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 SUPPLEMENTARY SUBMISSIONS IN RESPONSE

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Filed on behalf of: The Rio Tinto parties

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Part I: Certification for internet publication

1. Rio Tinto certifies that these submissions are suitable for publication on the Internet.

Part II: Reasons why leave to amend should not be granted

2. FMG should not be granted leave to amend its notices of appeal to raise the additional grounds which it now seeks to raise concerning the Tribunal's task under s. 44K of the Act (the ***s. 44K issue***). The Court should apply the special leave criteria.

3. FMG's proposed amendments do not raise an issue of public importance. The provisions of s. 44K were the subject of substantial amendments in July 2010. As a consequence, any decision of this Court concerning the s. 44K issue will be of no practical assistance in the future.[1]

4. To allow the amendments would cause substantial prejudice to Rio Tinto. If FMG had raised the s. 44K issue before the Tribunal, Rio Tinto would likely have made application for the relevant evidence to be adduced in reliance upon the Tribunal's express powers under s. 44K(6). The evidence relied upon by Rio Tinto would have been given to the NCC for this purpose. FMG is in a different position: to disallow the amendments would not cause prejudice to FMG because it may make a further application under s. 44F for declaration of the Hamersley and Robe Services.

5. The new grounds do not raise an issue about which a decision of this Court is required in order to resolve differences of opinion between different courts as to the state of the law. All of the earlier decisions[2] are against FMG on the s. 44K issue.

6. The proposed grounds do not have any realistic prospect of success, for the reasons addressed in the substantive part of Rio Tinto's submissions below.

7. To allow the amendments at this late stage would deprive this Court of the Tribunal's and the Full Court's consideration of and reasoning regarding the s. 44K issue. The s. 44K issue was not raised below. FMG raised the Chapter III issue before the Full Court.[3] Special leave to appeal the issue to this Court could have been sought, but was not. FMG should be held to that choice.

8. This Court's decision as to the s. 44K issue will not affect the outcome of the appeals if the private feasibility construction is accepted. Not only did the Minister err in applying the net social benefit construction, neither the Minister nor the NCC made

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1 Cf. FMG's supplementary submissions dated 22 March 2012 (***FMG's submissions***), [4].

2 See, e.g., *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1 (***Re Duke***) at [46]; *Re Freight Victoria Limited* (2002) ATPR ¶41-884 (***Re Freight Victoria***) at [22]; *Re Services Sydney* [2005] ACompT 2 (***Re Services Sydney***) at [9]; *Re Application by Services Sydney Pty Ltd* (2005) 227 ALR 140 (***Re Application by Services Sydney***) at [9]; *Re Application by Fortescue Metals Group Limited* (2006) 203 FLR 28 (***Re Application by Fortescue***) at [23] and [29].

3 FMG's submissions, [5] and [108].

any findings or had the material which would have enabled them to be satisfied of criterion (b) if a private feasibility construction were to be applied.[4] In these circumstances, even if FMG were to succeed on the s. 44K issue, the Minister's decision cannot stand. The appropriate course is for this Court to dismiss the appeals on this ground. A remitter to the Tribunal would not be appropriate – it would be futile as the Tribunal would be bound to overturn the Minister's decision.

9. This Court is hearing an appeal from the Full Court, which itself was engaged in an exercise of judicial review.[5] This Court is not in a position to exercise the powers of the Tribunal, and in any event it does not have before it the material that was before the Minister and which, on FMG's contention, is the only material the Tribunal is entitled to consider.[6]

10. The proposed grounds of appeal would require this Court to determine whether the Tribunal's jurisdiction under s. 44K, or the rules of procedural fairness, required it to consider updated factual information put forward by the parties, or other material that the Tribunal required to satisfy itself of the matters in s. 44H, in circumstances where the parties to the review were contending that the Minister's decision was based on an erroneous legal interpretation of one or more criteria in s. 44H(4). These issues are likely to require evidence that is not presently before the Court.

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

The NCC's recommendation

11. As appears from the language of s. 44H(1), the NCC's recommendation serves as a condition precedent to the Minister making a decision. Receipt of it enlivens the

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4 Indeed, the NCC foreshadowed to all parties in its guidelines that the net social benefit test would be applied: NCC, 'The National Access Regime: A Guide to Part IIIA of the *Trade Practices Act 1974* – Part B Declaration', December 2002 [4.15].

5 Section 20(2) of the *Federal Court of Australia Act 1976* (Cth) and s. 163A(4) of the Act.

6 Cf. FMG's submissions, [6]. For example, Rio Tinto provided lengthy submissions to the NCC on 30 April 2008 and 21 July 2008 which attached numerous annexures containing, amongst other things, information about third party developments and tenements in the Pilbara and expert reports from Dr Brian Fisher, Port Jackson Partners, Access Economics, Professor Joseph Kalt, TSG Consulting, Professor Janusz Ordover, CANAC Railway Services and Dr Philip Williams. The NCC issued draft recommendations on 20 June 2008 and final recommendations on 29 August 2008. None of these materials are in the appeal book before this Court, nor does this Court have any record of the other material that was before the NCC or the material that was before the Minister, or the other enquiries that were made by the NCC and by the Minister. Further, as is apparent from the index to the appeal book, this Court has only a very limited selection of the material that was before the Tribunal. This Court has little or no record or analysis of the extent to which the material before the Tribunal was obtained pursuant to s. 44K(6) or in response to requests by the Tribunal (such as material obtained at the Tribunal's request from the parties and from expert railway capacity modellers regarding the capacity of the railway lines, and answers to written questions which the Tribunal asked expert economic witnesses, including the NCC's expert witness, to consider). Nor is this Court apprised of the extent to which the material before the Tribunal was updating the material before the NCC, or the extent to which the material before the Tribunal went beyond, if at all, the issues that had been raised before the NCC.

