IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

Nos M155, M156 and M157 of 2011

B E T W E E N

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

Appellants

and

AUSTRALIAN COMPETITION TRIBUNAL & ORS

Respondents

Nos M45 and M46 of 2011

B E T W E E N

THE NATIONAL COMPETITION COUNCIL

Applicant

and

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

Respondents

RIO TINTO'S SUBMISSIONS

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Part I: Certification for internet publication

1. Rio Tinto Ltd and its associated entities[1] (***Rio Tinto***) certify that these submissions are in a form suitable for publication on the internet.

Part II: Issues

2. Whether s. 44H(4)(b)[2] (***criterion (b)***) should be construed by reference to:

   (a) the private feasibility approach adopted by the Full Federal Court below; or

   (b) the natural monopoly approach adopted by the Tribunal below.

3. Whether s. 44H(4)(f) (***criterion (f)***) involves an enquiry which is in FMG's[3] terminology "*confined*" rather than "*detailed*".[4]

10 4. Whether, as FMG contends, the scope of the Minister's residual discretion under s. 44H as to whether or not to declare a service is extremely limited.[5]

5. Whether the Tribunal denied FMG procedural fairness in concluding that it was likely that FMG would construct the Dixon line by 2013/14 and, if it did, whether that made any difference to the outcome of the case.

Part III: Section 78B certification

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

Part IV: Material facts that are contested

20 7. None.

Part V: Applicable provisions

8. The appellants' statement of applicable provisions is accepted.

Part VI: Argument

CRITERION (B)

9. The private feasibility construction adopted by the Full Court:

   (a) is faithful to the words used in criterion (b), and in cognate provisions such as ss. 44H(5) and (6), all of which implement the Competition Principles Agreement (***CPA***);[6]

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1 Comprising the second to tenth respondents in proceeding M155 of 2011, the second to eighth respondents in proceedings M156 and M157 of 2011, the first to ninth respondents in proceeding M45 of 2011 and the first to seventh respondents in proceeding M46 of 2011.

2 s. 44H(4)(b) of the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)) (the ***Act***).

3 The appellants in proceedings M155, M156 and M157 of 2011, the twelfth and thirteenth respondents in proceeding M45 of 2011 and the tenth and eleventh respondents in proceeding M46 of 2011.

4 FMG submissions in proceedings M155 - M157 of 2011, 25 November 2011 (***FMG's submissions***), [3].

5 FMG's submissions, [4] and [79].

6 The CPA, between the Commonwealth and various states and territories, was agreed on 11 April 1995.

(b) addresses the competition problem to which Part IIIA is directed: i.e. where it is not economically feasible to duplicate an essential facility on which other markets depend, access to the service is necessary to permit effective competition in those upstream or downstream markets;[7]

(c) is consistent with the objects and policy of Part IIIA;

(d) implements sound economic principles; and

(e) enables the decision-maker to consider, progressively, whether the competitive market place can be relied upon to overcome any competition problem; if not, whether access to a facility that cannot be duplicated economically will promote a material increase in competition in at least one dependent market; and, if so, whether access would not be contrary to the public interest having regard, inter alia, to all societal costs and benefits.

10. In contrast, the Tribunal's natural monopoly construction:

(a) bears no linguistic relationship with the words used in criterion (b);[8]

(b) is inconsistent with the CPA which Part IIIA implements;

(c) is inconsistent with the objects and policy of Part IIIA;

(d) focuses solely on the production costs of the below rail function, assessed on a purely static basis, and thereby ignores the allocative and dynamic components of economic efficiency (including the benefits to be derived from facilities-based competition, expanded overall capacity in relevant markets and technological innovations);[9]

(e) does not take into account all of the relevant costs incurred in sharing a facility between two or more firms, and so is not a true comparison between the costs of one facility, as against two or more facilities, meeting all reasonably foreseeable demand;[10]

(f) misapplies economic principles by extracting a test for natural monopoly from its proper context, that of an integrated *firm* in a market, to the distinctly different situation of a *facility* which might be shared, and in so doing fails to take into account all of the costs that arise from that sharing;[11]

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7 Report by the Independent Committee of Inquiry into Competition Policy (August 1993) (***Hilmer Report***) at xxxi, 250 and 251; and the National Competition Policy, Draft Legislative Package, pp 1.11 - 1.12.

8 The Full Court correctly held that it was 'constrained by the statutory text to part company with the tribunal': *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 (***Pilbara Infrastructure***) at [76].

9 *Re Fortescue Metals Group Ltd (2010) 271 ALR 256* (***Fortescue***) at [842] to [847]; cf the wider efficiency considerations that the Tribunal took into account in applying criterion (f) at [1230], [1243], [1304], [1324]-[1331] and [1337].

10 In concluding that a natural monopoly construction should ignore all 'social costs', the Tribunal reached a different view from the economists who appeared before it; see *Fortescue* at [842]-[845], [847] and [850]; *Pilbara Infrastructure* at [52].

11 Willig (30 June 2009), [36] and [42].

(g) attempts to draw a distinction between costs which are not distinguishable – 'above rail' costs which are necessarily imposed by sharing and the direct costs of providing a 'below rail' service; and

(h) is unsupported by any previous decision.

The Hilmer Report and other extrinsic materials

11. The Hilmer Report identified a competition problem where an essential facility cannot be duplicated economically, and competitors in dependent markets may need to be assured of access to that facility if effective competition is to be fostered in those markets.[12] Throughout the Hilmer Report and in other extrinsic materials, "*essential*" bears its ordinary meaning of indispensable or necessary. Where it is economically feasible to duplicate a facility, then that facility does not possess the key characteristic which marks it out for regulatory attention: it must be essential for competition in dependent markets. If it is economically feasible to duplicate the facility, the potential exercise of monopoly power is constrained by the potential for a rival facility to be built which will compete with the first mentioned facility in providing services to dependent markets.

