IN THE HIGH COURT OF AUSTRALIA **No M45 of 2011**

MELBOURNE REGISTRY

BETWEEN:

The National Competition Council

Applicant

and

Hamersley Iron Pty Ltd (ACN 004 448 276) & Others

Respondents

IN THE HIGH COURT OF AUSTRALIA **No M46 of 2011**

MELBOURNE REGISTRY

BETWEEN:

The National Competition Council

Applicant

and

Robe River Mining Co Pty Ltd (ACN 008 694 246) & Others

Respondents

APPLICANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: THE ISSUE

2. The issue presented by these applications is whether, on its proper construction, s 44H(4)(b) (**criterion (b)**) of the *Competition and Consumer Act 2010* (**Act**) should be applied by reference to:

   2.1 the social cost approach adopted by the Australian Competition Tribunal (**Tribunal**) in this case and in *Re Review of Freight Handling Services at*

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Sydney International Airport (***Sydney Airport No 1***),[1] *Re Duke Eastern Gas Pipeline Pty Ltd* (***Duke***),[2] and *Re Services Sydney Pty Limited* (***Services Sydney***);[3] or

2.2 the private profitability approach adopted by the Full Federal Court in this case.

PART III: SECTION 78B NOTICES

3. The Applicant (**Council**) does not consider that any notice under s 78B of the *Judiciary Act 1903* (Cth) is necessary in these applications.

PART IV: CITATION OF JUDGMENTS BELOW

4. The judgments below are reported as follows:

The Tribunal: *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256

The Full Federal Court: *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57

PART V: RELEVANT FACTS

5. On 27 October 2008, the Treasurer (on the Council's recommendation and in response to an application by The Pilbara Infrastructure Pty Ltd and its parent company, Fortescue Metals Group Ltd – collectively **FMG**) declared:

5.1 a service consisting of the use of certain parts of the Hamersley railway network and the use of all the associated infrastructure necessary to allow third party trains and rolling stock to move along the Hamersley railway network between points of interconnection (**Hamersley Service**); and

5.2 a service consisting of the use of the Robe railway network and the use of all the associated infrastructure necessary to allow third party trains and rolling stock to move along the Hamersley railway network between points of interconnection (**Robe Service**);

for a period of 20 years pursuant to s 44H(1) of the Act.

6. The owners of the Hamersley Service and the Robe Service (collectively **Rio Tinto**) sought review of the Treasurer's decisions under s 44K(1) of the Act.

7. On 30 June 2010, the Tribunal made determinations which included:

7.1 setting aside the Treasurer's decision to declare the Hamersley Service; and

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1 (2000) 156 FLR 10

2 (2001) 162 FLR 1

3 (2005) 227 ALR 140

7.2 varying the Treasurer's decision to declare the Robe Service, so that the period of the declaration commenced on 19 November 2008 and will expire on 19 November 2018.

8. In making those determinations, the Tribunal adopted a social cost approach to criterion (b) that focused on whether it was "*economically efficient*" for anyone to develop another facility to provide the service: (2010) 271 ALR 256 at [815]-[835].

9. Having adopted that approach, the Tribunal applied a "*natural monopoly test*" to determine whether criterion (b) was satisfied: (2010) 271 ALR 256 at [836]-[839].

Can each line provide society's reasonable demand for the below rail service at a lower total cost than if provided by two or more lines: (2010) 271 ALR 256 at [850].

9.1 In answering that question in this case, the Tribunal limited its inquiry to the costs of producing the below rail service.

9.2 The Tribunal stressed that merely because its test for criterion (b) did not take into account all social costs of access to the relevant services, it did not follow that those costs are irrelevant: (2010) 271 ALR 256 at [845].

9.3 It considered those costs relevant to s 44H(4)(f) (**criterion (f)**) of the Act and "*perhaps as discretionary factors*" (2010) 271 ALR 256 at [845].

