IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P44 of 2011

BETWEEN:

JOHN ANDREW HENRY FORREST
Appellant
and

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
First Respondent
and

FORTESCUE METALS GROUP LTD (ACN 002 594 872)
Second Respondent

RESPONDENT'S SUBMISSIONS

Part I: SUITABILITY FOR PUBLICATION

1 It is certified that these submissions are in a form suitable for publication on the internet.

Part II: STATEMENT OF THE ISSUES

2 The first respondent (**ASIC**) contends that this appeal gives rise to the following issues:

2.1 Whether the statements made by the second respondent (**FMG**) on the occasions set out in Schedule A to the Full Court's reasons for judgment (**FMG's announcements**) to the effect that it had executed binding agreements with each of CREC, CHEC and CMCC to build, finance and transfer the railway, port and mine for FMG's proposed Pilbara iron ore project (**the Project infrastructure**) would have been understood by ordinary and reasonable members of the investing public as conveying statements of fact or merely statements of opinion as to which a contrary view was reasonably open.

2.2 If FMG's announcements would have been understood as statements of fact, whether those statements contravened s 1041H of the *Corporations Act 2001* (Cth) in that they did not accurately describe the material terms or effect of the framework agreements.

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2.3 If FMG's announcements would have been understood as statements of opinion, whether FMG held an honest and reasonable belief in their accuracy.

2.4 For the purposes of s 674(2) of the *Corporations Act,* whether FMG and its directors were "aware" of the terms of each of the framework agreements, or whether the only "information" of which FMG and its directors were "aware" was the making of each framework agreement and their opinion as to its meaning and effect.

2.5 Whether the appellant (**Forrest**) established the defence in s 674(2B) of the *Corporations Act.*

10 2.6 Whether a company director may contravene s 180(1) of the *Corporations Act* by engaging in conduct which exposes the company to potential civil liability for contravention of the *Corporations Act.*

2.7 Whether Forrest established the "business judgment" defence in s 180(2) of the *Corporations Act.*

2.8 Whether there was a miscarriage of justice by the way in which the Full Court dealt with the appeal.

3 The issues referred to in paragraphs 2.1 - 2.4 also arise in FMG's appeal (P45/2011).

Part III: NOTICE UNDER S 78B OF THE *JUDICIARY ACT 1903*

4 It is certified that ASIC has considered whether any notice should be given in
20 compliance with s 78B of the *Judiciary Act 1903* (Cth) and considers that no such notice is required.

Part IV: STATEMENT OF MATERIAL FACTS

5 ASIC refers to and relies upon the factual matters stated in Part IV of its submissions on FMG's appeal.

Part V: APPLICABLE STATUTES AND REGULATIONS

6 In addition to the statutory provisions set out in Part VII of Forrest's submissions, Listing Rules 3.1 and 19.12 of the ASX Listing Rules are applicable to this appeal. The text of those Rules is set out Annexure A to FMG's submissions on its appeal.

Part VI: FIRST RESPONDENT'S ARGUMENT ON THE APPEAL

30 ### (1) Summary of the Full Court's decision

7 In August and November 2004, FMG announced that it had executed binding agreements with CREC, CHEC and CMCC to build, finance and transfer the railway, port and mine for FMG's proposed Pilbara iron ore project.[1]

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[1] FMG's announcements comprised letters to the ASX and associated media releases on 23 August 2004 and 5 and 8 November 2004 and the other announcements listed in Sch A to the FC Reasons. The text

8 The Full Court held that these announcements, which were made in unqualified terms and not said to be matters of opinion, would have been understood "by ordinary and reasonable members of the investing public" (FC [106]) as conveying the historical fact that agreements containing terms accurately summarised in the announcements had been made between the parties and not, as FMG contended, as mere statements of opinion as to which a contrary view was also reasonably open: FC [109], [117], [119] per Keane CJ, [213]-[215] per Emmett J, [218] per Finkelstein J.

9 The Full Court then considered whether the framework agreements[2] were, in law, binding agreements containing the commitments represented by FMG and held that
10 they were not: FC [135], [161], [176] per Keane CJ, [212] per Emmett J, [227]-[228] per Finkelstein J. The Court held that the framework agreements did not "manifest an existing consensus upon the subject matter of the work, or the price, or the schedule for performance", all of which were "matters essential to the conclusion of an enforceable contract to build and transfer the infrastructure for the Project": FC [161]. Rather, "[t]he content of the agreements as to subject matter, scheduling and price, was explicitly left to be agreed between parties" and not by the Court's application of standards of reasonableness or by third party determination: FC [135], [168].