12. This analysis explains numerous references in the Hilmer Report which emphasise whether an alternative is privately feasible as the touchstone for regulatory intervention – "*they cannot be duplicated economically*", "*access to the facility is required*", "*access to the facility should be essential, rather than merely convenient*" and "*access to the facility in question is essential to permit effective competition in a downstream or upstream activity*".[13] Similarly, the legislative package issued by COAG in 1994 emphasised that an essential facility is one that *"a competitor"* could not duplicate economically.[14]

13. By the expression "*they cannot be duplicated economically*", Hilmer meant they were not able to be duplicated whilst earning an economic return, i.e. not feasibly or profitably. The words "*not wastefully*" are not incompatible with the private feasibility construction; developing a facility that cannot earn an economic return is surely wasteful. Nevertheless, the words "*not wastefully*" do not capture the full meaning of the criterion, and ignore the words "*for anyone*". Not only do FMG and the NCC substitute those words into criterion (b), they add the gloss "*wasteful from society's perspective*" which disregards the words "*for anyone to develop*". They then use that gloss to confine the enquiry either to the production costs of providing an alternative below rail facility, or to the economic efficiency of the existing facility. That interpretation implies that chapter 11 of the Hilmer Report was directed to recommending something very different from a competition policy - rather a policy of directing what constitutes the most productively efficient use of existing national infrastructure irrespective of competition concerns. Nothing in chapter 11 suggests a concern with that subject matter, or any policy that does not flow from market failure.

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12 Hilmer Report, pp. xxvii, xxxi and 250-251.
13 Hilmer Report, pp. 240 and 251.
14 *Pilbara Infrastructure* at [67] and [68].

14. The fact that criterion (b) focuses on potential new entry throws up an analogy with the assessment of market power under s. 46, and the way in which the competitive consequences of a merger or acquisition are considered under s. 50.[15] In each context, it is fundamental to consider barriers to entry and the potential for new entry. As Gummow and Lockhart JJ said in *Eastern Express Pty Ltd v. General Newspapers Pty Ltd*:[16]

> "*Market power is concerned with power which enables a corporation to behave independently of competition and of the competitive forces in a relevant market. The primary consideration in determining market power must be taken to be whether there are barriers to entry into the relevant market ... To what extent is it rational or possible for new entrants to enter the market in this case?*"

15. Where new entry is rational and possible, it is improbable that the existing facility owner possesses any market power. The threat of new entry will mean that the incumbent is unlikely to behave in a manner different from the behaviour of a firm facing otherwise similar cost and demand conditions in a competitive market.[17]

The CPA

16. Section 44H(4) implements clause 6(1)(a) of the CPA ("*it would not be economically feasible to duplicate the facility*"), and must be construed accordingly. So much is clear from the express adoption of the CPA principles in ss. 44H(4)(e), (5) and (6).[18] The Full Court accepted this argument.[19]

17. The responses from the other parties are quite divergent. The NCC accepts that criterion (b) must be read conformably with clause 6(1)(a), but it appears to suggest that the clause may be read as "*it would not be feasible (without waste) to duplicate the facility*".[20]

18. The ordinary meaning of "*feasible*" is "*practicable or possible*" in the context of a design, project or plan.[21] On its face clause 6(1)(a) is directed to the project of developing another facility. This connotes a private endeavour by a commercial firm. The focus is on real world economic judgements. In that context , a construction that reads "*uneconomical for anyone to develop*" as not economically feasible or profitable for anyone to develop, in the sense of not supporting an economic return on the capital invested in the development, makes far more sense than the construction urged by the NCC.

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15 See s. 46(3) of the Act in relation to potential competitors and s. 50(3) of the Act in relation to potential competitors and barriers to entry.

16 (1992) 35 FCR 43 at 62.

17 See *Queensland Wire Industries Pty Ltd v. BHP* (1989) 167 CLR 177 at 200 per Dawson J, quoting Kaysen and Turner, *Antitrust Policy* (1959), p. 75.

18 It also follows from s. 44AA(b) of the Act.

19 *Pilbara Infrastructure* at [78]-[79].

20 NCC submissions in proceedings M45 and M46 of 2011, 25 November 2011 (***NCC's submissions***), [22.1].

21 The Oxford English Dictionary Online, Third edition April 2010, Online version November 2010.

19. Unlike the NCC, FMG denies the need for any conformity with clause 6 of the CPA.[22] FMG's first reason for adopting this stance derives from its erroneous construction of the objects clause in Part IIIA.[23]

20. Its second argument, that the reasoning of the Full Court is circular,[24] ignores the context in which the respective phrases "*uneconomical*" (criterion (b)) and "*would not be economically feasible*" (clause 6(1)(a)) are deployed. In criterion (b), the words "*for anyone*", and in clause 6(1)(a) "*feasible*", connote a private commercial investment by a hypothetical developer of another facility. The words *"for anyone"* are otiose in the natural monopoly construction advanced by FMG and the NCC.

10 **US essential facilities doctrine**

21. Both FMG and the NCC attempt to distance the US essential facilities doctrine. The overseas jurisprudence cannot be set aside so easily. Hilmer observed that courts in the US had developed an 'essential facility doctrine' through interpretation of the *Sherman Act*.[25] The expression 'essential facilities', found throughout the relevant chapter of the Hilmer Report – entitled "*11. Access to 'Essential Facilities'*" – derives from the US doctrine.[26] In circumstances where one of the principles of the US doctrine ("*a competitor's inability practically or reasonably to duplicate the essential facility*") is a direct analogue of criterion (b), the US doctrine and its economic reasoning should not be ignored.[27]

20 22. This is graphically illustrated by the debate concerning the implications of the CPA. *Hecht* states that "*[t]o be 'essential' a facility need not be indispensable; it is enough that duplication of the facility would be economically infeasible*".[28] There is no coincidence in the fact that the expression "*economically infeasible*" in *Hecht* is found almost verbatim as "*not ... economically feasible*" in clause 6(1) of the CPA.

Particular features of "anyone"

23. The application of the private feasibility construction does not vary according to the idiosyncratic position of a particular firm.[29] Criterion (b) invites consideration of the economic returns from the development of "*another facility to provide the service.*"

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22 If the test applied under criterion (b) were different from the economic feasibility test under cl 6 of the CPA, significant anomalies would arise when applying s.44H(4)(e), which exempts services that are the subject of an effective access regime, where the benchmark is economic feasibility (CPA, cl 6(3)(a)(i)).

23 FMG's submissions, [50].

24 FMG's submissions, [51].

25 Sherman Act, 15 U.S.C. (1994); see Hilmer Report, p. 244.

26 *Hecht v Pro-Football Inc* 570 F.2d 982 (1977) (***Hecht***); *MCI Communications Corp v American Telephone & Telegraphic Co* (1983) 708 F.2d 1081.

27 The economically feasible construction has also been adopted in the European Community (*Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* (C-7/97) [1998] ECR I-7791; *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* (C-481/01) [2004] 4 CMLR 28; Evrard, S, 'Essential Facilities in the European Union: *Bronner* and Beyond' (2004) 10 *Columbia Journal of European Law* 1) and New Zealand (*Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647, 679-680). Were the social or natural monopoly constructions to be accepted, Part IIIA would be out of step with the manner in which the 'essential facility' problem has been resolved in overseas jurisdictions.