Minister's powers. FMG acknowledges that receipt of the recommendation is a jurisdictional fact for the Minister's decision.[7]

12. Section 44H does not require the Minister to consider, assess, adopt or reject the NCC's recommendation. The Minister must satisfy himself or herself of the criteria.[8] The Minister may refer to the recommendation, but is not bound by it.[9]

13. The words 'his or her decision on a declaration recommendation' in s. 44HA(1) are merely a shorthand reference to the Minister's decision under s. 44H(1). They do not constrain the Minister to decide only whether or not the declaration recommendation is correct.[10] Section 44HA was introduced by a later amending Act[11] and there is no reason to suppose it was intended to alter the scope of s. 44H.[12]

The Minister's powers

14. The Minister must either declare the service or decide not to declare it.[13] The Minister cannot declare a service unless he or she is satisfied of all of the matters in s. 44H(4). In deciding whether to declare the service or not, the Minister must consider whether it would be economical for anyone to develop another facility that could provide part of the service.[14]

15. In order to satisfy himself or herself, the Minister has incidental power to request additional information beyond the NCC's recommendation and the material referred to in it. No limitation on the Minister's power to request additional information is found in s. 44H. The Minister can request the most recent and accurate information and in fact is legally obliged to do so.[15]

16. FMG concedes that the Minister is not prohibited from making further enquiries.[16] The Minister did so in the present case. For example, he met with representatives of Rio Tinto and FMG, and visited the facilities of Rio Tinto and FMG in the Pilbara.[17]

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7 FMG's submissions, [12].

8 Section 44H(4).

9 *Re Duke* at [46]. See also *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281 (***Re Herald***) at 296, regarding the relevance of the ACCC's determination upon a review by the Tribunal.

10 Cf. FMG's submissions, [12].

11 *Trade Practices Amendment (National Access Regime) Act 2006*, s 3 and Sch 1 item 27.

12 The Revised Explanatory Memorandum to the Trade Practices Amendment (National Access Regime) Bill 2005 states at [1.46] that s 44HA 'requires the designated Minister to publish his or her decision on a declaration recommendation and his or her reasons for the decision' and that '[t]his requirement should enhance procedural transparency and regulatory accountability [and] will facilitate informed consideration of whether there are grounds to challenge a decision by way of merit review before the Tribunal, or judicial review by the courts.'

13 Section 44H(1).

14 Section 44H(2).

15 *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* (1986) 162 CLR 24 (***Peko-Wallsend***) at 44-5 per Mason J; *Our Town FM Pty Ltd v. Australian Broadcasting Tribunal (No. 2)* (1987) 77 ALR 601 at 605-6.

16 FMG's submissions, [14] and [28].

17. Here, in deciding to declare the service, the Minister made a number of decisions on matters of law. For example:

(a) he rejected a private feasibility construction of criterion (b), and applied a net social benefit test;[18]

(b) he did not adopt the natural monopoly test for criterion (b) subsequently adopted by the Tribunal;[19]

(c) contrary to the Tribunal's conclusions, he assumed that the arbitration provisions of Part IIIA contain clear and sufficient safeguards designed to protect the legitimate business interests of service providers and ensure that they are compensated for the costs of providing access;[20] and

(d) he did not restrict his analysis under criterion (f) in the manner for which FMG now contends.[21]

The Minister did not investigate or establish the facts relevant to the rejected legal tests for criterion (b).

The Tribunal's powers

18. The Tribunal has the same powers as the Minister.[22] The Tribunal may affirm, vary or set aside the declaration,[23] or may affirm or set aside the Minister's decision not to declare the service.[24] A declaration by the Tribunal is taken to be a declaration by the Minister.[25]

19. These powers are the same as those given to the Administrative Appeals Tribunal (the ***AAT***) on a review under the *Administrative Appeals Tribunal Act* 1975 (Cth) (the ***AAT Act***) by s. 43 of the AAT Act.[26] Relying upon those powers, in *Shi v. Migration Agents Registration Authority*[27] this Court held that, on review, the AAT might have regard to new, fresh, additional or different evidence in reaching its own decision on the review.[28] These powers indicate that the process to be undertaken by the Tribunal

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17 See Declaration of the Hamersley Railway dated 27 October 2008, p. 2 (**AB 4**).
18 Ibid, pp. 5-6 (**AB 7-8**).
19 Ibid, pp. 5-6 (**AB 7-8**).
20 Ibid, pp. 9-10 (**AB 11-12**). See *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 (***Re Fortescue***) at [592] to [606], (**AB 2081-5**).
21 Ibid, pp. 9-10 (**AB 11-12**).
22 Section 44K(5).
23 Section 44K(7).
24 Section 44K(8).
25 Section 44K(9).
26 AAT Act, ss. 43(1)(a), (b) and (c) and 43(6).
27 *Shi v. Migration Agents Registration Authority* (2008) 235 CLR 286 (***Shi***).
28 Ibid at [39] per Kirby J; see also [33]-[38] and [40]-[42] per Kirby J, [81] and [97]-[101] per Hayne and Heydon JJ, [117] per Crennan J and [143] per Kiefel J.

is one of merits review, on the basis of the facts as they stand at the time of the Tribunal's decision.

20. The Tribunal has no power to remit the question of whether or not to declare the service to the Minister. The Tribunal must satisfy itself in relation to the criteria.[29] In order to satisfy itself, the Tribunal is not limited to the information considered by the Minister. If the Tribunal concludes that the Minister applied the wrong legal test, the Tribunal must either set aside the Minister's decision, or satisfy itself of the necessary matters having regard to the relevant facts in light of the correct legal test.

21. The references to 'review' of the declaration and to 'review' of the decision not to declare in ss. 44K(1) and (2) do not compel the Tribunal to analyse the Minister's decision and the NCC's recommendation.[30] The word 'review' is commonly used to refer to a review *de novo* that is based on the facts and the law as they stand at the time the review is undertaken.[31]

Re-consideration of the matter

The matter

22. The review by the Tribunal is a re-consideration of the matter.[32]

23. 'Matter' is a word of broad scope. Its usage in other provisions of the Act indicates that it is not to be construed narrowly.[33] The 'matter' referred to in s. 44K(4) is the subject or situation under consideration,[34] namely the issue, question or controversy to be decided or resolved.[35] The 'matter' is the question of whether or not to declare the service.[36]

24. Contrary to FMG's submissions, the 'matter' is not the 'correctness' or otherwise of the Minister's decision based upon the NCC's recommendation.[37]

25. Section 44K(4) refers to a 're-consideration' of the matter by the Tribunal. The Tribunal considers the *same* matter as the Minister. If the 'matter' were the correctness of the Minister's decision, there would be no '*re*-consideration' by the

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29 Sections 44K(5) and 44H(4).