10 It followed that FMG's announcements had contravened s 1041H of the *Corporations Act 2001* (Cth): FC [177], [215]. It was therefore unnecessary to determine whether
20 the framework agreements should be categorized as agreements to agree or void for uncertainty: FC [177], [220].

11 In relation to s 674(2) of the *Corporations Act*, the Full Court held that the terms of each of the framework agreements were information in the possession of each of the directors and of which they were aware: FC [185]. It held further that, "because the misleading statements by FMG were apt to create an understanding on the part of common investors that FMG had secured the construction of the infrastructure for the Project on terms as to deferred payment" (FC [189]), FMG was obliged by s 674(2) to disclose the terms of the framework agreements to correct the misleading understanding that had been created: FC [184], [189]. FMG's failure to disclose that
30 information constituted a breach of s 674(2) in relation to each agreement which continued until March 2005.[3]

12 Forrest "was intimately and directly involved in the execution of the framework agreements [and] the formulation of FMG's notifications to the ASX and other disclosures": TJ [895], FC [190]. He knew the terms of the framework agreements and the Full Court found that "it can reasonably be inferred that he knew of the disparity between these terms and FMG's representations about them": FC [191].

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of the letters to the ASX and media releases is set out at FC [23]-[30]. The Full Court considered it sufficient for the purposes of the appeal to focus upon the letters to the ASX and media releases: FC [32].

2 The first of the framework agreements, the CREC agreement, is set out in full at FC [17]. The terms of the other two agreements, the CHEC and CMCC agreements, were relevantly identical. Relevant variations are set out at FC [19]-[22].

3 On 24 March 2005, an article was published in the *Australian Financial Review* which asserted, inter alia, that the framework agreements did not impose any legally binding obligations on the Chinese counterparties to build, finance and transfer the Project infrastructure. On 29 and 30 March 2005, FMG published copies of the framework agreements to the ASX: FC [8]-[9].

Accordingly, Forrest was involved in FMG's contravention of s 1041H within the meaning of s 79(c) of the Act: FC [191], [216].

13 Forrest's involvement in FMG's contravention of s 674(2) also constituted a contravention of s 674(2A) unless he could establish the defence provided by s 674(2B), which required him to show that he had taken all reasonable steps to ensure that FMG complied with its continuous disclosure obligations and that he believed on reasonable grounds that FMG was complying. The Full Court held that Forrest was unable to satisfy either of these two limbs. It held that:

13.1 "Forrest was unable to point to any steps he took to ensure that the framework agreements were, in law, binding agreements to the effect represented by FMG": FC [193]; and

13.2 as at 27 October 2004, "Forrest plainly did not entertain, and it may be inferred had never entertained, reasonably or at all, the opinion that the terms of the framework agreements were effective as binding agreements to build, finance and transfer and finance the infrastructure involved": FC [194].

14 The Full Court also held that Forrest's conduct had breached his duty of care and diligence under s 180(1) of the Act and that he could not satisfy the business judgment rule in s 180(2): FC [196]-[200]. The Full Court held that the absence of evidence from Forrest (neither he nor any other director of FMG gave evidence) made it difficult to see how he could discharge the onus he bore under s 180(2) to establish that he had made a judgment in good faith and for a proper purpose and that his shareholding in FMG was not a material personal interest in the subject matter of that judgment: FC [197].

15 Forrest has not demonstrated any error in the Full Court's reasoning or conclusions.

(2) FMG's contraventions of ss 1041H and 674(2)

16 In relation to the issues identified in pars 2.1 to 2.4 above, ASIC relies on its submissions in the FMG appeal.

(3) Section 674(2A)

17 A person who is involved in a listed disclosing entity's contravention of s 674(2) will contravene s 674(2A). The concept of being "involved in" a contravention of a provision of the *Corporations Act* is defined in s 79. A person may be involved in a contravention by being "in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention": s 79(c).

18 There is no question on this appeal that Forrest was a person involved in FMG's contravention of s 674(2). The trial judge found, at TJ [895], that Forrest:

> "was intimately and directly involved in the execution of the framework agreements, the formulation of FMG's notifications to the ASX and other disclosures, as well as the ongoing discussions with the NDRC and CMCC seeking Chinese government approval."