28 *Hecht*, 992.

29 Cf. FMG's submissions, [32].

Particular features of 'anyone' in criterion (b) do not need to be identified. The economic feasibility of such a development can be provided by market evidence,[30] or it can be shown by a net present value analysis of the project to develop the 'other facility' that produces a positive outcome.[31] No issues of cross-subsidisation arise. If a mine owner can profitably build and operate a railway for its own requirements (to provide a haulage service to itself), a haulage operator should also be able to earn a profit from tariffs charged to the mine owner for the same haulage service.

A private feasibility construction implements economic principles

24. Opponents of the private feasibility construction adopted by the Full Court argue that, unlike its rivals, this construction (1) does not apply economic principles, with the consequence that (2) society's resources are wasted.[32]

25. These arguments mis-state the private feasibility construction, which is founded upon economic rather than accounting concepts. The terms "*economically feasible*" or "*economically profitable*" mean that if an alternative facility were to be developed by anyone, it will be able to earn revenue that exceeds the capital and operating costs of the development, including an economic rate of return on the capital deployed. This was how the Full Court used the term.[33] The Tribunal understood that the private profitability construction was based on economic concepts of profit.[34]

26. The theory underpinning this construction was explained by the economists.[35] Where it is feasible (profitable) to construct an alternative facility, an incumbent faces the ever present threat of entry by a competitor who can achieve an economic return by building its own facility and entering the market. So if the incumbent continues to deny access, it foregoes the opportunity to obtain access revenue from the access seeker in circumstances where it knows the access seeker can enter the market in any event. If the incumbent can provide the entrant with access and generate access revenues from the entrant that exceed the incumbent's costs of providing the service, the rational incumbent will do so. The interplay of market forces performs a social cost/benefit analysis on the construction of alternative facilities.

27. Contrary to FMG's submissions, it does not follow that an application of the private feasibility construction will lead to the construction of unnecessary infrastructure.[36] The dictates of rational self-interest maximise the benefits of competition and avoid the wastage of society's resources. As the Full Court recognised, errors are possible,[37] but economic theory suggests that market participants are a better judge of costs and benefits than an external regulator. If the market participants are of the view that the

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30 Eg. the actual construction of an alternative rail facility, such as the Chichester line in the case of the Mt Newman line: see *Fortescue* at [418]-[422].
31 *Fortescue* at [964]-[965]; *Pilbara Infrastructure* at [57].
32 FMG's submissions, [2], [30]-[36]; NCC's submissions, [19.3], [25.2], [25.3].
33 *Pilbara Infrastructure* at [76]-[77].
34 *Fortescue* at [954].
35 Willig (30 June 2009), [14]-[20]; Kalt (3 July 2009), pp.11-14; see *Fortescue* at [820]-[823].
36 Cf. FMG's submissions, [33].
37 *Pilbara Infrastructure* at [100].

costs of access will not exceed the costs of building and operating an alternative facility, it is likely that access will be agreed without regulatory intervention.

28. A natural monopoly construction as adopted by the Tribunal will not avoid economic inefficiencies. This is because the natural monopoly construction ignores important aspects of economic efficiency, namely allocative and dynamic efficiency, and excludes all costs other than the capital and operating costs of providing a below rail function. Moreover, it was common ground amongst the experts that infrastructure which might be described (inaptly) as possessing natural monopoly characteristics may be able to be duplicated feasibly by a competitor.

The objects clause

29. The natural monopoly construction is not assisted by reference to the objects of Part IIIA, indeed the opposite is the case.[38]

30. The general object of the Act is, relevantly, to enhance the welfare of Australians through the promotion of competition,[39] and the particular objects of Part IIIA include promoting 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.[40]

31. The particular objects of Part IIIA, which were inserted by the 2006 amendments, emerged from the Productivity Commission's review[41] of the national access regime.[42] The object concerning efficient investment in infrastructure was included to emphasise that access should not be granted in circumstances where it would lead to a chilling of investment. The objects clause does not support the conclusion that Part IIIA has a much wider purpose than the removal of bottlenecks.[43]

32. Specifically, s. 44AA(a) refers to the infrastructure by which services are provided, not *the* services which are the subject of the application for declaration. There is no definite article. The infrastructure by which services are provided includes the facility that provides the service that is the subject of the application and *any other* facilities by which such services might be provided competitively.[44] Thus, s. 44AA(a) requires the Minister to consider the likely effect of access on the efficient operation of, use of and investment in the incumbent's infrastructure and the desirability of promoting efficient operation of, use of and investment in additional infrastructure to facilitate infrastructure based competition.

33. The contention that the private feasibility construction merely encourages the construction of competitively weak alternative facilities[45] is fallacious.[46] By definition,

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38 Cf. FMG's submissions, [35]; NCC's submissions, [25].
39 s.2 of the Act.
40 s.44AA of the Act.
41 Productivity Commission, *Review of the National Access Regime: Inquiry Report* (28 September 2001).
42 See Australian Government, *Government Response to Productivity Commission Report on the Review of the National Access Regime*, (released February 2004), p.3.
43 Cf. *Fortescue* at [817]-[819].
44 This is confirmed by the Revised Explanatory Memorandum which includes the objective of fostering efficient investment in new infrastructure.
45 FMG's submissions, [36].

the alternative facilities will achieve an economic return. They will expand the overall capacity available to access seekers and the facility owner, compelling greater competition between the parties. They are likely to incorporate newer technology which may be advantageous to upstream or downstream users of the facility and which may give the entrant a competitive edge in going head to head with the incumbent. Forcing rivals to cooperate by mandated access runs the danger of blunting competition between them,[47] and is likely to provide upstream and downstream users with much less satisfactory options.[48]

34. The NCC[49] and FMG[50] both support the Tribunal's natural monopoly construction by arguing that the natural and ordinary meaning of "*uneconomical*" is "*not wasteful*" and then they read those words in an artificially constrained way. But a natural monopoly construction does not examine "*wastefulness*", since major economic costs are excluded from consideration.[51] Nor is the natural monopoly construction consistent with s. 44AA because it ignores vital aspects of economic efficiency, namely allocative and dynamic efficiency, and it disregards the advantages of fostering efficient investment in new infrastructure. On no view of the matter can "*uneconomical*" support the natural monopoly construction, although the NCC appears to contend that this is the same thing as a net social benefit approach.[52] Plainly it is not.[53]

Other considerations support a private feasibility construction

35. Other considerations favouring the private feasibility construction include the following:

(a) It is the natural reading of criterion (b), which refers to the economics of the development by anyone of another facility to provide the service. Unlike criteria (a) and (f), which refer to 'access to the service,' criterion (b) does not invite a comparison between the state of affairs with and without access.