30 Cf. FMG's submissions, [15].

31 See, e.g., *Re Herald,* 295-296. The word "review" is used in that sense in ss. 101 and 102 of the Act and in s. 43 of the AAT Act, which provided the model for s. 44K.

32 Section 44K(4).

33 See, e.g., s. 42(1), where 'matter' is used in the sense of 'that to be decided'.

34 Oxford Dictionary online, available at http://oxforddictionaries.com/definition/matter?q=matter, accessed on 4 April 2012.

35 See *Re Application by Fortescue* at [13]. See also, for example, *Re McBain v Ex Parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at [62] and [242].

36 See ss. 44F(1) and (2)(b), 44G(2), 44H(1), (2), (4) and (9) and 44K(1) and (2).

37 Cf. FMG's submissions at, e.g., [15]-[16], [18], [26], [30], [71], [75], [81], [91], [101] and [102]. Indeed, parts of these submissions appear wrongly to suggest that the Tribunal's function is akin to judicial review.

Tribunal. That issue would not have been considered by the Minister on a previous occasion. Similarly, if the 'matter' were the correctness of the Minister's decision, the Tribunal would not require the same powers as the Minister. Nor would the Tribunal be required to satisfy *itself* of the criteria; rather, it would be required to assess the conclusions arrived at by the Minister.

26. Section 44K applies to deemed decisions not to declare where the Minister has not published his or her decision within the relevant timeframe.[38] The Mt Newman Service, which was the subject of one of the applications before the Tribunal in the present case, affords an example.[39] One cannot analyse the correctness of a deemed decision because there is no actual or reasoned decision.

Re-consideration

27. 'Re-consideration' is not defined in the Act, and it is not a term of art.[40] The natural meaning of 're-consider' is to consider afresh.

28. Section 44K(4) refers to the review being a 're-consideration of the matter', rather than being a 're-hearing of the matter'.[41] Nothing turns upon that difference in statutory language. The word 're-consideration' is more appropriate here: an earlier 'hearing' by the Minister is unlikely to have occurred, and certainly is not required.

29. The corresponding expression 're-hearing' in s. 101(2) reflects the fact that the *Trade Practices Act* 1974 (Cth) (as originally enacted) provided for authorisation hearings (s. 90(2)). Section 90(2) was later amended to remove the reference to 'hearings'[42] but s. 101(2) was left unaltered.

30. In other review contexts, a 're-consideration' (or 'reconsideration') is construed as a determination de novo constituting a merits review process.[43]

31. The Tribunal cases concerning Part IIIA have all proceeded on the footing that the Tribunal's role under s. 44K is to make a new decision according to the material before the Tribunal,[44] consistently with a merits review under s. 44K.

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38 Section 44H(9).

39 Tribunal determination dated 30 June 2010 regarding application for review of the deemed decision by the Commonwealth Treasurer of 23 May 2006, pp. 1-2 (**AB 1932-3**).

40 FMG's submissions, [21].

41 Cf., e.g., s. 101(2).

42 *Trade Practices Amendment Act 1977* (Cth), s 56.

43 See, e.g., *Esber v. The Commonwealth of Australia* (1992) 174 CLR 430 at 440 per Mason CJ, Deane, Toohey and Gaudron JJ; *Re Scibilia and Lejo Holdings Pty Ltd Arbitration* [1985] 1 Qd R 94 at 97 and 102; *Sandhu v. Secretary of State for Work and Pensions* [2010] EWCA Civ 962 at [5]-[6]; see also *Seablest Pty Ltd v. Smith* (1997) 6 Tas R 350 at 359-360.

44 See, e.g. *Re Freight Victoria* at [22]; *Re Services Sydney* at [9]; *Re Application by Services Sydney* at [9]; *Re Application by Fortescue* at [23] and [29]. See also *Re Duke* at [6] and [46] where the Tribunal adopted a broad construction of the 'review' to be performed under s.38 of the National Gas Law, contrasting that provision with the expressly constrained form of review provided for under s.39.

32. Other provisions of Part IIIA provide for reviews by the Tribunal in a similar manner to s. 44K.[45] Each contains sections providing that the review by the Tribunal is a 're-consideration of the matter', and that the Tribunal has the same powers as the original decision-maker, namely the Minister or the ACCC depending upon the section. Like provisions were inserted in July 2010.[46] And, as discussed below, s. 44ZP uses the expression 're-arbitration'.

33. The expressions 're-consideration' and 're-arbitration' in Part IIIA and 're-hearing' in Part IX are not used to suggest that the Tribunal has previously addressed the matter. The three expressions have the same substantive purpose, which is to require the Tribunal to consider the matter afresh in the light of the facts presented to the Tribunal when it performs its task.

Sections 44ZP and 44ZQ

34. The one differently expressed type of review by the Tribunal provided for in Part IIIA is that provided for by s. 44ZP. That section, appearing within Division 3, concerns review of a final determination by the ACCC regarding an access dispute.[47] Here, the review by the Tribunal is expressed to be 'a re-arbitration of the access dispute'.[48] This expression is used because the final determination that may be reviewed is a determination made by the ACCC upon the arbitration of an access dispute.[49]

35. In a review under s. 44ZP, the Tribunal has the same powers as the ACCC,[50] and a number of the other provisions correspond to those in the other types of review provided for in Part IIIA.[51] However, unlike s. 44K and the other review provisions referred to above, s. 44ZQ provides that ss. 37, 39 to 43 and 103[52] to 110 do not apply here. Sections 103 to 110 regarding procedure and evidence are not appropriate because Division 3 of Part IIIA contains its own regime, for the procedure to be adopted in arbitrations before the ACCC.[53] For the purposes of the review, the

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Similarly, the provision for review by the Tribunal under s. 44K can be contrasted with the expressly constrained review by the Tribunal provided for under s.116 of the Act.

45 Sections 44L, 44O, 44PG, 44PH, 44ZX and 44ZZBF. The Explanatory Memorandum to the Trade Practices Amendment (National Access Regime) Bill 2005 relating to the enactment of s. 44ZZBF said that the Tribunal's reconsideration of the Commission's decisions regarding access undertakings and access codes constituted a process of 'merit review': at [1.17] and [5.243]-[5.248].