10. The Tribunal considered the approach it adopted to criterion (b) to be a departure from the approach in *Sydney Airport No 1* and *Duke*: (2010) 271 ALR 256 at [836]-[838].

11. The Tribunal found that criterion (b) was satisfied in respect of both the Robe and the Hamersley Services: (2010) 271 ALR 256 at [929], [937].

11.1 However, having regard to the likely benefits and potential costs of access, the Tribunal could not be satisfied that declaration of the Hamersley Service would not be contrary to the public interest or alternatively exercised its discretion not to declare that service: (2010) 271 ALR 256 at [1331].

11.2 In relation to the Robe Service, the Tribunal was only satisfied that access would not be contrary to the public interest for a period of 10 years and limited the declaration accordingly: (2010) 271 ALR 256 at [1337].

12. The Tribunal found that, if the private profitability approach to criterion (b) had applied, criterion (b) would not be satisfied for both the Hamersley and Robe Services: (2010) 271 ALR 256 at [964]-[965].

13. FMG applied to the Full Federal Court for judicial review of the Tribunal's determinations in respect of the Hamersley Service: VID616 of 2010; and Robe

Service: VID687 of 2010. Rio Tinto applied for judicial review of the Tribunal's determination in respect of the Robe Service: VID686 of 2010.

14. The Full Court disagreed with the Tribunal's interpretation of criterion (b): (2011) 193 FCR 57 at [76]-[100]. It held that "*the intention of the legislature was that if it was privately feasible for someone in the market place to develop an alternative to the facility in dispute, then criterion (b) will not be satisfied*": (2011) 193 FCR 57 at [100].

15. In reaching that conclusion, the Full Court reasoned that:

    15.1 the term "*uneconomical for anyone*" indicates that the perspective of criterion (b) is "*that of a participant in the market*": (2011) 193 FCR 57 at [76]; see also [77];

    15.2 clause 6(1) of the Competition Principles Agreement (the **CPA**) indicates that the phrase, "*uneconomical for anyone*", in criterion (b) meant "*not economically feasible for anyone*" in the market place: (2011) 193 FCR 57 at [73]; and it was "*to strain too far to treat 'economically feasible' as 'economically efficient' ...*": (2011) 193 FCR 57 at [79];

    15.3 by adopting a "*natural monopoly test*" the Tribunal was departing from the approach taken by the Tribunal in previous determinations: (2011) 193 FCR 57 at [83];

    15.4 an approach to criterion (b) that involved "*an evaluative judgement about efficiency in terms of costs and benefits*" is "*inconsistent with the intention evident from the text and context of Pt IIIA that access should not be available merely because it would be convenient to some parties, or indeed to society, according to the evaluation of a regulator*": (2011) 193 FCR 57 at [85];

    15.5 the philosophy which informed the enactment of Pt IIIA, and which is reflected in the provisions of s 44H makes the granting of access "*a distinctly exceptional occurrence which is simply not justified by an evaluation by a regulator that economic efficiency from the point of view of society as a whole would be served by declaration*"; if that were the legislative intention, "*it could have been expected to express its intention in very different terms*": (2011) 193 FCR 57 at [87]-[94];

    15.6 s 44X(1)(g) "*shows that when the Parliament sought to speak of economic efficiency, it did so in terms of individual facility owners in the market*": (2011) 193 FCR 57 at [98].

16. Having regard to its interpretation of criterion (b), and given the Tribunal's findings concerning the application of the private profitability test, the Full Court dismissed FMG's applications and upheld Rio Tinto's application: (2011) 193 FCR 57 at [137].

PART VI: ARGUMENT

Special leave

17. The Council relies on paragraphs 15-24 and 43-48 of its Summary of Argument in proceeding M45 of 2011 and M46 of 2011. In particular, the Council relies on the fact that the declaration of a service pursuant to s 44H operates for the benefit, not only of the person who made the application for a declaration, but also for the benefit of any person who seeks access to the service: s 44S of the Act.