19 Forrest did not appeal from this finding. Keane CJ relied on it (FC [190]) and held (at FC [191]):

> "Forrest's knowing participation in the relevant events leading to FMG's contravention of s 1041H of the Act established that Forrest was involved in FMG's contraventions of s 1041H within the meaning of s 79(c) of the Act. Forrest knew of the terms of the framework agreements; *and it can reasonably be inferred that he knew of the disparity between these terms and FMG's representations about them.* He was also a person involved in FMG's contravention of s 674(2)(c) of the Act by virtue of s 674(2A). Accordingly, he contravened s 674(2A) unless he established the defence under s 674(2B) of the Act." (emphasis added)

20 There is no ground of appeal challenging this aspect of the Full Court's judgment.

21 While Forrest's submissions deal with s 674(2A) in pars 76-83, there is no ground of appeal challenging the Full Court's finding that Forrest contravened s 674(2A) independently of the challenge to the finding that FMG contravened s 674(2): see ground 7 of Forrest's notice of appeal. In any event, there is no basis put forward to depart from the Full Court's finding that "it can reasonably be inferred that he knew of the disparity between these terms and FMG's representations about them" (FC [191]).

22 It follows that Forrest was knowingly concerned in the contravention within the meaning of the authorities discussed in Forrest's submissions, pars 80-81.

(4) Forrest's s 674(2B) defence

23 In order to establish s 674(2B), Forrest was required to show that:

23.1 he had taken all reasonable steps to ensure that FMG complied with its continuous disclosure obligations; and

23.2 he believed on reasonable grounds that FMG was complying.

24 The Full Court held that Forrest was unable to satisfy either of these two limbs: FC [192]-[195].

(a) Forrest did not take all reasonable steps to ensure compliance

25 The assessment of whether a person has taken all reasonable steps for the purposes of s 674(2B)(a) is essentially a factual inquiry: cf Forrest submissions, par 86. It requires consideration of matters such as the significance of the information that ought to have been disclosed, the position occupied by the person within the entity and the time available to the person and the entity in which to take steps to ensure compliance.

26 Forrest, as CEO and Executive Chairman of FMG, was the person primarily responsible for ensuring that FMG complied with its continuous disclosure obligations. There was no evidence as to the policy or process, if any, that he or FMG followed to ensure compliance.

27 Compliance with s 674(2) could have been achieved by the simple expedient of publishing the actual terms of the framework agreements or the agreements themselves (which is what was eventually done at the end of March 2005 after the publication of the AFR article). The agreements were brief, written in ordinary English terms and, as Keane CJ held, did not contain any confidential information: FC [87].

28 FMG and Forrest did not take that course. Instead, they chose to publish announcements that described the framework agreements in significantly different terms to the terms of the agreements themselves. As noted above, Forrest was aware of the terms of the framework agreements, of the terms of the FMG's announcements about them and, as the Full Court held, of the disparity between them: FC [191]. In those circumstances, it was incumbent on Forrest to have taken all reasonable steps to ensure that the announcements were accurate. There was ample time to do so between the initial signing of each of the framework agreements and the making of the announcements immediately following the formal signing ceremonies.[4] However, as the Full Court held, "Forrest was unable to point to any steps he took to ensure that the framework agreements were, in law, binding agreements to the effect represented by FMG": FC [193].

29 **No legal advice sought or obtained.** In particular, Forrest was unable to show that he had obtained legal advice as to the effect of the framework agreements before allowing FMG to make the public announcements.

30 Forrest contends that Huston "advised upon the Agreements from at least October 2004": Forrest submissions, par 54. There is no evidence of this and there is no basis in the evidence for an inference to that effect.

31 Huston was engaged as FMG's in-house legal counsel on 3 October 2004. That was well after the signing of the CREC framework agreement on 6 August 2004 and the announcements made on 23 August 2004. Huston's engagement also came after the signing of the CHEC framework agreement on 1 October 2004. The CMCC framework agreement was signed on 20 October 2004, but there is no evidence of any involvement by Huston in the preparation and execution of that agreement. At the request of CHEC and CMCC, it simply followed the form already determined by earlier framework agreements: TJ [169].