(b) If Parliament had intended the words "*uneconomical for anyone to develop*" to mean "*not economically efficient*" or to refer to a "*natural monopoly*", it would have used those precise terms, given that "*economic efficiency*" appears in ss. 44AA and 44X(1)(g) and "*natural monopoly*" appears in clause 4(3)(b) of the CPA.

(c) It permits a clean analytical division between the key criteria for declaration – promotion of competition, uneconomical for anyone to develop another facility and public interest. If a declaration application overcomes the hurdles

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46 Willig (23 September 2009), [9]. By definition, those facilities will be capable of making an economic return on capital, and thus they will be a source of effective competition.
47 2 Willig (23 September 2009), Annexure "RW-2", [10].
48 *Fortescue* at [1188]-[1190] and [1326].
49 NCC's submissions, [19.1]-[19.2].
50 FMG's submissions, [30].
51 *Fortescue* at [843]-[845].
52 NCC's submissions, [8] and [9].
53 *Fortescue* at [838]; *Pilbara Infrastructure* at [80].

established by criteria (a) and (b), a wider review of costs and benefits can then be conducted under criterion (f).

(d) Criterion (a) enquires whether access would result in a particular benefit, not the necessity for it. It cannot serve the purpose of determining whether there is a "*bottleneck*"[54] preventing competition in dependent markets that cannot be overcome by market forces.

(e) Compared to its rivals the private feasibility construction is straightforward to apply,[55] and avoids any overlap or distortion of other criteria.

(f) In deciding whether or not to declare a service, s. 44H(2) provides that the designated Minister must consider whether it would be "*economical for anyone to develop another facility that could provide part of the service*" (our emphasis). This provision is a linguistic pointer to private feasibility.

36. If the private feasibility construction is not adopted, then the only plausible alternative is the "net social benefits" construction. This at least requires an analysis of all costs and benefits to the community as a whole (after taking into account productive, allocative and dynamic effects) of developing another facility, rather than providing access to the existing facility.[56] However, this would leave no work for criterion (f) to do.[57]

CRITERION (F) AND THE DISCRETION

37. The issues raised by FMG concerning criterion (f) and the discretion do not involve questions of law. As the Tribunal observed, FMG has never successfully delineated, by reference to any satisfactory principle, which material it contends should be disregarded for the purposes of the first stage of the Part IIIA process.[58]

38. This is immediately apparent from FMG's description of the claimed "*issue*": whether criterion (f) permits or requires a "*detailed factual and counter factual analysis of the likely net balance of all social costs and benefits of access*" or stipulates a "*confined test considering only whether there would be concrete harm to an identified aspect of the public interest not otherwise addressed under the [other] criteria*".[59] The adjectives "*detailed*" and "*confined*" do not reflect a difference of legal principle or the outcome of a process of legal construction. Moreover, the factual findings of the Tribunal could be justified as representing the application of such a "*confined*" test.

39. The uncertainty inherent in FMG's preferred approach to criterion (f) also emerges from its references to *"some aspect"* of the public interest not otherwise addressed under criteria (a) to (e) which might be harmed by access,[60] and which would arise

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54 *Re Sydney Airports Corporation Ltd* (***Sydney Airport (No. 1)***) (2000) 156 FLR 10, [107].
55 *Pilbara Infrastructure* at [86].
56 *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1 at [64] and [137].
57 See paragraph [65] below.
58 *Fortescue* at [30].
59 FMG's submissions, [3].
60 FMG's submissions, [54].

"irrespective" of the ultimate terms and conditions or other details of access to be determined during the second stage.[61]

40. FMG then fails to observe these notions when identifying the aspects of public interest that may be considered. While sovereignty and national security are not addressed in criteria (a) to (e) and might arise irrespective of terms and conditions for access, they are not the only aspects of public interest that fall into this category. Indeed, the costs that the Tribunal found were likely to exceed or dwarf the benefits of access were not addressed under criteria (a) to (e). The Tribunal also considered that these matters were likely to arise assuming reasonable terms and conditions of access.[62] They included:

(a) delayed expansions due to negotiation with third parties;[63]

(b) inefficiencies associated with delayed or suboptimal new operating practices and technology that would arise as a result of access;[64]

(c) constraints on third party operations through using the incumbent's line rather than a new line;[65]

(d) the loss of dynamic efficiencies;[66] and

(e) costs (including delay costs) of arbitration.[67]

The Tribunal also acknowledged the real benefits of facilities-based competition which might be lost if access is granted.[68]

41. FMG has articulated no principle whereby these very significant aspects of the public interest, involving a significant impact on GDP, should be ignored under criterion (f). It also ignores the requirement that the decision-maker must be satisfied that access will *not* be contrary to the public interest.[69] If, as in this case, the decision-maker cannot be satisfied that reasonable terms and conditions will address its significant public interest concerns, criterion (f) is not met.

42. The NCC does not challenge the Full Court's decision in relation to the application of criterion (f) and the discretion. It also submitted to the Full Court that the Tribunal did not fail to have proper regard to the distinction between stage 1 and stage 2 of the Part IIIA process in this case in a manner giving rise to an error of law.[70] The NCC acknowledges that the Tribunal dealt with the evidence of other costs of access (being

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61 FMG's submissions, [54]; see also [76].
62 *Fortescue* at [1167].
63 *Fortescue* at [1246]-[1269].
64 *Fortescue* at [1238]-[1243].
65 *Fortescue* at [1230]-[1237].
66 *Fortescue* at [1230]-[1237].
67 *Fortescue* at [1282]-[1291].
68 *Fortescue* at [1324]-[1331].
69 E.g. FMG's submissions, [54] (*"aspect of public interest...which would arise irrespective of ultimate terms and conditions"*).
70 NCC's outline of submissions dated 13 December 2010 in proceedings VID 616 and 686 of 2010 at [70], [74], [82] and [83], Transcript, 24 February 2011, T237.32-T238.16.

the costs other than the costs of producing the below rail service) in criterion (f) or the residual discretion,[71] and it does not suggest that the Tribunal erred in doing so.[72]

43. Criterion (f) is not a *"check"* on a *"prima facie case"* otherwise established pursuant to criteria (a) to (c).[73] It is clear from the text and structure of s. 44H(4) that the Minister must be satisfied of all six criteria as pre-conditions for declaration. Criterion (f) is not subordinate to the other criteria in some way. Nor is the phrase 'the public interest' to be read down by reference to the contents of the other criteria.