The statutory language

18. The Full Court erred by adopting a private profitability approach to criterion (b) for the following reasons.

19. **First,** the text of criterion (b) favours an interpretation based on social cost and economic efficiency of producing a service from one facility or two or more facilities, rather than the private profitability of building a second facility.

19.1 The "*natural and ordinary*"[4] meaning of the word "*uneconomical*" is more closely aligned to concepts of economic efficiency than a concept of private profitability.

19.2 The Australian Oxford English Dictionary defines "*uneconomical*" as "*not economical; wasteful*"[5] and "*economical*" as "*sparing in the use of resources; avoiding waste*".[6]

19.3 Further, the term "*uneconomical*" clearly draws upon the concepts of economics, which are concerned with the efficient use of scarce resources, rather than the attainment of profit at any cost.

20. **Second,** the words "*for anyone*" do not favour either interpretation of criterion (b). They simply serve to anonymise the analysis required.

20.1 The preposition "*for*" does not necessarily, as the Full Court must have assumed, create a composite concept "*uneconomical for anyone*", thereby focusing on whether it would be uneconomical for the person who might develop the facility.

20.2 The preposition is equally capable of being read as identifying the activity that would be uneconomical – namely, the activity of anyone developing another facility to provide the service – so that the focus of the question is whether the

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4 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 398 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ)

5 Oxford University Press, Melbourne, 2nd ed (2004), p. 1407

6 Oxford University Press, Melbourne, 2nd ed (2004), p. 397

development of the facility by anyone would be uneconomical in the sense of wasteful of those resources.

21. Indeed, as the Full Court found, the private profitability interpretation requires the word "*anyone*" to be read as "*anyone other than the incumbent facility owner*": (2011) 193 FCR 57 at [83]. That is not consistent with the natural and ordinary meaning of the word "*anyone*". No such qualification is required for a social cost/economically efficient interpretation of criterion (b).

22. **Third**, while the word "*uneconomical*" in criterion (b) should be interpreted conformably with the term "*not economically feasible*" in clause 6(1) of the CPA.

10 22.1 The term "*feasible*" is equally consistent with the term "*economically*" meaning "*without waste*" as it is with that term meaning "*profitably*".

22.2 The real question remains what is meant by the term "*economically*". For the reasons set out in paragraph 19 above, the natural and ordinary meaning of that word is "*wasteful*" not "*unprofitable*".

23. Further, it is notable that clause 1(3)(j) of the CPA provides that, where the CPA calls for a determination of the costs and benefits or appropriateness of a particular policy, one of the matters to be taken into account is "*the efficient allocation of resources*".

Legislative context

24. **Fourth**, reading criterion (b) as imposing a social cost test better promotes the objects
20 of Part IIIA than does a private profitability test.[7]

24.1 In *BHP Billiton Iron Ore Pty Ltd v National Competition Council*: (2008) 236 CLR 145 at [42], this Court preferred an interpretation of the term "*production process*" in Part IIIA that was consistent with "*the large national and economic objectives of Part IIIA*".

24.2 Those objects, as set out in ss 2 and 44AA of the Act, reveal an ultimate objective of enhancing the welfare of Australians by promoting "*the economically efficient operation of, use of and investment in infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets.*"[8]

30 25. The objects of Part IIIA are not met by the private profitability test.

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7 *Acts Interpretation Act 1901* (Cth), s 15AA

8 s 44AA(a) of the Act

25.1 If criterion (b) was interpreted as requiring a test of private profitability, then no analysis of what is "*economically efficient*" would occur for facilities that could be duplicated profitably, albeit in an economically inefficient manner.

25.2 That cannot be consistent with the object of promoting the "*economically efficient*" operation, use of and investment in infrastructure. The Full Court, acknowledged that the private profitability test "*might occasion some wastage of society's resources in some cases*": (2011) 193 FCR 57 at [100]. That is not an outcome that should be accepted lightly.

25.3 In circumstances where Part IIIA applies only to facilities "*of national significance*",[9] the amount of such wastage is also likely to be significant.