46 Sections 44LJ and 44LK.

47 Section 44ZP(1).

48 Section 44ZP(3).

49 See ss. 44S(1), 44U and 44V(1)(a).

50 Section 44ZP(4).

51 See, e.g., ss. 44ZP(5), (6) and (7).

52 This section is addressed below.

53 See Subdivision D, ss. 44Z to 44ZNA. Section 44ZF(1)(c) provides that the powers of the ACCC in an arbitration hearing about an access dispute include, amongst others, informing itself of any matter relevant to the dispute in any way it thinks appropriate.

Tribunal has the same powers as the ACCC.[54] Having regard to the private nature of the arbitral process, it makes sense that the procedure in a Tribunal review under s. 44ZP would be governed by the same provisions as those applicable to the ACCC.

36. Parliament included s. 44ZQ for Tribunal reviews of ACCC determinations regarding access disputes (where the procedure to be followed is spelt out in a distinct regime), but included no analogous provision in relation to other reviews by the Tribunal under Part IIIA (where there is no such distinct procedural regime). This raises a strong implication that ss. 103 to 110 were intended to apply to those other reviews, including reviews under s. 44K. The implication is confirmed by the other matters discussed below.

Section 44K(6)

37. Section 44K(6) ensures that the Tribunal can ascertain the facts it needs to satisfy itself about the matters in s. 44H, not just from the review participants who will be acting in their private interests, but also from an independent statutory body. That body is equipped with the resources and expertise to assist the Tribunal.[55] Absent s. 44K(6), the statutory role of the NCC would be spent and its services could not be called upon.

38. Section 44K(6) is inconsistent with the argument that the Tribunal's deliberations are confined to an examination of the correctness of the Minister's decision based upon the material before the Minister. The statutory language does not support an implication that this is the *only* means, rather than an additional means, by which the Tribunal can receive further information for the purposes of the review.[56]

No requirement for the Minister to retain and transmit the record

39. The statutory language nowhere suggests that the Tribunal is limited to the material before the original decision maker.[57] If s. 44K were intended to confine the Tribunal in this way, one would expect s. 44K to contain standard machinery provisions providing for the transmission of the record considered by the Minister to the Tribunal.[58] Those provisions are absent. The Minister may not have kept a full record, and without further evidence or other steps being taken it may be difficult for the Tribunal to know that it is confining itself to the material before the Minister.

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54 Section 44ZP(4).

55 Sections 29B, 29C and 29N.

56 Cf. FMG's submissions, [29]. See also s. 44ZZP(1)(e) which permits regulations to be made about procedure and evidence, 'including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report)'.

57 Cf. FMG's submissions, [26].

58 See, e.g., ss. 44ZT(a), 113(1) and s. 10.82E(3). See also amendments made in 2010, s. 44ZZOAAA(3).

The 2010 amendments

40. The July 2010 amendments to s. 44K, including the extra words added to s. 44K(4) and the insertion of s. 44ZZOAA,[59] were based upon Parliament's acceptance that the Tribunal's existing jurisdiction involved a full merits review. The purpose of the amendments was to modify that existing jurisdiction by placing certain limits on the material eligible for consideration by the Tribunal, but not so as to inhibit the Tribunal from obtaining all reasonable and appropriate information.[60]

41. This is a case where the subsequent amendments confirm that the proper construction of the pre-existing statutory provision is that it provided for merits review, just as Parliament assumed when it enacted the later amendments.[61]

42. Consistently with the earlier Tribunal decisions regarding the nature of a review under s. 44K, the original Explanatory Memorandum to the Trade Practices Amendment (Infrastructure Access) Bill 2009 stated, in its description of the then current law, that a review of a Part IIIA decision is a complete rehearing of the matter and that new information may be submitted to the Tribunal.[62] In contrast, it described the proposed more limited review model which now appears in s. 44K(4) as 'limited merits review'.[63]

43. A Supplementary Explanatory Memorandum for this Bill was subsequently issued in 2010,[64] following the report of the Senate Standing Committee on Economics – Legislation Committee on 9 March 2010.[65] The Supplementary Explanatory Memorandum addressed the new proposed ss. 44ZOAAA(4), (5) and (7), and stated that under the new provisions the Tribunal may request any information it considers is material to the review, and that the information sought by the Tribunal may be in whatever form the Tribunal sees fit.[66]

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59 The other amendments included the insertion of ss. 44KA and 44KB, which provide further confirmation that a review by the Tribunal is a 'proceeding'.

60 See in particular ss. 44ZZOAA(a)(i) to (iv) and ss. 44ZZOAAA(3) and (5).

61 See *Deputy Federal Commissioner of Taxes (SA) v. Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610 at 625-6, referred to with apparent approval in *Commissioner of Taxation v. Anstis* (2010) 241 CLR 443 at [24] per French CJ, Gummow, Kiefel and Bell JJ.

62 Explanatory Memorandum to the Trade Practices Amendment (Infrastructure Access) Bill 2009, 29 October 2009, p.10.

63 Ibid.

64 Supplementary Explanatory Memorandum to the Trade Practices Amendment (Infrastructure Access) Bill 2009, 2010.

65 Senate Standing Committee on Economics – Legislation Committee,' Trade Practices Amendment (Infrastructure Access) Bill 2009' , 9 March 2010.

66 Supplementary Explanatory Memorandum to the Trade Practices Amendment (Infrastructure Access) Bill 2009, 2010, [1.3], [1.4], [1.6] and [1.7]. Separately, the Supplementary Explanatory Memorandum also stated at [1.8] that the Tribunal would continue to exercise its powers and functions in accordance with the general procedural provisions in Part IX, Division 2. The amendments thus proceeded on the basis that these procedural and evidentiary provisions are applicable to reviews by the Tribunal under Part IIIA.

44. Even the review model found in the amended s. 44K(4) expressly contemplates that the Tribunal may have regard to various categories of information that were not before the Minister. It would be a strange result indeed if, in seeking to place some limits on the information that might be considered by the Tribunal, Parliament had achieved the opposite result by expanding the Tribunal's jurisdiction. Yet that is FMG's argument.

Target time limits

45. If the Minister does not make a decision within 60 days, he or she is deemed to have decided not to declare the service.[67] The standard period for the Tribunal to make a decision is four months, which may be extended.[68] The Tribunal is given a longer (potentially much longer) period than the Minister, albeit that the Tribunal is required to satisfy itself about the same criteria when it makes its decision. The reasons for this are not hard to discern. The Tribunal comprises a panel of three, it is the last administrative decision-maker about issues of national significance, the person who applied for the declaration recommendation and the provider are entitled to participate in the review,[69] it proceeds by way of hearing, it must afford procedural fairness, it is given explicit powers to gather and consider additional material including sworn evidence, it is not subjected to a guillotine time limit in the same way as the Minister and, as all these factors indicate, it must consider the matter of whether or not a declaration should be made afresh on the material before it.