44. It is not to the point that the enquiry under criterion (f) may be complex[74] or difficult.[75] As the Full Court in *Sydney Airport Corporation Ltd vACT* (2006) 155 FCR 124 (***Sydney Airport (No. 2)***) observed, difficult and complex questions of an economic, commercial and social character will be involved at both stages of the process.[76] While there are differences between the enquiries, this is likely to apply to the question of whether access would be contrary to the public interest at each stage.

45. Significant elements of the Tribunal's reasoning for its approach to the construction and application of criterion (f) and the residual discretion, all of which are correct, include that:[77]

(a) the 'public interest' requires consideration of the economic welfare of the Australian community as a whole;

(b) criterion (f) should not be used to call into question the results obtained by the application of the earlier criteria, but they are not to be ignored – the benefits arising from the satisfaction of criteria (a) and (b), and other benefits not considered under earlier criteria, as well as the costs of access, must be taken into account under criterion (f);

(c) the discretion to declare may be affected by a wide range of considerations of a commercial, economic or other character not squarely raised by, nor falling within, the necessary pre-conditions in s. 44H(4) (i.e. the discretion is very broad);

(d) criterion (f) requires the Tribunal to consider whether 'access' is contrary to the public interest; it is necessary for there to be a more detailed enquiry to appreciate the effect on public welfare of a declaration, but that enquiry is only relevant to the discretion;

(e) criterion (f) requires the decision-maker to consider the consequences of access (assuming that access will be on reasonable terms as described in *Sydney*

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71 NCC's submissions, [9.2], [9.3] and [55].
72 NCC's submissions, [55]-[57].
73 Cf. FMG's submissions, [54], and see also [24(b)] and [24(c)].
74 Cf. FMG's submissions, [55], and see also [63], [71] and [75]. It may be observed that the hearing would probably have occupied only one or two sitting days had the Tribunal adopted the private feasibility construction of criterion (b).
75 Cf. FMG's submissions, [64].
76 *Sydney Airport (No. 2)* at [35]
77 *Fortescue* at [1161]-[1164], [1166]-[1167], [1170] and [1172]-[1174], and see also [592]-[606].

Airport (No. 2)), giving them a weight that pays regard to their degree of likelihood;

(f) Part IIIA does not provide the incumbent with certainty that its legitimate business interests will be protected, and any costs of protecting them borne by the access-seeker may be considered under criterion (f) since they are costs from society's perspective; and

(g) the decision-maker's role at the declaration stage is to be concerned with the 'big picture' whereas the minutiae of terms of access will be dealt with at stage 2. When considering the public interest and exercising its discretion at the declaration stage, the decision-maker is concerned with broad issues of policy that are unlikely to be dealt with at stage 2.

46. The Full Court rejected the arguments advanced by FMG in relation to criterion (f) and the discretion, and agreed with the Tribunal's approach.[78]

47. The Tribunal's approach does not render criteria (a) to (e) largely redundant[79] – all of the criteria must be satisfied. Since each is a 'hurdle', it will not be necessary for the Minister to consider criterion (f) and the discretion if one of the earlier criteria cannot be satisfied.

48. If all of the earlier criteria are satisfied, the results of the application of them are taken into account, but not revisited or reassessed,[80] in the application of criterion (f). Criterion (f) is not expressed to be limited to aspects of the public interest other than those which might be addressed in applying criteria (a) to (e). Indeed, to exclude matters addressed under criteria (a) to (e) would work against the interests of the applicant for declaration, since these criteria usually entail potential benefits for society.

49. A number of FMG's grounds of appeal,[81] and most of its submissions regarding criterion (f),[82] are to the effect that various enquiries should be deferred to the second, arbitral, stage of the Part IIIA process, and are not matters eligible for consideration by the Minister.

50. As the Full Court correctly held, nothing in the language of Part IIIA conveys the intention that the decision making required in stage 1 should somehow be constrained or limited by the consideration that if a declaration is made, it may fall to the ACCC to consider the same or similar issues in stage 2.[83] Stage 2 involves a very different enquiry for a very different purpose, namely the arbitration of a particular dispute. The ACCC will never be concerned with the same large policy issues as the decision-maker under s. 44H(4), including an overall assessment of the costs and benefits of access and other public interest considerations. Accordingly, the 'staged scheme' of

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78 *Pilbara Infrastructure* at [101]-[121], in particular [117].
79 Cf. FMG's submissions, [57].
80 Cf. FMG's submissions, [57].
81 See, e.g., FMG's notice of appeal, grounds 3(a), 3(b)(1), 3(b)(2) and 4.
82 See, e.g., FMG's submissions, [58] and [60]-[75].
83 *Pilbara Infrastructure* at [115].

Part IIIA does not reveal any deficiency in the Tribunal's approach.[84] Nor should stage 1 be read down by reason of the facts that negotiation between (particular) parties may occur at stage 2,[85] that a number of outcomes are possible at stage 2,[86] or that various protections for the facility owner operate as constraints at the second stage.[87]

51. The Full Court rightly held that criterion (f) requires the decision maker to consider the consequences of access on reasonable terms and conditions. The Tribunal was entitled to[88] consider consequences that are likely to arise as a result of access, giving them a weight corresponding to their degree of likelihood.[89] This necessarily involves forward-looking assessments, as do most of the criteria in s. 44H(4), including criteria (b) and (a). If such assessments were impermissible, it would be impossible for criterion (a) ever to be satisfied. Other provisions of the Act require similar exercises to be performed.[90]

52. There was no error by the Tribunal in considering the consequences that are likely to arise as a result of access and reaching the conclusions about which FMG complains.[91] FMG is wrong to contend that forward-looking assessments by the Tribunal amount to speculation in stage 1 whereas similar forward-looking assessments at stage 2 are likely to be better informed.[92] This is not the case in relation to forward-looking assessments about the impact of access by third parties generally over a lengthy access period on expansions, operational methodologies, the introduction of new technology and other areas where the Tribunal found that the likely costs weighed heavily against any grant of access.