26. **Fifth**, whereas the Full Court interpreted criterion (b) as a test of market failure such that it would not apply where "*there is no problem in the market place that participants in the market place cannot be expected to solve*": (2011) 193 FCR 57 at [100], the relevant extrinsic material[10] reveals that the mischief that Part IIIA sought to address was not individual instances of market failure but structural impediments to the promotion of "*effective*" competition in related markets. That is consistent with the finding of the Full Court in *Sydney Airport Corporation Ltd v Australian Competition Tribunal* ***(Sydney Airport No 2)***: (2006) 232 ALR 454 at [78], that Part IIIA should not be interpreted so as to act "*like a remedy for a wrong, rather than as a public instrument for the more efficient working of essential facilities in the economy*".

27. It is also incorrect to assume that, because a party may build a duplicate facility in the absence of access to an existing facility, there is no problem in the marketplace.

28. The context in which Part IIIA of the Act was enacted has been traced in detail in a number of decisions of the Full Federal Court[11] and by the Tribunal in this case: (2010) 271 ALR 256 at [551]-[585]. Properly understood, that context shows that Parliament intended criterion (b) and s 44H(4)(a) (**criterion (a)**) to constitute a cumulative two-part enquiry, directed to whether there is a structural impediment to effective competition, in which enquiry the role of criterion (b) is to determine if the relevant

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9 s 44H(4)(c) of the Act

10 see the Report of the National Competition Review dated 25 August 1993 under the chairmanship of Professor Hilmer (the **Hilmer Report**) at pp xv, xxx-xxxii, 239-268; the draft legislative package released by the Council of Australian Governments (**COAG**) in 1994 at pp 1.7-1.17 and 2.30; Second Reading Speech on the Competition Policy Reform Bill 1995: Senate, *Debates*, 29 March 1995, p 7

11 *Rail Access Corporation v New South Wales Minerals Council Ltd* (1998) 87 FCR 517 at 518-20, (Black CJ, Wilcox and Goldberg JJ); *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124 at 125-132 (French, Finn and Allsop JJ); *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at [61]-[67] and [69]-[72]). See also *BHP Billiton Iron Ore Pty Ltd v The National Competition Council* (2008) 249 ALR 418 at [13]

facility exhibited natural monopoly characteristics such that it is wasteful of society's resources for more than one facility to provide a service.

29. The genesis of Part IIIA is the Hilmer Report.[12] The Hilmer Report identified two cumulative factors necessary for the "essential facility" problem to arise, namely a facility that:

    29.1 exhibits natural monopoly characteristics, in the sense that it cannot be duplicated economically; and

    29.2 occupies a strategic position such that access is required to compete effectively in upstream or downstream markets.[13]

30. The "*essential facilities problem*" was then said to become more acute where the owner of the "*essential facility*" is vertically integrated with potential competitive activities in upstream or downstream markets, in which case the potential to charge monopoly prices may be combined with an incentive to inhibit competitors' access to the facility.[14]

31. Those two cumulative characteristics of an essential facility were picked up in the draft legislative package released by COAG:[15]

> *The report of the Hilmer Committee emphasised that there will be little prospect of introducing effective competition in some markets unless competitors are able to gain access to particular "essential facilities" ... An essential facility is transportation or other system which exhibits a high degree of natural monopoly; that is, a competitor could not duplicate it economically. A natural monopoly becomes an essential facility when it occupies a strategic position in an industry such that access to it is required for a business to compete effectively in a market upstream or downstream from the facility....*

They were then embodied in the first three criteria set out in ss A-6(3)(a)-(c) of the draft legislation put forward by COAG in its draft legislative package released in 1994.[16] When Part IIIA of the Act was enacted, those first three criteria were reduced to two, being criterion (a) and criterion (b).