32 The only evidence that Huston gave any advice on the framework agreements is contained in the minutes of a directors' meeting held on 22 January 2005, which record that Huston advised the directors, in somewhat tentative terms, that the framework agreements "could be determined through the judicial system to be binding" and that he referred to *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* (2000) 22 WAR 101: FC [68], [193], [**TB1145**]. This advice was given in the context of Mr Ma of CMCC having asserted that the framework agreements were merely

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[4] In the case of the CREC framework agreement, there were 16 days between the agreement being signed on 6 August 2004 and the announcement on 23 August 204. In the case of the CHEC framework agreement, there were 34 days between the signing of the agreements on 1 October 2004 and the announcement of 5 November 2004. And in the case of the CMCC framework agreement, there were 14 days between the signing of the agreement on 20 October 2004 and the announcement of 5 November 2004.

MOUs and not binding. The advice recorded does not address the nature of the obligations that Huston advised "could be determined ... to be binding". Moreover, it does not support an inference that Huston gave advice on the framework agreements at any earlier point in time: FC [68]-[70]. On the contrary, it suggests that this was the first occasion Huston had given advice to the Board on that topic.

33 Forrest refers in his submissions (at par 54) to his email of 3 October 2004 [**TB578**] in which he asked his staff to "please ensure with Peter [Huston] complete legal enforceability on the agreements that we are all relying [on] to construct FMG." That statement does not support an inference that Huston was consulted or gave advice in relation to any of the framework agreements. Still less does it support an inference that Huston gave advice that the CMCC framework agreement contained legally enforceable obligations on CMCC to build, finance and transfer the infrastructure. It may be noted that in this email Forrest refers to the CHEC framework agreement as both a "B.T. deal with [CHEC]" and "our signed MOU with [CHEC]".

34 Forrest also refers to Huston's meeting with Walsh from the ASX following the 5 November 2004 announcement and his involvement in preparing the 8 November 2004 announcement: Forrest's submissions, par 56. Again, that does not support an inference that he gave advice at that time on the effect of the CHEC or CMCC framework agreements or the accuracy of the 5 and 8 November 2004 announcements. There was no evidence that Huston considered the terms of the framework agreements or the 5 November 2004 announcement prior to the announcement being made and, further, "there was no evidence that Mr Huston did not, in fact, advise the Board or Forrest that the 5 November 2004 letter was incorrect or not legally accurate": FC [68].

35 Forrest also submits that he was entitled to rely on Huston to advise him if any of his public statements about the framework agreements were inaccurate: Forrest's submissions, pars 56 and 62.8. Forrest gave no evidence and there is no other evidence that he placed such reliance on Huston. Further, the submission tacitly suggests that no such advice was sought. In circumstances where FMG was representing to the market that it had entered into agreements binding the counterparties to finance and construct the three principal parts of an estimated $1.85bn infrastructure project, and where Forrest was aware of the disparity between those representations and the actual terms of the agreements, a "no news is good news" approach does not satisfy the obligation to take all reasonable steps to ensure compliance with s 674(2). Moreover, the reasonableness of any such asserted reliance should be evaluated in the light of the fact that FMG had access to legal advice from three external law firms over this period of time: see FMG's 2004 Annual Report [**TB1417**, pg 4599]; and affidavit of Danielle Eaton sworn 7 November 2010. External legal advice on the effect of the framework agreements and the accuracy of the proposed announcements could have been obtained readily, but there was no evidence that it was.

36 Finally on the issue of legal advice, Forrest submits that his personal knowledge of the *Anaconda* decision is relevant to the assessment of his beliefs: Forrest submissions, par 55. There was no evidence that Forrest had the *Anaconda* decision in mind at the time that he made any of the public statements concerning the effect of the framework agreements: FC [68]. Indeed, had he done so, he ought to have been aware of the

significant differences between the letter agreement in question in that case and the framework agreements. *Anaconda* was a case in which the Court held that the parties had agreed all of the essential terms of their bargain. On no view could the same be said of the framework agreements.

37 In summary, there was no evidence and no basis for any inference that Forrest sought or obtained legal advice on the effect of the framework agreements and the accuracy of FMG's public statements about them at any time during the relevant period.

(b) No reasonable belief that FMG was complying

38 ASIC refers to and repeats pars 74-85 of its submissions in the FMG appeal regarding honest and reasonable belief. For the reasons there set out, Forrest failed to establish that he held an honest and reasonable belief that the framework agreements had the legal effect ascribed to them in FMG's announcements. It follows that he failed to establish that he believed on reasonable grounds that FMG was complying with its disclosure obligations under the Listing Rules.