53. The Tribunal found, in relation to the Hamersley Service, that there is the very real possibility, indeed probability, that the benefits of access would be "*dwarfed*" by the costs,[93] and, in relation to the Robe Service, that it was concerned about the likelihood of extensive use by the Rio Tinto parties of the Robe line after 2018 and it was not satisfied that, for any period beyond 2018, access would not be contrary to the public interest.[94] Further, the lost export revenue in the order of $10 billion referred to by FMG[95] was, the Tribunal found, based on "*a very conservative assumption*" of a three

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84 As appears to be contended in FMG's submissions, [58].
85 As appears to be contended in FMG's submissions, [61].
86 As appears to be contended in FMG's submissions, [66]-[67] and [69].
87 As appears to be contended in FMG's submissions, [25]. As to the effectiveness of those protections, see *Fortescue* at [592]-[606].
88 Cf. FMG's submissions, [60], and see also [63] and [64].
89 *Pilbara Infrastructure* at [102] and [117]; *Fortescue* at [1172].
90 See, e.g., *Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385 at 405 (regarding authorisation of mergers); *Australian Wool Growers Association Ltd* [1999] ACompT 4 at [15] (regarding authorisation of mergers); *Australian Gas Light Company v. Australian Competition and Consumer Commission* (2003) ATPR 41-966 at [348] (regarding s. 50); *Qantas Airways Ltd* [2004] ACompT 9 at [151] (regarding authorisation of mergers).
91 Cf. FMG's submissions, [64]-[70].
92 FMG's submissions, [64] and [72].
93 *Fortescue* at [1319].
94 *Fortescue* at [1337].
95 FMG's submissions, [67].

month average delay to an expansion,[96] and on the assumption that 20% of the revenue lost by Rio Tinto is diverted to other Australian producers and 20% is subsequently recovered by Rio Tinto.[97] The impact on GDP of this lost export revenue to Australia of $10 billion would be around $6 billion to $7 billion.[98]

54. FMG appears to contend that the Tribunal should not have addressed the likely demand for the service in undertaking the analysis described above.[99] Under criterion (a), the decision-maker must address the likely extent of access in assessing whether access would promote a material increase in competition. Criterion (f), which is in similar terms to criterion (a) (both requiring an assessment of the impact of access) requires (and certainly permits) the same approach.

55. The Tribunal,[100] and the Full Court,[101] correctly held that criterion (f) requires consideration of the consequences of *access*, not *declaration*. The Tribunal did not forecast, or speculate as to, the possible terms and conditions of access in an impermissible manner.[102] It (correctly) applied the *Sydney Airport (No. 2)* approach by making some broad assumptions about the nature of access 'on reasonable terms and conditions'.[103]

56. The Full Court was right to hold that to accept FMG's argument would radically inhibit the power and responsibility of the decision-maker to reject applications which appear to it to be contrary to the public interest.[104] FMG's argument would diminish the responsibility of the decision-maker to make a decision as to whether access would be in the public interest in a broad national perspective.[105]

57. A stage 2 arbitration involves a fundamentally different enquiry from stage 1. The perspective of each decision-maker (the Minister and the Tribunal on the one hand, and the ACCC on the other) will be different, even if some of the relevant evidence might be similar.[106] The service being considered is one provided by a facility of national significance.[107] The Minister must assume access, and must be satisfied that access to the service would not be contrary to the public interest, as elements in a broad assessment of Australia's welfare and national interests. Stage 1 of the process is the only point in time at which the public interest is considered in the broad, for the entirety of the proposed period of declaration, for all potential demand for the service and having regard to the full range of costs and benefits attributable to access.

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96 *Fortescue* at [1328]. Mr Taylor estimated the NPV of lost export revenues to Australia ranging from around $10 billion for a three month average delay to around $40 billion for an eighteen month average delay: *Fortescue* at [1296].

97 *Fortescue* at [1294].

98 *Fortescue* at [1297], referring to the modelling evidence of the economist Mr Brown.

99 Cf. FMG's submissions, [67].

100 *Fortescue* at [1172].

101 *Pilbara Infrastructure* at [102] (referring to *Fortescue* at [1172]), and [112].

102 Cf. FMG's submissions, [71].

103 *Fortescue* at [1166].

104 *Pilbara Infrastructure* at [110]-[111].

105 *Pilbara Infrastructure* at [114].

106 *Pilbara Infrastructure* at [116].

107 s. 44H(4)(c) of the Act.

58. The ACCC, on the other hand, is engaged in a dispute resolution process. It makes its decision in the narrower context of resolving a specific dispute between a facility owner and an identified access-seeker.[108] The terms and extent of access about which the ACCC might make a determination at stage 2 are only those which are the subject of the particular dispute before it.

59. The reference to 'the public interest' in criterion (f) is unqualified and unconfined. The public interest will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where 'the public interest' resides.[109] The similar expression 'public benefit' has consistently been given a wide ambit.[110]

60. Criterion (f) is an expansive provision that allows the Minister to take into account every relevant factor that bears upon the public interest and Australia's welfare. The Minister is not limited to considering whether, if there were access to the service in the future, there would be concrete harm to an identified aspect of the public interest not addressed under the earlier criteria, such as national security or sovereignty, and that would arise irrespective of the ultimate terms and conditions of access determined at the second stage.[111] There is no warrant for such a narrow reading.

61. If a factor cannot be taken into account under criterion (f) (because criterion (f) focuses upon the consequences of access, not declaration), it can be taken into account under the residual discretion.

FMG contends for no overall cost: benefit analysis

62. FMG's submissions regarding criterion (f) and discretion cannot be addressed in isolation, but must be considered in the context of the proper construction of s. 44H(4) (and Part IIIA) as a whole.

63. Although they are expressed in different ways, FMG's grounds of appeal in relation to criterion (f) and the discretion are to the general effect that the Tribunal and the Full Court erred in construing and applying criterion (f) and the discretion too broadly.[112] In substance, FMG submits that it is erroneous to take all costs and benefits into account under criterion (f) and the discretion.

64. The Tribunal considered the costs and benefits of access under criterion (f), whereas previous decisions of the Tribunal considered the same matters under criterion (b).[113] The Full Court correctly observed that the costs which the Tribunal took into account under criterion (f) would have been taken into account under criterion (b) if the 'net social benefit' construction of criterion (b) had been applied by the Tribunal in the

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108 See ss. 44S, 44U and 44V of the Act.

109 *McKinnon v. Secretary, Department of Treasury* (2005) 145 FCR 70 at [12] per Tamberlin J, referred to in *McKinnon v. Department of Treasury* (2006) 228 CLR 423 at [50] per Hayne J; see also *McKinnon v. Department of Treasury* (2006) 228 CLR 423 at [14]-[17] per Gleeson CJ and Kirby J, [55] per Hayne J and [93] per Callinan and Heydon JJ.