Legislative history leading up to 30 June 2010

32. **Sixth**, the history of Part IIIA since its enactment in 1995 (in particular, the form in which Part IIIA was left after a comprehensive review and a series of amendments in

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12 Independent Committee of Inquiry into a National Competition Policy (Chair: Prof F G Hilmer), *National Competition Policy*, AGPS, Canberra. 1993

13 Hilmer Report at p 240

14 Hilmer Report at p 241

15 National Competition Policy, Draft Legislative Package, Explanatory Material at p 1.10

16 National Competition Policy, Draft Legislative Package, Explanatory Material at p 2.30

2006 and thus stood on 27 October 2008[17] and on 30 June 2010[18]) confirms that the focus of criterion (b) is the social cost and economic efficiency of producing a service for which declaration is sought, rather than notions of private profitability of building a duplicate facility.

33. On 11 October 2000, the Assistant Treasurer, acting pursuant to Parts 2 and 3 of the *Productivity Commission Act 1998* (Cth), referred the National Access Regime, embodied in Part IIIA, to the Productivity Commission for inquiry and report.

34. The Productivity Commission reported to the Assistant Treasurer on 28 September 2001,[19] and the Government issued its final response on 17 September 2002. That led to the introduction of the Bill for the *Trade Practices Amendment (National Access Regime) Act 2006* (the **Amendment Act**), which brought about a number of amendments to Part IIIA – including the introduction of the objects clause in s 44AA and a change to criterion (a). The Explanatory Memorandum to the Bill for the Amendment Act makes clear that the Amendment Act was intended to "*implement the Government's response to the Productivity Commission's Inquiry Report*".

35. By the time that the Productivity Commission issued its report, the Tribunal had already decided, in *Sydney Airport (No 1)* and *Duke*, that criterion (b) posed the question "*whether for a likely range of reasonably foreseeable demand for the services provided by means of the pipeline, it would be more efficient, in terms of costs and benefits to the community as a whole, for one pipeline to provide those services rather than more than one*".[20]

36. The Productivity Commission report included a detailed consideration of the declaration criteria, including criterion (b), and the Tribunal's decisions in *Sydney Airports No 1* and *Duke*.[21] The report concluded that:[22]

> *In sum, the Commission considers that having criterion (b) operate as a screening device for natural monopoly technologies (at least for point to point transmission services like gas pipelines) is not necessarily inappropriate, provided that criterion (a) is strengthened ...*
>
> *Finally, the Commission considers that it is essential that criterion (a) only be met where the facility in question can exercise substantial and enduring market power. It is therefore of the view that criterion (a) must be strengthened ...*

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17 The date of the Treasurer's declaration of the Hamersley Service and the Robe Service.

18 The date of the Tribunal's decision.

19 Productivity Commission Review of the National Access Regime, Report No 17, 28 September 2001

20 *Duke* (2001) 162 FLR 1 at [64], [137]

21 Productivity Commission Review of the National Access Regime, Report No 17, 28 September 2001, pp 159-198, especially pp 165, 173, 178, 182 and 191

22 Productivity Commission Review of the National Access Regime, Report No 17, 28 September 2001, p 182, see also p 191

37. On that basis, the Productivity Commission recommended a change to criterion (a).[23] There was no suggestion in the Productivity Commission's report that criterion (b) either was or should be a test of private profitability.

38. The Government's Response to the Productivity Commission's report:

38.1 described the access regime as ensuring that, "*facilities with natural monopoly characteristics (i.e., which cannot be economically duplicated) do not create barriers to competition*";[24]

38.2 adopted the incorporation of an objects clause into Part IIIA but altered the wording proposed by the Productivity Commission, expressly noting that, "*the promotion of economic efficiency is a fundamental objective of competition policy*" and "*consideration of the impact of an access decision in a wider economic and public benefit context was one of the key reasons for including a statutory access regime within the NCP framework*";[25]

38.3 supported an amendment to criterion (a) as the only amendment to the declaration criteria;[26] and

38.4 did not consider any amendment was required to address the interpretation of criterion (b) in either *Sydney Airport (No 1)* or *Duke*.