Section 44ZZP and the regulations

46. Section 44ZZP(1) provides that the regulations address a number of matters concerning the functions of the Tribunal under Part IIIA, including in relation to procedure and evidence. Regulations made under or supported by that provision apply to the functions of the Tribunal under Part IIIA generally,[70] save as expressly excluded in s. 44ZZP(2).

47. Section 172 also enables regulations to be made in connection with the procedure of the Tribunal.

48. The scheme of the regulations is that reviews under s. 44K are characterised as review proceedings before the Tribunal. A number of the regulations within Part 2 of the regulations (entitled 'General') are expressly directed to reviews by the Tribunal under

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67 Section 44H(9).

68 Section 44ZZOA. Under the 2010 amendments, the 'expected period' was extended to 180 days (s. 44ZZOA(2)) and 'clock stoppers' were introduced (ss. 44ZZOA(3) to (5)). The time period can still be extended (s. 44ZZOA(7)).

69 Regulations 22B(1) and (2).

70 See s. 44ZZP(1).

s. 44K.[71] The other regulations within Part 2 are equally applicable to reviews under s. 44K. Part 2 contains no provision equivalent to regulation 28Q.[72]

49. Regulation 22 is significant. It is located between regulations 20A and 22B, each of which expressly applies to reviews under s. 44K. The natural inference is that regulation 22 also applies to reviews under s. 44K.[73]

50. The reference in regulation 22 to the power to give directions for the provision of preliminary statements of facts and contentions[74] rebuts the suggestion that the review process lacks any documents akin to pleadings.[75] The power to give directions for the production of documents and with respect to the giving of written and oral evidence by persons to the Tribunal[76] demonstrates that the Tribunal may have regard to documents and other evidence that was not before the Minister.

51. FMG relies upon regulation 7B to repel the application of regulation 22.[77] This is wrong. Section 44ZZP(2) provides that regulations made under subsection (1) do not apply in relation to the functions of the Tribunal under a State/Territory energy law or a designated Commonwealth energy law. This express exclusion indicates that the regulations otherwise apply when the Tribunal is exercising its other functions, including review under s. 44K. Regulation 7B is required due to the operation of s. 44ZZP(2), not for any other reason.

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71 Regulations 20A and 22B.

72 Regulation 28Q provides that regulations 22 and 22A do not apply to a review under Part 2A (which relates to reviews by the Tribunal under ss. 44ZP or 152DO of an access determination made by the ACCC). Note that regulation 28B still refers to a review under Part 2A as relating to a determination made by the ACCC under s 152DO (in addition to s 44ZP) even though s 152DO was repealed in 2002.

73 Notably, it is clear from the explanatory materials that Parliament understood reviews under Part IIIA to be 'review *proceedings*' for the purposes of regulation 22. A suite of regulations were introduced in 1996 to amend a number of existing regulations, and introduce new regulations, relating to the Tribunal's powers generally under the CCA. The Explanatory Statement to the *Trade Practices Regulations (Amendment) 1996* (Cth) relevantly provides:

> 'Under Part IIIA of the Principal Act, the Tribunal may, upon application, review Ministerial decisions and Commission access determinations. Regulations 3 and 4 of the Amending Regulations amend Registrations [sic] 17 and 18 of the Principal Regulations to provide for the title of the application in those review proceedings and the lodgement of the application'.
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> ...
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> 'Regulation 6 of the Amending Regulations amends regulation 22 of the Principal Regulations to specifically allow the Tribunal to give directions with respect to evidence in proceedings before the Tribunal. This, for instance, enables the Tribunal to commission and receive experts' reports as evidence.
>
> The Tribunal may exercise this power in respect of any proceedings before the Tribunal (except in respect *of* the review *of* access arbitration determinations).'

74 Regulation 22(1)(a).

75 FMG's submissions, [43].

76 Regulations 22(1)(a) and 22(1)(aa). See also regulation 22A.

77 FMG's submissions, [67].

52. FMG argues that Regulation 22 is made in pursuance of s. 104 with the consequence that it is confined to Part IX reviews.[78] The consequence does not follow from the premise. Section 104 is not the sole source of power for Regulation 22. It also falls within the scope of the powers conferred by ss. 44ZZP(1) and 172. The first of these sections is contained within Part IIIA. Once it is accepted that other parts of the Act, other than Part IX, provide for Tribunal reviews, there is no reason to suppose that s. 104 is confined to Part IX reviews. Its language is perfectly general, and when all of the relevant considerations are brought to account, it is plain that Regulation 22 applies to proceedings before the Tribunal under Part IIIA.

Proceedings before the Tribunal

53. Part III contains a number of basic provisions of general application to the Tribunal, concerning such matters as the constitution of the Tribunal for particular matters and for the disclosure of interests by members of the Tribunal.[79] Those provisions refer to 'proceedings'. They are plainly applicable to all proceedings before the Tribunal, including reviews under s. 44K.

54. FMG attempts a distinction between reviews of the kind provided for in Part IX of the Act and those found in Part IIIA such as s. 44K.[80] In fact Part III suggests that the Tribunal may only act by conducting a 'proceeding'.[81] Hence a review under s. 44K must be a 'proceeding'. Regulation 22 applies generally to 'proceedings before the Tribunal'.

55. The 2010 amendments also proceed on the footing that reviews under s. 44K are proceedings before the Tribunal.[82]

Division 2 of Part IX

Section 102A

56. Division 2 of Part IX of the Act, containing ss. 102A to 110, deals with procedure and evidence in 'proceedings' before the Tribunal.[83]

57. Although s. 102A does not refer expressly to applications to the Tribunal made under Part IIIA, including s. 44K, the definition is inclusive only. The scheme of the Act is that if Division 2 of Part IX is not intended to apply, it is specifically excluded.[84]

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78 FMG's submissions, [68].

79 See, e.g., ss. 37, 40, 41 and 43.

80 FMG's submissions, [69].

81 Sections 40, 41, 42 and 43. See also regulations 17 and 19 which suggest that any application to the Tribunal under the Act is a 'proceeding.'