110 See, e.g., *Re Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357 at 42,677.

111 Cf. FMG's notice of appeal, ground 3(c); see also FMG's submissions, [54].

112 FMG's notice of appeal, grounds 3 and 4.

113 *Pilbara Infrastructure* at [104]; *Fortescue* at [1160]-[1174] and [1196]-[1337].

present case.[114] Critically, the Full Court held that whether or not these costs fall for consideration in relation to criterion (b) or criterion (f), it cannot be right to say that these costs should be ignored altogether.[115]

65. The consequences of FMG's arguments need to be appreciated. It contends that criterion (f) is limited to distinct aspects of the public interest, such as national security or sovereignty,[116] and that the Tribunal's natural monopoly construction ought to be adopted for criterion (b),[117] so that only 'the costs of producing the below rail service' would be considered under criterion (b).[118] Thus, on FMG's approach, a full assessment of the societal costs and benefits of access would *never* be undertaken. This would exclude considerations of allocative and dynamic efficiency. This cannot be correct,[119] and cannot have been Parliament's intention.

Scope of the discretion

66. The Minister retains a discretion not to declare a service, even if all of the criteria are satisfied. The Full Court held in *Sydney Airport (No. 2)* that, after the considerations in ss. 44H(2) and (4) are dealt with, the decision whether or not to declare a service may be affected by a wide range of relevant considerations of a commercial, economic or other character not squarely raised by, nor falling within, the necessary preconditions in s. 44H(4).[120] FMG's reliance on two earlier decisions of the Tribunal regarding the breadth of the discretion is therefore misplaced.[121] It is clear that the discretion is broad, and extends beyond matters expressly identified in s. 44H(4).[122]

67. Under criterion (f) the Minister is limited to consideration of the public interest consequences of *access*. However, under the discretion, the Minister can consider the public interest consequences of *declaration*. As the Tribunal held, it is necessary for there to be a more detailed enquiry to appreciate the effect on public welfare of a declaration, as well as access under Part IIIA, but the former enquiry is only relevant to the discretion.[123] It is therefore plain that the scope of the discretion is not co-extensive with the scope of criterion (f).[124]

68. The ACCC does not, and cannot, take into account public interest considerations arising from declaration in stage 2; this can only occur under the discretion given to the Minister at stage 1, which is a further reason why the discretion is broad.

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114 *Pilbara Infrastructure* at [108].
115 *Pilbara Infrastructure* at [108].
116 FMG's notice of appeal, ground 3(c); FMG's submissions at [54].
117 FMG's notice of appeal, ground 2(b).
118 *Fortescue* at [850].
119 Cf. *Fortescue* at [846] and [1160]-[1337]; *Pilbara Infrastructure* at [101]-[121], in particular [104] and [108].
120 *Sydney Airport (No. 2)* at [39].
121 FMG's submissions, [79] and footnote 21, referring to *Sydney Airport (No. 1)* at [223] and *Re Virgin Blue Airlines Pty Ltd* (2005) 195 FLR 242 at [611]-[612].
122 Cf. FMG's submissions, [78].
123 *Fortescue* at [1164]; *Pilbara Infrastructure* at [101].
124 Cf. what FMG appears to submit in its submissions at [77], and see also [80].

APPROPRIATE DISPOSITION OF THE APPEALS

69. If the Full Court's construction of criterion (b) is accepted, the appeals should be dismissed.

70. If FMG's appeals succeed on all issues, and its construction of criterion (b), criterion (f) and the discretion is accepted, the proceedings ought to be remitted to the Tribunal with appropriate directions or guidance as to what matters the Tribunal is entitled to consider under criterion (f) and the discretion.

71. If FMG succeeds on criterion (b) (or the "net social benefits" test is adopted[125]), but fails on criterion (f) or the discretion, then this Court should dismiss the appeals, having regard to the Rio Tinto parties' submissions regarding the procedural fairness issue, referred to below. Alternatively, if those submissions are rejected, the Hamersley proceeding ought to be remitted to the Tribunal, having regard to the Full Court's conclusion as to procedural fairness. The Tribunal's decision regarding the Robe declaration would stand.

Part VII: Argument on the notice of contention

PROCEDURAL FAIRNESS

72. In holding that the Tribunal denied FMG procedural fairness in concluding that it was likely that FMG would construct the Dixon line by 2013/14,[126] the Full Court held that:

(a) the provision by Rio Tinto to the Tribunal in June 2010 of investor material published by FMG and released to the Australian Stock Exchange in March 2010 (the ***March ASX material***) was irregular;[127]

(b) the March 2010 material was adverse to FMG;[128]

(c) FMG was not the author of its own misfortune by refraining from seeking an opportunity to be heard in relation to the March ASX material;[129] and

(d) it was unable to conclude that the March ASX material, and the absence of any explanation from FMG in relation to it, did not make a difference to the Tribunal's conclusions adverse to FMG in respect of criterion (f).[130]

73. If Rio Tinto's challenge to this finding is upheld by this Court, the issues concerning criterion (b) will not affect the outcome of the case. This is because criterion (f) (or criterion (b) if a 'net social benefit' construction of criterion (b) were adopted) would not be satisfied and the Hamersley Service would not be declared, even if this Court disagreed with the Full Court regarding the proper construction of criterion (b).

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125 Under the net social benefits test the Tribunal would have reached the same decision, by undertaking the entire cost benefit analysis under criterion (b) instead of criteria (b) and (f).

126 *Pilbara Infrastructure* at [122]-[136].

127 *Pilbara Infrastructure* at [133]; see also [123] and [132].

128 *Pilbara Infrastructure* at [129]-[130].

129 *Pilbara Infrastructure* at [130]-[132].

130 *Pilbara Infrastructure* at [133]-[135].

74. The 17 May 2010 letter from the Tribunal to the NCC[131] sought additional information concerning iron ore projects which might constitute likely demand for the services sought to be declared, including any transport arrangements proposed or being investigated for those projects. The likely existence of alternative transport options was an issue in the proceeding, and the Tribunal sought to update the available information. FMG's March ASX material and the statements in it concerning the proposed Dixon line were relevant to this issue.

75. The Tribunal sent the 17 May 2010 request to the solicitors for all parties. The Tribunal made the request to enable it to update its demand assessment.[132] FMG's projects comprised the principal source of demand for the Hamersley Service, and were included in exhibit "JW-3" to the Weekes affidavit (referred to in the Tribunal's request). In that context the reference to 'junior miners' in the 17 May 2010 letter was, or appeared to be, a reference to all potential users of the services, including FMG.