39. It follows that, when the Treasurer declared the Hamersley Service and the Robe Service, and when the Tribunal made its decision, Part IIIA stood in a form that was the result of the policy choices made when Part IIIA was first enacted in 1995, and when the Amendment Act was enacted in 2006. There is an analogy with the point made by Dawson J in *Hunter Resources Ltd v Melville*,[27] where his Honour used amendments proposed to the Mining Act as an indication of the intention of the legislature that there needed to be strict compliance with the relevant legislation. His Honour said:[28]

> *That conclusion does not arise from the amendments by themselves because none of them mentions the need for strict compliance. But it does arise from the absence of any provision to that effect in the amending Act when that Act is read with both the committee's report and the second reading speech of the minister.*

40. When the Full Court examined the underlying legislative intent in the present case, it failed to have any regard to the context of the amendments made by the Amendment Act or the Explanatory Memorandum, which specifically identified the Government's

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23 Recommendation 7.1

24 Government Response to Productivity Commission Report of the National Access Regime, p 1

25 Government Response to Productivity Commission Report of the National Access Regime, pp 3-4

26 Government Response to Productivity Commission Report of the National Access Regime pp 6-7; it substituted the word "material" for "substantial"

27 (1988) 164 CLR 235

28 (1988) 164 CLR 235 at 254

intention to implement substantially the recommendations of the Productivity Commission report.[29]

40.1 The Parliament may be assumed to have made a deliberate and fully informed choice to leave criterion (b) in the form that the Tribunal found, in *Sydney Airports No 1* and *Duke*, to pose the question whether "*it would be more efficient, in terms of costs and benefits to the community as a whole, for one [facility] to provide [particular] services rather than more than one*": see paragraph 35 above.

40.2 If the legislative intent behind criterion (b) had been to adopt the perspective of "*a participant in the market place who might be expected to choose to develop another facility in that person's own economic interests*": (2011) 193 FCR 57 at [76]; then a quite different approach to the Productivity Commission report would have been adopted and an amendment would have been proposed to criterion (b), given the interpretation of criterion (b) that was prevalent at that time.

Access as an "exceptional occurrence"

41. **Seventh**, the Full Court erred by applying to the interpretation of criterion (b) a philosophy that the granting of access is "*a distinctly exceptional occurrence which is simply not justified by an evaluation by a regulator that economic efficiency from the point of view of society as a whole would be served by a declaration*": (2011) 193 FCR 57 at [87]. There are several problems with that approach.

42. Access under Part IIIA is not determined by a regulator's evaluation of efficiency. There is no regulator involved in Division 2 of Part IIIA. The decision whether to declare or not to declare a service is an administrative decision made by the Minister on the recommendation of a governmental advisory body (the Council).

43. Further, access is not the inevitable consequence of declaration. As this Court stated in discussing the two stage nature of the National Access Regime in *BHP Billiton Iron Ore Pty Ltd v National Competition Council*: (2008) 236 CLR 145 at [17] and [18]:

> *The consequence of a declaration of a service is that the "third party" (which is defined in section 44B to include "a person who wants access to the service") is given what may be described as an enforceable right to negotiate access to the service...*
>
> *Access to the declared service is, however, not a necessary or ultimate result of the arbitration (s 44V(3)).*

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[29] *Re Alcan Australia Limited and Ors, ex parte Federation of Industrial Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106ff

44. Criterion (b) is but one of a number of criteria, on which the relevant Minster must be satisfied before exercising the discretion to declare or not to declare the relevant facility. In that circumstance, it is wrong to see criterion (b) as limiting access to "*a distinctly exceptional occurrence*". By applying that view to the interpretation of criterion (b) on its own, the Full Court adopted an approach that would foreclose the possibility of declaration in circumstances where it was privately profitable to duplicate without the "*economically efficient operation of, use and investment in the relevant facility ever having been considered*".[30] That is contrary to the objects of Part IIIA.[31]

45. The terms of criterion (b) should be interpreted so as to give them "*presumptively the most natural and ordinary meaning which is appropriate in the circumstances*".[32] There is nothing in the wording of criterion (b) that indicates its satisfaction should be "*a distinctly exceptional occurrence*". Applying a social cost approach to criterion (b) would not give rise to a flood of declarations, as is evident from the history of the number of declarations that have been made since Part IIIA was enacted.