(c) Response to Forrest's contentions regarding reasonable belief (pars 22-60)

39 Forrest's submissions refer to a number of matters which are said to provide evidence of his honest and reasonable belief that FMG's announcements were an accurate statement of the effect of the framework agreements. None of the matters referred to supports the conclusion that there was any reasonable basis for such a view.

40 **27 August 2004 board minutes.** Forrest relies on the minutes of a board meeting on 27 August 2004 at which he gave a report which described an agreement with CREC "whereby CREC will deliver a fully commissioned iron ore railway on a fixed price, fully warranted basis" [**TB420**]. Contrary to the suggestion in Forrest's submissions, these minutes do not evidence "the unanimous view of the Board" as to the effect of the CREC framework agreement: Forrest submissions, par 24. Rather, they record a report given by Forrest of his visit to China for the signing ceremony of the CREC framework agreement.

41 Forrest then submits that ASIC conceded that the 27 August 2004 minutes recorded "Forrest's opinion" and that "Forrest argued before the Full Court why this submission from [ASIC] was important": Forrest's submissions, pars 25-26. Forrest criticises the Full Court for failing to refer to this "concession". The relevant extract from the transcript should be noted. Senior counsel for ASIC said [**AT 354.40-46**]:

> "Where does one get 'fully warranted' from, let alone 'fixed price'? You don't find it in the provisions of the framework agreements. That was Mr Forrest's opinion. It's not reasonably founded in anything. It's more likely that it's where he hoped to get to at the end of the negotiation, rather than the fact. That doesn't support his state of mind as one of honest and reasonable belief in the existence of binding commitments to build and finance as of August, nor that there was a fixed price agreement."

42 Contrary to par 26 of Forrest's submissions in this Court, Forrest made no submission to the Full Court as to "why the submission from [ASIC] was important". The

submission was made in reply on the final day of hearing, after FMG and Forrest had made their submissions. In any event, given that Forrest's description of the CREC framework agreement in the 27 August 2004 board minutes contained further misstatements (that the agreement contained a "fixed price" and was "fully warranted"), it cannot provide any support for the submission that his asserted beliefs about the framework agreements were reasonably based.

43 **Heyting's communications with third parties.** Forrest refers (at par 32) to Heyting's email to Worley Parsons, in which he said that FMG had signed "a number of build and transfer contracts for the railway, port and mine..." [**TB805**]. It is not surprising that in correspondence with third parties Heyting described the framework consistently with FMG's public announcements.

44 **Views expressed by Heyting and Kirchlechner.** The evidence that Heyting was satisfied of the accuracy of the 23 August release (Forrest subs, par 31) and that Kirchlechner agreed that the announcements reflected his view of the agreements (Forrest subs, par 33) do not provide a reasonable basis for Forrest's asserted beliefs. There is no evidence that Forrest relied on Heyting's expertise or on Kirchlechner's views in any way. In any event, neither Heyting nor Kirchlechner were relevant decision-makers of FMG: see FMG's July 2004 Project Brief which lists Kirchlechner as head of marketing and does not list Heyting as part of FMG's management team at all [**TB263**, at pp 2242-2245].

45 **Differences between framework agreements and MOUs.** Differences between the language used in the framework agreements and that used in other memoranda of understanding entered into by FMG do not address the nature of the obligations contained in the framework agreements: cf Forrest submissions, par 30. These differences may convey nothing more than that FMG intended the framework agreements to be binding agreements to negotiate. It is notable that FMG emphasises in this respect the apparent significance of the *title* to the framework agreements. Yet nowhere in FMG's announcements of 23 August 2004 or 5 or 8 November 2004 does FMG use the term "framework agreement".

46 **CREC's subsequent conduct.** CREC's subsequent conduct suggests nothing more than that it desired to be involved in the Project and that it may have considered itself bound to negotiate toward a build and transfer agreement for the railway infrastructure. It does not indicate that CREC considered itself bound by the framework agreement to build and transfer the railway and, significantly, Forrest does not say that it does. His submission rises no higher than that CREC's subsequent conduct showed that they accepted "that they were bound by a contract": Forrest submissions, par 37. The evidence goes no higher than that.

