74. Fortescue criticises the counterfactual analysis undertaken by the Tribunal.[106] That analysis conforms with the statutory language. A number of the criteria in subsection 44H(4) use the future conditional tense (*would* promote a material increase in competition, *would* be uneconomical and *would* not be contrary to the public interest). The use of that tense necessarily requires the decision maker to make a judgment or assessment about matters in the future and, in the case of criteria (a) and (f), on the assumption that access to the service is granted. The earlier decision of the Full Court of the Federal Court in *Sydney Airport Corporation Ltd v ACT*[107] is not to the contrary. The enquiry is not directed to comparing the future "*with and without declaration*",[108] but may require a comparison of the relevant circumstances referred to in criteria (a) and (f) with and without access.[109]

75. Fortescue also criticises the Tribunal's reference to the fact that assessing future events requires some speculation.[110] The criticism takes the Tribunal's statement out of context. The approach to criterion (f) adopted by the Tribunal involved no more than making an assessment of future matters.[111] That approach was correctly approved by the Full Court.[112]

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[103] Fortescue submissions at [59]
[104] (2006) 155 FCR 124 at [81] – [83]
[105] cf Fortescue submissions at [57]
[106] Fortescue submissions at [59]
[107] (2006) 155 FCR 124
[108] Ibid at [86]
[109] Ibid at [83]
[110] Fortescue submissions at [60]
[111] Tribunal reasons at [1172]
[112] Full Court reasons at [117]

76. Fortescue seeks to impose a limitation on the meaning of the word "access" in criterion (f), but fails to articulate what that limitation is or why, as a matter of construction, the plain meaning of criterion (f) should be read down by such a limitation. It may be accepted, as pointed out by Fortescue, that the ACCC is given broad powers with respect to the determination of the terms of access at the second stage, including the power to decide that access will not be required.[113] However, for the reasons given by the Full Court, that does not provide a basis for reading down the power given to the Minister at the first stage.[114] Further, Fortescue's focus on the fact that access may not be ordered by the ACCC following declaration reveals the error in Fortescue's reasoning. To assess criterion (f), it is necessary to consider what the effects of access would be; it would be irrelevant to consider the fact that no access may ultimately be ordered following declaration. Such an approach would involve substituting the word "declaration" for "access".

Complexity of analysis

77. Fortescue contends that the approach adopted by the Tribunal and the Full Court to criterion (f) requires the NCC and the Minister in every case to undertake a complex analysis in order to attempt to predict the likely outcome of any negotiation or subsequent arbitration.[115]

78. No such enquiry is necessitated by criterion (f). Criterion (f) is stated in a negative form. If in a given case the Minister is satisfied in respect of all criteria other than (f), the Minister would be entitled to form the view that he or she was satisfied in respect of criterion (f) unless material is presented to the Minister demonstrating that access would be contrary to the public interest.

79. If material is presented to the Minister demonstrating that access would be contrary to the public interest, the Minister would be required to consider it. The Minister could not disregard such material for the reason that Part IIIA places time limits on the declaration process.[116] If the Minister does not make a decision within the time prescribed by subsection 44H(9), the Minister is taken to have decided not to declare the service. It can be inferred that Parliament intended that if the Minister was unable to reach the requisite level of satisfaction in respect of the declaration criteria within the time limit stipulated in s44H, the service should not be declared.

C. Discretion

80. In respect of the Minister's discretion whether to declare a service under section 44H, the Tribunal followed what had been correctly said by the Full Court of the Federal Court in *Sydney Airport Corporation Ltd v ACT.*[117]

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[113] Fortescue submissions at [62]
[114] Full Court reasons at [111]-[116]
[115] Fortescue submissions at [63]
[116] cf Fortescue submissions at [75]
[117] Tribunal reasons at [1163]

81. The Full Court in the present case did not find it necessary to address the scope of the discretion afforded the Minister under section 44H, finding that there was no legal error in the Tribunal's approach to criterion (f).

82. Fortescue contends that the terms of subsections 44H(2) and (4) preclude consideration of any matter not identified in those subsections[118] and, in the alternative, the discretion does not extend to an assessment of the effects of access so as to contradict the conclusions reached under criteria (a)-(c).[119] Fortescue contends further that the analysis undertaken by the Tribunal was not an exercise of discretion within the scope and object of section 44H.[120]

10 83. Fortescue's first contention should be rejected. For the reasons explained by the Full Court in *Sydney Airport Corporation Ltd v ACT*, the contention is inconsistent with the language and structure of section 44H.[121] That conclusion is also supported by the Explanatory Memorandum accompanying the *Competition Law Reform Bill* 1995 (Cth) which introduced Part IIIA into the Act.[122] Fortescue's second contention may be accepted: the Minister's discretion is confined by the scope and object of section 44H. That limitation was expressly referred to in *Sydney Airport Corporation v ACT*.[123] The Tribunal's reasons are consistent with that limitation.

84. Fortescue's third contention should be rejected. If criterion (f) includes consideration of the effects of access upon the welfare of Australians, the Tribunal's reasons based
20 upon criterion (f) were correct. If criterion (f) were to be read down in some manner to exclude consideration of the efficiency consequences of access, particularly the costs that would be imposed by access on society, those considerations would be relevant to the exercise of the Minister's discretion under section 44H. Those efficiency considerations were not taken into account by the Tribunal under criterion (b). Having regard to the scope and objects of Part IIIA, those considerations are relevant to the Minister's decision whether to declare a service.

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118 Fortescue submissions at [78]
119 Fortescue submissions at [80]
120 Fortescue submissions at [81]
121 (2006) 155 FCR 125 at [38]
122 At [180]
123 (2006) 155 FCR 125 at [39]