82 See, e.g., ss. 44K(6B)(a)(iv), 44KA(2) and 44KB(1) and (2).

83 See, e.g., ss. 102A, 103(1), 104 and 110.

58. Section 102A[85] was inserted in 2006.[86] It was part of a suite of amendments which introduced a new regime concerning applications directly to the Tribunal for merger authorisations,[87] and a new process of merger clearances in which the ACCC could make determinations regarding merger clearances and the Tribunal can review the ACCC's determinations.[88] The definition in s. 102A was inserted to leave no doubt that the procedural and evidentiary provisions in Division 2 of Part IX applied to the two new kinds of proceedings before the Tribunal referred to in the two sub-paragraphs of the definition. The Supplementary Explanatory Memorandum explained that the intention of the (revised) amending Bill was to ensure that the Tribunal has all appropriate powers and procedures, and sufficient flexibility of operation, to take on its new merger functions.[89] By inserting s. 102A, Parliament did not intend to limit or narrow the types of proceedings before the Tribunal to which the Division applied.

59. In various places, the Act confirms that Division 2 applies to proceedings before the Tribunal in addition to those expressly referred to in the definition in s. 102A. Examples include review of Ministerial decisions under s. 10.82E,[90] and reviews under ss. 10.82B[91] and 151CJ.[92] Thus Division 2 applies outside Part IX.

Section 103

60. Section 103 is entitled 'Procedure generally', and it provides that, in proceedings before the Tribunal, the procedure of the Tribunal is, subject to the Act and the regulations, within the discretion of the Tribunal.[93]

61. If s. 103 applies to reviews under s. 44K, which Rio Tinto submits that it does, this tells against FMG's construction of s. 44K – for example, if the Tribunal were limited to considering only the material that was before the Minister, the procedure of the Tribunal would not be within its discretion, but would be circumscribed by a supposed limitation on the material that the Tribunal could consider.

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84 See s. 44ZQ. Section 44ZZR is in a different position – it deals with a particular issue of inconsistency between various laws, and specifies particular provisions of Division 2 for that purpose: see s. 44ZZR(1) and (3). To similar effect are s. 44ZZR(2) and regulation 7B.

85 And the identical provision s. 29P, in Part III.

86 *Trade Practices Legislation Amendment Act (No. 1)* 2006.

87 See Subdivision C of Division 3 of Part VII, referred to in sub-paragraph (a) of the definition of 'proceedings' in s. 102A.

88 See s. 111, referred to in sub-paragraph (b) of the definition of 'proceedings' in s. 102A.

89 Supplementary Explanatory Memorandum to the Trade Practices Legislation Amendment Bill (No. 1) 2005, p. 2.

90 See the note to s. 10.82E. Thus Division 2 governs the review of a Ministerial decision. The review is assumed to be a proceeding.

91 See the note to s. 10.82B.

92 See the note to s. 151CJ. Similar notes were formerly contained in ss. 152AW and 152CF within Part XIC. Those sections were repealed in 2010, but that does not affect this argument.

93 Section 103(1)(a).

62. The Tribunal has previously held that s. 103 applies to all proceedings before the Tribunal, whether or not they are for review of determinations by the ACCC.[94] The analysis of this question in those decisions is correct. Section 103(1) confers an independent power on the Tribunal to gather evidence as it sees fit for the discharge of its functions, including its functions under s. 44K.

63. Even if s. 103 did not apply to the Tribunal's review under s 44K, this is no reason to confine the Tribunal's task in the manner contended for by FMG. The other provisions and regulations discussed above are more than sufficient to establish that the Tribunal is required to conduct a merits review under s. 44K.

The heading to Part IX

64. FMG relies on the heading to Part IX – "Review by Tribunal of Determinations of Commission".[95] It is evident that that heading has been overtaken by later legislative changes and is no longer accurate:

(a) When the heading was enacted, Division 1 of Part IX was the sole source of the Tribunal's power to review. That is no longer the case.

(b) The note to s. 10.82E, referred to above,[96] indicates that Division 2 of Part IX applies to reviews by the Tribunal of decisions of the Minister (not the ACCC) under Division 14B of Part X; and

(c) Section 102A(a) provides that Division 2 of Part IX applies to applications to the Tribunal under Subdivision C of Division 3 of Part VII. Under that Subdivision, the application to the Tribunal for a merger authorisation is made to the Tribunal directly,[97] and is not a review of a determination of the ACCC.

The practical consequences of FMG's construction

65. FMG's approach to the s. 44K issue means that, in re-considering whether or not to declare the service, the Tribunal would not be entitled to have regard to current information concerning the issues required to be addressed under s. 44H, including each of the statutory criteria in s. 44H(4). Such an approach is antithetical to the review process contemplated by s. 44K, particularly where a number of the criteria require consideration of likely future circumstances (such as whether access to the service would promote a material increase in competition and whether access to the

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94 *Re Freight Victoria* at [17]; *Re Asia Pacific Transport Pty Ltd* [2003] ACompT 1 at [7]; *Re Lakes R Us Pty Ltd* [2006] ACompT 3 at [27]-[28]; *Re Application by Fortescue* at [15]-[20].

95 FMG's submissions, [58].

96 See footnote 90 above.

97 See, e.g., ss. 95AT(1), 95AU and 95AZG.

service would not be contrary to the public interest).[98] The exclusion of current information would also run counter to the objectives referred to in ss. 44AH and 44H(1A).

66. For example, in the proceedings below, since the Minister's decision:

(a) there had been further potential future developments in the global iron ore trade, particularly in China and India;[99]

(b) additional mines were being developed by Rio Tinto;[100]

(c) Rio Tinto had established a single operations centre at Perth Airport;[101]

(d) Rio Tinto had completed an expansion of export capacity to 220 Mtpa, and had a number of (revised) planned expansions for significant increases in production;[102]

(e) a joint venture had been proposed between Rio Tinto and BHP Billiton which presaged a reshaping of future mine developments in the Pilbara;[103]

(f) other miners had made significant announcements regarding their resources and proposed developments, including announcements by Aquila regarding tenements in the vicinity of the Robe railway line, and announcements by FMG regarding its tenements within the Solomon group;[104] and

(g) FMG had proposed various future expansions, from 55 Mtpa to 95 Mtpa, then to 155 Mtpa, and then to 255 Mtpa or more, and there had been developments and announcements in relation to the proposed future port at Anketell Point, including the signing of a cooperation agreement between FMG and Aquila, and the proposed Dixon railway line.[105]

Procedural fairness

67. There are a number of facets of the statutory scheme that bear upon the Tribunal's obligations to accord procedural fairness upon a review under s. 44K:

(a) the Tribunal is required to satisfy itself of the criteria;

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98 The importance of the Tribunal's ability to take into account further evidence than was available to the decision maker whose decision is under review was emphasised by the Tribunal in the context of authorisations, see *Qantas Airways Limited* (2005) ATPR ¶42-065 (***Qantas Airways***) at [129]-[137].