47 CREC's subsequent conduct is consistent with a view of the framework agreement as an agreement to negotiate, not as an agreement under which CREC is already bound to build and transfer the railway infrastructure. Its memorandum of understanding with Barclay Mowlem [**TB454**] is not evidence that either CREC or Barclay Mowlem believed that the framework agreements were binding to the effect represented by FMG: cf Forrest submissions, par 42. The MOU contains no assertion that the framework agreement actually contains any binding build and transfer obligations. On the contrary, clause 1 of the MoU appears to contemplate a joint venture between

CREC and Barclay Mowlem for the purpose of submitting "a proposal(s) to FMG for the build and transfer of the Project ... based on the principles of the Head Agreement and the Joint Venture Agreement." And clause 11 contemplates that the MoU might terminate upon "[t]he issuance by FMG on a notice of award to a third party without the involvement of CREC".

48 Again, as Keane CJ said (at FC [134]):

> "In this regard, it is important to bear in mind that the only statement by both sides of the terms on which they had actually reached agreement is to be found in the text of the framework agreements, including the recitals... [T]he conduct of the parties does not suggest that the parties had agreed upon anything more than what was stated in the framework agreements."

49 In the same context, Forrest refers to a number of documents which he submits show that at all times he honestly believed that the CREC framework agreement was "a binding agreement relating to the building and financing of the railway": par 38 of Forrest's submissions. Forrest's belief is described in his submissions in very oblique terms: a belief that the framework agreement was a binding agreement *relating to* the building and financing of the railway is not a belief that it was an agreement binding CREC to build and finance the railway. Moreover, the documents referred to do not provide a reasonable basis for a belief that the framework agreement did impose such obligations on CREC. Some of the documents evidence communications to which Forrest was not a party (eg, TB649, 650, 798, 805 and 875, all of which are emails from Heyting to third parties); others indicate only that the framework agreements were considered to be binding but provide no evidence of the nature of the obligations contained in them (eg TB505, 580, 1145); and many are long after the relevant announcements (TB1145 and subsequent documents date from January 2005 and later).

50 **The signing ceremonies.** The seriousness or solemnity of the signing ceremonies for the framework agreements indicates, at most, that the Chinese parties treated them as binding agreements, but it does not indicate their view as to the nature of the obligations undertaken: cf Forrest submissions, pars 39, 50. It may simply have reflected their view that the agreements represented an important step on the path toward the negotiation of a build and transfer agreement, whether or not it bound them to undertake such negotiations.

51 **Market information.** Forrest says (Forrest submissions, pars 20, 47) that the CREC framework agreement provided for a competitive price because it provided for a price determined by reference to the Definitive Feasibility Study (**DFS**) and payable in instalments upon completion of the works. Implicitly, if not expressly, this submission seeks to justify Forrest's statement at the press conference on 23 August 2004 that the price of the contract was "confidential but we are pleased to say it is competitive" (FC [6], [194]). The CREC framework agreement simply does not say that the price is to be determined by reference to the DFS. Moreover, even a price determined "by reference to" the DFS would have included a profit component. How was that to be determined? How could Forrest have known at this point in time that it would result in a "competitive" price?

52 Forrest's comments at the 23 August press conference may be contrasted with those in an internal email dated 7 November 2004 [**TB893**] in which Forrest, discussing the terms of the 8 November 2004 media release, says:

> "There is no price because we don't want a price (unless it is unbelievably low) as we want a feasibility study to give us the argument to make sure we get a fair price. The 3 contractors have an obligation to give us that."

53 In the same chain of emails, FMG's public relations advisor said that "the last thing FMG needs now is some newspaper heading that says 'ASX queries Fortescue on China contract details'...". Forrest replied: "Agreed!".

54 Forrest's submissions also refers to the fact that the 23 August 2004 media release referred to Worley Parsons as the manager of the DFS process and says that an investor has some responsibility to understand what relevant information is in the market: Forrest submissions, pars 46-47. It is not clear what point is sought to be made by this submission. If the argument is that reasonable investors ought to have understood from the reference to Worley Parsons and the DFS that the price was to be determined by reference to the DFS, it should be rejected. The media release referred to a fixed price. It cannot be read as describing a process whereby a price would be fixed in the future.