76. All parties were invited by the Tribunal to comment on the material supplied by the NCC in response to the request. This was apparent from the Tribunal's second letter of 17 May 2010,[133] and was confirmed by a further email from the Tribunal sent on 4 June 2010.[134]

77. The 8 June 2010 letter from Rio Tinto's solicitors to the Tribunal was copied to the solicitors for all parties, including FMG.[135] In addition to providing FMG's March ASX material, this letter addressed other omissions in the material supplied by the NCC.[136] Neither the Tribunal nor FMG objected to Rio Tinto's provision of this material.

78. The March ASX material was required to comply with the requirements of the ASX Listing Rules and the *Corporations Act* 2001 (Cth). The material emanated from FMG, and the Full Court erred in concluding that that it was adverse to FMG.[137]

79. Contrary to the Full Court's conclusion, it is clear from the facts recited above that the provision to the Tribunal of the March ASX material was not 'unbidden', 'unsolicited' or 'irregular'.[138] Rio Tinto acted responsively in providing it.

80. Moreover FMG was notified of the provision of the March ASX material to the Tribunal. FMG must have known of its relevance. No material was filed to suggest otherwise. It was being advised by a major law firm and counsel. However, FMG chose not to raise any issue in relation to the Tribunal's receipt of the material. The Full Court erred in concluding that FMG was not the author of its own misfortune by refraining from seeking an opportunity to be heard in relation to this material.[139]

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131 Tab B248 of the application book before the Full Court.
132 *Fortescue* at [856].
133 Tab B249 of the application book before the Full Court.
134 Tab B252 of the application book before the Full Court.
135 Tab B253 of the application book before the Full Court.
136 Tab B251 of the application book before the Full Court.
137 *Pilbara Infrastructure* at [129]-[130].
138 *Pilbara Infrastructure* at [123], [132] and [133].
139 *Pilbara Infrastructure* at [130]-[132].

81. In supplying the March ASX material to the market, FMG must have been satisfied that it was accurate and not misleading, either by omission or commission. Before the Full Court, FMG did not adduce any evidence as to what it might have said to contradict or qualify the contents of the material. Nor in the hearing before the Full Court was counsel for FMG able to articulate any material omission or qualification which FMG wished to advance in relation to the contents of the material.[140]

82. To suggest, as FMG did in submissions to the Full Court, that an FMG witness could have 'explained' the material,[141] was not sufficient to show that there was a possibility of a different outcome.[142] The material concerned FMG's future plans, and the Tribunal considered it (along with a wealth of other material) in the context of assessing future commercial likelihoods, not past facts. The Tribunal was aware that project timelines are conditional upon the timing of various steps, and might or might not be achieved in the timeframe contemplated. FMG failed to mount even an arguable case that there might have been a different outcome or that there was any relevant lack of procedural fairness by the Tribunal.[143]

83. As a consequence, the Full Court erred in holding that it was unable to conclude that the March ASX material, and the absence of any explanation from FMG in relation to it, did not make a difference to the Tribunal's conclusions adverse to FMG in respect of criterion (f).[144]

84. In any event, the Tribunal expressly considered as one possible scenario the scenario in which there was access to the Hamersley Service and the Dixon line is not built.[145]

85. The March ASX material related to the likely timing of construction of the Dixon line. FMG's complaint to the Full Court regarding procedural fairness was, in substance, that the Tribunal should have concluded that the Dixon line was not likely to be built within a relevant timeframe. However, the Tribunal expressly considered that scenario (in fact it considered the scenario where the Dixon line is *never* built), and determined that its conclusion would not be different.[146] It concluded that if there were access to the Hamersley Service and the Dixon line were not built, then, from the perspective of third parties using the Hamersley Service, the constraints associated with fitting in with Rio Tinto's requirements would be very significant, if not

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140 For example, counsel said that an FMG witness, Mr Tapp, *"should have been given an opportunity to explain the material and talk about what was meant by a target or a medium term production plan"* (transcript, 22 February 2011, T86.37-9) and *"he can talk about what [a target] actually means"* (transcript, 22 February 2011, T88.1-2, and see also 25 February 2011, T310.45-7, T311.1-2). There was no suggestion that the contents of the March ASX material were inaccurate.

141 Ibid.

142 Cf. *Stead v. State Government Insurance Commission* (1986) 161 CLR 141 (***Stead***) at 147 per Mason, Wilson, Brennan, Deane and Dawson JJ.

143 Cf. *Re Minister for Immigration and Multicultural Affairs; ex parte "A"* [2001] HCA 77 (Kirby J) at [54]; see also *Milne v. Minister for Immigration and Citizenship* [2011] FCAFC 41 at [59] per Ryan, Bennett and Edmonds JJ; *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at [19], [22], [29] and [36] per Gleeson CJ and [149] per Callinan J.

144 Cf. *Pilbara Infrastructure* at [132]-[133].

145 *Fortescue* at [1324]-[1331].

146 *Fortescue* at [1331].

prohibitive;[147] and from the perspective of Rio Tinto, the consequences of third party access would likely be grave;[148] and most of the lost export revenue in the order of $10 billion calculated by Mr Taylor would be lost.[149] The Tribunal therefore was not satisfied that access would not be contrary to the public interest in that scenario, and in fact concluded that "access *would* be contrary to the public interest".[150]

86. Those passages make it plain that the Tribunal expressly considered the situation where the Dixon line is not built and there is access to the Hamersley Service, and still concluded that the probability was that the benefits of access could be dwarfed by the costs.[151]

87. FMG appears to contend that the scenario of there being no access to the Hamersley Service and the Dixon line not being built was not considered in the three scenarios addressed by the Tribunal.[152] This is fallacious. In doing a cost/benefit analysis of the first scenario (namely where there is access to the Hamersley Service and the Dixon line is not built), and finding that the costs outweigh the benefits, the counterfactual against which the analysis was conducted was and could only have been the scenario where there is no access granted and the Dixon line is never built.

88. Thus, even if the March ASX material affected the Tribunal's conclusions as to the likely timing of the construction of the Dixon line and FMG was not afforded a sufficient opportunity to respond to that material, the Full Court should have held that compliance with the requirements of procedural fairness could have made no difference to the result[153] of the Tribunal's decision concerning the application of criterion (f) and the discretion.

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147 *Fortescue* at [1326].
148 *Fortescue* at [1327].
149 *Fortescue* at [1328].
150 *Fortescue* at [1331].
151 *Fortescue* at [1319].
152 Applications for Special Leave to Appeal in M42, M43, M44, M45 and M46 of 2011, Transcript, 28 October 2011, T18.40-444.
153 Cf. *Stead* at 145 per Mason, Wilson, Brennan, Deane and Dawson JJ; *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 at [4] per Gleeson CJ, [131] per Kirby J and [211] per Callinan J.