99 *Re Fortescue* at [100]-[102] (**AB 1977-8**).

100 *Re Fortescue* at [310] (**AB 2024**).

101 *Re Fortescue* at [314]-[315] (**AB 2025**).

102 *Re Fortescue* at [378]-[407] (**AB 2037-41**).

103 *Re Fortescue* at [408]-[412] (**AB 2041-3**).

104 See, e.g., *Re Fortescue* at [440] and [443] (**AB 2048**) and at [769] and [777] – [779] (**AB 2128-9**).

105 *Re Fortescue* at [446]-[462] (**AB 2049-51**).

(b) the Tribunal is required to 'stand in the shoes' of the Minister, but a number of months may have passed since the Minister's decision;

(c) the applicant for the declaration recommendation and the provider are entitled to participate in the review;

(d) the decision to be made is likely to have a substantial impact on private property rights in relation to a significant infrastructure facility; and

(e) the Tribunal may decide that the Minister has applied the wrong legal test, and that the relevant facts need to be assessed within a different legal framework from that adopted by the Minister.

68. The Tribunal was correct to conclude in the present case that the rules of procedural fairness required the Tribunal to afford a party likely to be adversely affected by its decision the right to be heard, including the right to bring forward evidence.[106]

69. The Tribunal could also properly take the view that the requirements of procedural fairness required the Tribunal to permit affected parties to be given the opportunity to bring forward up-to-date evidence addressing matters relevant to the application of s. 44H.[107]

70. The requirements of procedural fairness support the resolution of the s. 44K issue for which Rio Tinto contends. On FMG's construction of s. 44K, the parties would have been denied the right to adduce updating evidence regarding significant issues, and the Tribunal would have made its decision on the basis of out-dated information. The Tribunal would have been required to make assumptions about developments in the future which ignored what had actually occurred in the real world. That unacceptable outcome is a further reason for rejecting FMG's construction.

71. FMG again emphasises the amount of material that was before the Tribunal.[108] It must be borne in mind that there were four different applications before the Tribunal, concerning four different railway lines, each raising different issues as to its operation, congestion, technology and expansion plans. Those railway lines serve a multi-billion dollar export industry. Extensive sworn evidence was adduced before the Tribunal, but the issues addressed were in substance the same as had been raised before the NCC and the Minister, updated to take account of recent developments. Had the Tribunal applied the private feasibility construction of criterion (b) and considered that criterion as a preliminary issue, the evidence would have been very confined.

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106 *Re Fortescue* at [24] **(AB 1959-60)**. See also *Re Application by Fortescue* at [23]-[26].

107 See, e.g., *Peko-Wallsend Ltd* at 45 per Mason J, referring to the general principle that an administrative decision maker is required to make his or her decision on the basis of material available to him or her at the time the decision is made, particularly where the decision in question is one which may adversely affect a party's interests. This passage was referred to with apparent approval in *Shi* at [42] per Kirby J.

FMG's argument concerning Chapter III of the Constitution

72. In reliance upon its argument regarding Chapter III of the Constitution, FMG contends that the Tribunal's function upon review is limited to reviewing the decision of the Minister for 'correctness' or 'error'.[109] It says that the Tribunal's task in considering criterion (f) must be 'read down' to 'a review of whether the notion of the public interest that the Minister deployed was outside the available range (recognising that that range will be a very broad one)',[110] and that the Tribunal's task in relation to the discretion must be similarly 'read down'.[111] These submissions suffer the same flaw referred to earlier – it is clear from the language of s. 44K that the Tribunal's task on review is not akin to judicial review of the Minister's decision;[112] rather, it is for the Tribunal to satisfy *itself* in relation to all of the criteria, exercising the same powers as the Minister.[113] FMG's construction is not open on the statutory language.

73. The question raised by FMG's argument concerning Chapter III is therefore not, as FMG would have it, whether the Tribunal's function under s. 44K, and in particular in considering criterion (f), should be 'read down' (i.e. re-written) so that it is to review the Minister's decision for correctness; rather, the question raised is whether s. 44K (and as a consequence the whole scheme of Division 2, and ultimately of Part IIIA), confers a function upon a presidential member of the Tribunal (being a Federal Court judge) that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power (the incompatibility condition).[114]

74. No such incompatibility arises. The functions to be performed by a presidential member of the Tribunal on a review under s. 44K are not of such a nature that the capacity of the judge to perform his or her judicial functions with integrity is compromised or impaired. Nor are they of such a nature that public confidence in the

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108 FMG's submissions, [72].

109 FMG's submissions, [91] and [102].

110 FMG's submissions, [101].

111 Ibid.

112 Indeed, if the Tribunal's function on review were to conduct judicial review, this may give rise to other Ch III issues given the Tribunal is made up of lay members as well as Federal Court judges.

113 The Tribunal's observations in relation to its review function under s.101 of the Act are apposite. In *Qantas Airways* [136], the Tribunal noted: 'This proceeding is a hearing *de novo*. It does not involve an analysis of the Commission's determination for the purpose of identifying error and the applicants are not required to demonstrate any error on the part of the Commission. Rather, we must reach our own conclusions on whether the relevant tests for authorisation are satisfied on the evidence put before us, bearing in mind that there is no presumption in favour of the findings of the Commission: *QCMA* at 487; *Re Herald & Weekly Times Ltd on behalf of the Members of the Media Council of Australia* (supra) at 295; Re Rural Traders Co-operative (WA) Ltd (1979) 37 FLR 244 at 260.'