46. For the reasons set out above, it is submitted that the appropriate role for criterion (b) within the context of Part IIIA is as one of the two cumulative facts (criterion (a) being the other) that indicate the existence of the "*essential facilities problem*". Once the "*essential facilities problem*" has been found to exist, upon the satisfaction of criterion (a) and the social cost test in criterion (b), then, if the facility is of national significance and the Minister is satisfied that access would not be contrary to the public interest (s 44H(4)(f)), the Minister has a discretion whether or not to declare the service.

47. The role of criterion (b) is not to ensure that access only occurs in circumstances of market failure and is "*a distinctly exceptional occurrence*". Criterion (b) is not even concerned with access.

Taking material out of context

48. **Eighth**, the Full Court's reliance on the use of the phrase "*economically efficient*" in s 44X(1)(g) as supporting a private profitability interpretation is incorrect. The reference to "*economically efficient*" in that paragraph is in a different context and for a totally different purpose. The context is the final stage of the access regime, where an access dispute is being arbitrated by the ACCC; the purpose is that of balancing the interests of the service provider and the access seeker. The more important reference to

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30 s 44AA(a) of the Act

31 s 44AA(a) of the Act

32 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 398 (per Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ)

economic efficiency is the reference in the objects of Part IIIA: s 44AA, which supports the social cost test for criterion (b).

Overall consistency in approach

49. **Ninth**, the approach that the Tribunal adopted in this case was not inconsistent with the approach adopted by the Tribunal to the interpretation of criterion (b) in *Sydney Airport No 1*, *Duke* or *Services Sydney*. To the extent that the Tribunal and the Full Court considered otherwise, they misapprehended the nature of those previous decisions and the effect of what the Tribunal decided in this case.

50. In *Sydney Airport (No 1)*, the Tribunal found that it would be "*uneconomical for anyone to develop another*" airport facility whether "*uneconomical*" was construed in a private or social cost benefit sense: (2000) 156 FLR 10 at [204]. Nevertheless, the Tribunal went on to state that "*the uneconomical to develop test should be construed in terms of the associated costs and benefits of development for society as a whole*": (2000) 156 FLR 10 at [204]. The Tribunal did not consider that criterion (b) was intended "*only to consider a narrow accounting view of 'uneconomic' or simply issues of profitability*": (2000) 156 FLR 10 at [204]. Given the facts in that case, it was not necessary for the Tribunal to undertake any detailed consideration of what costs were relevant for that assessment.

51. In *Duke*, no argument was put before the Tribunal that the term "*uneconomic*"[33] should be interpreted on the basis of private profitability.[34] The Tribunal adopted the position taken by the Tribunal in *Sydney Airport (No 1)*, that "uneconomic" was to be interpreted in a broader social cost benefit sense: (2001) 162 FLR 1 at [59], noting that the assessment of social costs would need to take into account productive, allocative and dynamic effects: (2001) 162 FLR 1 at [63]-[64].

52. In applying criterion (b) in the *Duke* case, the Tribunal focused on the haulage services provided by the Eastern Gas Pipeline and assessed demand and capacity and the costs that would be involved in expanding the capacity to meet demand. The costs that it considered were the incremental costs involved in the expansion of the pipeline: (2001) 162 FLR 1 at [139]-[142]. They did not relate to costs or impacts that might arise in other related markets. The costs the Tribunal actually took into account in that case related to productive efficiency only. The Tribunal noted, "*we do not have any information on the magnitude of the allocative and dynamic efficiency benefits [of*

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33 *Duke* was a decision under the *National Third Party Access Code for Natural Gas Pipeline Systems* (the **Gas Code**). Section 1.9 of the Gas Code provided that the relevant Minister must decide that a pipeline is not covered if "*it would be uneconomic for anyone to develop another Pipeline to provide the Service provided by means of the Pipeline*".

