

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
BETWEEN:

No M155 of 2011

The Pilbara Infrastructure Pty Ltd
(ACN 103 096 340) & Another
Appellants
and
Australian Competition Tribunal
& Others
Respondents

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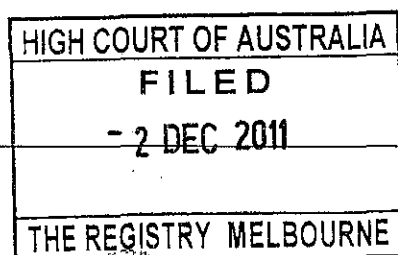
No M157 of 2011

The Pilbara Infrastructure Pty Ltd
(ACN 103 096 340) & Another
Appellants
and
Australian Competition Tribunal
& Others
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Filed on behalf of the Applicant for Intervention
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SUBMISSIONS OF THE APPLICANT FOR INTERVENTION

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. The Applicant for intervention (**Council**) seeks leave to be heard in these appeals, generally in support of the appellants, on one issue – namely, whether, on its proper construction, s 44H(4)(b) (**criterion (b)**) of the *Competition and Consumer Act 2010* (**Act**) should be applied by reference to:

- 2.1 the social cost approach adopted by the Australian Competition Tribunal (**Tribunal**) in this case and in *Re Review of Freight Handling Services at Sydney International Airport*,¹ *Re Duke Eastern Gas Pipeline Pty Ltd*,² and *Re Services Sydney Pty Limited*,³ or
- 2.2 the private profitability approach adopted by the Full Federal Court in this case.

PART III: REASONS WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. The Council is an independent statutory body charged with the task of assessing applications for declaration of particular services and making recommendations to the designated Minister as to whether the relevant services should be declared. The Council does so by reference to criteria identical to those contained in s 44H(4) of the Act (the **Declaration Criteria**).⁴ In response to the applications by the Appellants (**FMG**), the Council so recommended for the services the subject of the Tribunal determinations, which were in turn reviewed by the Full Federal Court in the proceedings below.⁵ The designated Minister accepted the Council's recommendations on those applications.⁶
4. The Council took part in the hearing of the review proceedings before the Tribunal that give rise to the Full Federal Court proceedings below, as required by s 44K(6) of the Act. Its involvement included making written and oral submissions directed primarily to issues of law and policy concerning the application of the Declaration Criteria and

¹ (2000) 156 FLR 10.

² (2001) 162 FLR 1.

³ (2005) 227 ALR 140.

⁴ see generally paragraphs [4] to [9] of the Affidavit of Robert John Feil sworn 21 November 2011 in support of the Council's application to intervene in these appeals (**Affidavit**).

⁵ Affidavit, paragraphs 22 to 23.

⁶ Affidavit, paragraph 24.

more broadly the operation of the National Access Regime established by Part IIIA of the Act.⁷

5. The Council was granted leave to, and did, intervene in two of the Full Federal Court proceedings below (VID616 of 2010 and VID686 of 2010) on the same issue of the interpretation of criterion (b), for which the Council now seeks leave to intervene in these appeals.⁸
6. The Council has a special interest in the interpretation and application of the Declaration Criteria, which the Council interprets and applies on a regular and ongoing basis. As a result, the Council has specialised knowledge and experience of the considerations relevant to the application of such criteria and the consequences that different interpretations of those criteria have for declaration applications beyond those the subject of the current proceedings.
7. That specialised knowledge and experience, together with the independent and impartial status of the Council, allow the Council to make submissions that focus on the broader context and objectives of the provisions in question. That is particularly important given:
 - 7.1 that, once a service is declared, any person (not only the relevant applicant – here FMG) is entitled to make a request for access to the service; and
 - 7.2 the potential significance of the issues, on which the Council seeks to intervene in this proceeding, for the future application of the National Access Regime.⁹
8. The Council participated in the only other appeal to date from a determination of the Tribunal reviewing a declaration decision under Part IIIA of the Act.¹⁰ Further, the Council has participated in all litigation associated with Part IIIA access to the Hamersley and Robe railway services to date, including the appeal to this Court in *BHP Billiton Iron Ore Pty Ltd v National Competition Council*.¹¹

⁷ Affidavit, paragraphs 32 to 33.

⁸ Affidavit, paragraphs 39 to 42.

⁹ See generally Affidavit, paragraphs 67 to 75.

¹⁰ *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 232 ALR 454.

¹¹ (2008) 249 ALR 418. See also, *Hamersley Iron Pty Ltd v National Competition Council* (1999) 164 ALR 203; *National Competition Council v Hamersley Iron Ore Pty Ltd* (1999) 167 ALR 109; *BHP Billiton Iron Ore Pty Ltd v The National Competition Council* [2006] FCA 1764; *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 247 ALR 104; *Rio Tinto Ltd v Australian Competition Tribunal* (2008) 246 ALR 1; *Hamersley Iron Pty Ltd v National Competition Council* (2008) 247 ALR 385.

9. Finally, the parties to these appeals have either consented to, or expressed no opposition to, the Council being granted leave to intervene in these appeals.¹²

PART IV: APPLICABLE PROVISIONS

10. As at 30 June 2010 (the date of the Tribunal's decision), s 44H(4) of the Act provided:

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

- (a) *that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;*
- 10 (b) *that it would be uneconomical for anyone to develop another facility to provide the service;*
- (c) *that the facility is of national significance, having regard to:*
- (i) *the size of the facility; or*
- (ii) *the importance of the facility to constitutional trade or commerce; or*
- (iii) *the importance of the facility to the national economy;*
- (d) *that access to the service can be provided without undue risk to human health or safety;*
- (e) *that access to the service is not already the subject of an effective access regime;*
- 20 (f) *that access (or increased access) to the service would not be contrary to the public interest.*

11. Paragraph (d) of s 44H(4) was deleted and paragraph (e) of s 44H(4) was amended with effect from 14 July 2010.

PART V: ARGUMENT

12. The Council relies on and repeats the matters set out in paragraphs 18 to 57 of its submissions filed in proceedings M45 of 2011 and M46 of 2011 on 25 November 2011.

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¹² Affidavit, paragraphs 48 to 49