114 *Grollo v. Palmer* (1995) 184 CLR 348 (***Grollo***) at 364-5 per Brennan CJ, Deane, Dawson and Toohey JJ; *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 (***Wilson***) at 8-9 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished.[115]

75. Section 44K requires the Tribunal to consider and apply statutory criteria and to exercise a discretion in deciding whether or not to declare a service. These functions do not compromise the independence of Chapter III judges from the political branches of government. The Tribunal's task it is far removed from the function of reporting to the Minister that was held to be invalid in *Wilson*.

76. Nor is public confidence in the integrity of the judiciary generally, or in the integrity of the particular presidential member, diminished by the Tribunal's role under s. 44K. Judges are commonly appointed to administrative tribunals, in which roles they may be required to review and re-hear administrative decisions.

77. Section 44K required the Tribunal to satisfy itself in relation to the criteria. The exercise undertaken by the Tribunal was required to be, and was, performed fairly, without bias and independently of any instruction, advice or wish of the legislature or the executive government. The Tribunal provided detailed reasons for each element of its decision. Criterion (f) is a statutory criterion which expressly requires the Tribunal to consider the public interest. The matters to which the Tribunal made reference constituted the Tribunal's legitimate consideration of factors which might be relevant to the application of criterion (f) and the discretion. They did not diminish either the actual or perceived independence of the presidential member of the Tribunal from the political branches of government. They give rise to no question of the presidential member acting incompatibly with the proper performance by him of his judicial power.[116]

78. If, notwithstanding Rio Tinto's submissions, this Court were to accept that s. 44K is in breach of the incompatibility condition, the result that FMG seeks could not follow. The consequence would have to be that s. 44K does not validly confer any power upon a presidential member of the Tribunal. Section 44K could not stand, with the consequence that the whole scheme of Division 2, and of Part IIIA, would have to be struck down. A similar consequence would arise in relation to the Tribunal's review of authorisations, notifications and arbitration determinations.[117] The same would probably also apply to the AAT, and to Fair Work Australia, both of which are required to consider the public interest.[118]

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115 *Grollo* at 365; *Wilson* at 14.

116 Cf. FMG's submissions, [105].

117 See ss 90, 101(1) and 102(1) in relation to authorisations; ss 101A, 102(4)(a)(ii), 102(5A), 102(5AA) and 102(5AB) in relation to notifications; and ss 44ZP and 44X(1)(b) in relation to arbitrations.

118 Section 43(1) of the AAT Act permits the AAT to exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision. Where the original decision-maker was required to consider the public interest, the AAT will similarly be required to consider the

Part IV: Consequences for the outcome of the appeals

79. If the Court refuses to grant FMG leave to amend its notices of appeal, the appropriate disposition of the appeals is as set out in Rio Tinto's principal submissions.[119]

80. If FMG is granted leave to amend its notices of appeal, it would seem necessary for s. 78B notices to be issued, and there may then need to be a further oral hearing.

81. If FMG is granted leave to amend its notices of appeal, and the Court concludes that the proper construction of s. 44K is as FMG contends, with the consequence that the Tribunal was only permitted to consider the material that was before the Minister, then whether or not the proceedings will need to be remitted to the Tribunal will depend upon this Court's conclusions as to the other issues which are already the subject of the appeals. In particular:

(a) if this Court upholds the Full Court's private feasibility construction of criterion (b), FMG's appeals should be dismissed – it would be unnecessary to remit the proceedings to the Tribunal, because the Minister adopted a net social benefit construction of criterion (b),[120] and did not have the material to be satisfied on criterion (b) using the private feasibility construction;[121] the Minister's decision would inevitably have to be set aside on this ground alone;

(b) similar consequences would also follow if the Tribunal's natural monopoly construction were accepted, since the Minister did not adopt this construction of criterion (b) either;

(c) only if this Court considers that the approach to criterion (b) adopted by the Minister was correct would the proceedings need to be remitted to the Tribunal for determination in accordance with this Court's decision as to the proper construction of s. 44K.

82. It should be noted that, contrary to FMG's submission, the Tribunal did not accept that the Minister's decision was correct on the material before him.[122] In fact, what the Tribunal stated was that, while it set aside the Minister's decisions, it did not follow that it disagreed with them.[123] The observation related to the fact that, on the Tribunal's approach, it was not required to, and did not, consider whether or not the Minister's evaluation of the facts was correct on the material before him. It is also

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public interest on review of the decision. See s. 604 (2) of the *Fair Work Act 2009* in relation to Fair Work Australia.

119 See Rio Tinto's annotated submissions dated 27 February 2012, [69]-[71].

120 Declaration of the Hamersley Railway dated 27 October 2008, pp. 5-6 (**AB 7-8**); cf. FMG's submissions, [79].

121 See [8] above.

122 Cf. FMG's submissions, [77].

123 *Re Fortescue* at [1347] (**AB 2266-7**).

clear that the Tribunal was not directing itself to legal issues, since it departed from the net social benefit construction of criterion (b). FMG's submissions[124] therefore proceed on a false premise.

83. There are further reasons why FMG cannot draw any comfort from the Tribunal's observations in paragraph [1347] of its reasons. First, as the Full Court held, the Tribunal (and the Minister) proceeded under the wrong construction of criterion (b). Secondly, other aspects of the Minister's statement of reasons disclose that he proceeded upon the wrong principles. For example, in relation to criterion (f), the Minister placed some reliance upon the fact that the arbitration provisions of Part IIIA were said to contain clear safeguards sufficient to protect the legitimate business interests of service providers and ensure that they are compensated for the costs of providing access.[125] However, the Tribunal held that those safeguards do not provide the incumbent with certainty that its legitimate business interests will be protected,[126] and that conclusion has not been challenged by FMG. That is a further reason why, if it were relevant to consider the correctness of the Minister's decision, it is evident the Minister's decision proceeded upon an incorrect basis. It is also a reason why the Minister's decision would have to be set aside if the proceeding were to be remitted to the Tribunal.

84. It follows from what is set out above that there is no basis upon which the Minister's decision can be affirmed by this Court, and that the outcome of the appeals must be either that the appeals are dismissed or that the matter is remitted to the Tribunal.

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124 FMG's submissions, [77]-[82].
125 Declaration of the Hamersley Railway dated 27 October 2008, p. 10 (**AB 12**).
126 *Re Fortescue* at [1173] (**AB 2226**); see also [592]-[606] (**AB 2081-5**).