34 The Tribunal was, however, alive to the issue of private cost and its implications for investment and noted that owners generally act on private cost rather than social cost but did not see that as being relevant to the interpretation of criterion (b): (2001) 162 FLR 1 at [64]. Rather, it saw that issue as having implications for criterion (a).

developing a duplicate facility] and the extent to which these might offset the productive efficiency aspects of this case. Thus, these factors cannot be taken into account.": (2001) 162 FLR 1 at [143].

53. In *Services Sydney*, the Tribunal followed the approach to criterion (b) adopted in Duke: (2005) 227 ALR 140 at [103]. There was no dispute that criterion (b) was satisfied in that case and the Tribunal did not need to consider what costs were relevant to that issue: (2005) 227 ALR 140 at [105].

54. In the present case, the Tribunal asked the same question in relation to criterion (b) as it had asked in *Duke* - namely, "*can each line provide society's reasonably foreseeable demand for the below rail service as a lower cost than if produced by two or more line*": (2010) 271 ALR 256 at [850].

55. For the purpose of answering that question in the circumstances of this case, the Tribunal limited its analysis to the "*costs of producing the below rail service*: (2010) 271 ALR 256 at [850]; and compared "*the additional costs ... of operating the [existing] line on a shared basis plus the capital costs of any expansion that is necessary to meet the [foreseeable] demand ... with the sum of the costs of operating the incumbent's line (plus the costs of any expansion) for its own use and the costs of constructing and operating a new line(s) to meet third party demand*": (2010) 271 ALR 256 at [851]. The Tribunal dealt with all evidence of other costs of access in criterion (f) or the residual discretion.

56. That approach was not inconsistent with the approach adopted by the Tribunal in *Sydney Airport (No 1)* and *Duke*. The costs to which criterion (b) directs itself are the costs involved in developing another facility to provide the service, not the costs or lost profits that may be incurred by the incumbent in upstream or downstream markets. That is apparent from the wording of criterion (b) and its focus on the cost structure of "*the facility*" used "*to provide the service*" rather than the impact of "*access*". It is also apparent from the role that criterion (b) plays in determining whether a facility is an "essential facility" in the sense described in the relevant extrinsic material.

57. The costs that the Tribunal dealt with under criterion (f) or the residual discretion did not relate to the operation of the relevant rail lines in providing the relevant below rail services, but rather to the impact that access (if it occurred) would have on the incumbents' iron ore businesses. The Tribunal noted that: (2010) 271 ALR 256 at [845]. Properly considered, the decisions in *Sydney Airport No 1* and *Duke* do not require that such costs be considered under criterion (b). To the extent that they do, they were in error.

PART VII: APPLICABLE PROVISIONS

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

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

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

PART VIII: ORDERS SOUGHT

60. In M45 of 2011, the Council seeks the following orders:

(a) Special leave to appeal be granted.

(b) The appeal be allowed.

(c) The orders made by the Federal Court of Australia in proceeding number VID616 of 2010 on 16 May 2011 be set aside and, in lieu thereof, order that the twelfth and thirteenth respondents' applications for orders of review be remitted to the Federal Court of Australia for further consideration in light of the decision of this Court.

(d) The first to ninth respondents pay the appellant's costs of the appeal.

61. In M46 of 2011, the Council seeks the following orders:

(a) Special leave to appeal be granted.

(b) The appeal be allowed.

(c) The orders made by the Federal Court of Australia in proceeding number VID 686 of 2010 on 16 May 2011 be set aside and, in lieu thereof, order that the first to seventh respondents' applications for orders of review be dismissed.

(d) The first to seventh respondents pay the appellant's costs of the appeal.

Dated: 25 November 2011

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