55 **Views of FMG's executives.** Forrest submits that FMG's executives, including Forrest, believed that the CHEC and CMCC framework agreements were "binding first arrangements relating to a design, build and finance arrangement... to be followed by further more detailed agreements": Forrest submissions, par 52. That is not what was represented in FMG's announcements. What was represented was that the framework agreements were binding agreements obliging the Chinese contractors to build and finance the relevant Project infrastructure. In any event, none of the documents listed at par 52 of Forrest's submissions supports the submission made. Two are from Forrest [**TB580, TB644**]. One of these [**TB580**] is the 3 October 2004 email referred to above. Only one of the other documents listed is from a director of FMG, an email dated 20 October 2004 from Rowley [**TB705**]. It does not indicate what view Rowley held as to whether the framework agreements were binding or the nature of any obligations imposed. Instead, Rowley refers to one of the "challenges" facing FMG being "to get CREC off the fence and start moving on our project" and suggests that the signing ceremony for the CHEC and CMCC framework agreements be used "to ensure that CHEC and MCC do not repeat CREC's 'slow motion'." The remaining documents are emails from Heyting [**TB805, TB875**] and David Liu, a marketing employee [**TB382, TB582**], neither of whom were relevant decision-makers of FMG.

56 **Drafting of the advanced framework agreement with CREC.** CREC's conduct during the negotiation of the advanced framework agreement does not suggest that it considered itself already bound to an agreement to build and finance the railway infrastructure with a price to be fixed "by reference to" the DFS process. Forrest's submissions focus upon one aspect of a draft prepared by CREC in which it inserted a recital describing the effect of the framework agreement as FMG's acceptance of CREC's offer to carry out the build and transfer of the railway: Forrest's submissions, par 59. Forrest does not refer to other aspects of the drafting of the advanced

framework agreement, including that the definition of the scope of the works remained vague and CREC's amendments to the definition of "Performance Date" and to clauses relating to the value of the works: FC [140]-[149]. The Full Court correctly held (at [150]) that:

> "Each of these differences between the two draft documents evidences a rejection of what Mr Forrest recognised could be 'hard asks' [in his 27 October 2004 email]. The Chinese rejected provisions that would have allocated to them the full risk of the construction of the Project. The differences also show that price is left at large for further negotiation and that the parties still had competing conceptions of what constituted the 'value of the works'. These differences also show that there was no reasonable basis for the claim in the ASX letters and associated media releases that the initial framework agreements contained a 'fixed price' under which CREC had assumed '100 per cent of the risk'. As is apparent, these issues were still very much a subject of negotiation as between the parties."

(d) Response to Forrest's contentions regarding reasonable steps (pars 61-62)

57 None of the matters referred to at pars 61-62 of Forrest's submissions constitute reasonable steps to ensure that FMG was complying with its continuous disclosure obligations. ASIC's submissions on each of those matters are as follows.

57.1 **FMG's status as a "corporate minnow" (par 61.1).** It is true that at the time of these events FMG was a relatively small company. However, it raised a significant amount of funds during this period through major share issues: see FMG's 2004 Annual Report, recording share issues in March and August 2004 of $9.2 million and $7.1 million respectively and approximately 60,000,000 additional shares issued during the 2004 financial year [**TB1417**, at pp 4615, 4630]. It enjoyed the benefits of public listing and was obliged to comply with the obligations that come with that. In relation to the question of whether Forrest took any or any adequate steps to obtain legal advice on the effect of the framework agreements and the accuracy of its announcements, as noted above, Forrest could readily have obtained external legal advice from any of the firms which it had engaged over this period of time.

57.2 **Forrest's reliance on others (par 61.2).** Forrest gave no evidence that he relied on others' views as to the effect of the framework agreements or the accuracy of FMG's public announcements. It should also be noted that Forrest was intimately involved in every aspect of the conduct which led to the contraventions found by the Full Court: FC [190]-[191]; and see also the minutes of the FMG board meeting on 3 November 2004 where a concern is raised by another director about "the dependence FMG has to [sic] Forrest in regards to all areas of the business from negotiating with the Chinese through to investor presentations and general media exposure": [**TB809**, pg 3188].

57.3 **Reliance on Heyting to draft the framework agreements and check the accuracy of the announcements (pars 29, 62.1 and 62.2).** There is no evidence that Forrest or any other director of FMG relied on Heyting's views as to the accuracy of the announcements. In any event, any such reliance

would not provide a reasonable basis for Forrest's asserted belief on such a significant matter. Heyting was not a relevant decision-maker of FMG: FMG's July 2004 Project Brief does not list Heyting as part of FMG's management team at all [**TB263**, at pp 2242-2245]. Heyting was not a lawyer. Forrest submits (at par 29) that he had done a course in contract law. The evidence was that Heyting had completed a two day contract management course on the use and application of AS4300 General Conditions of Contract sometime between 1993 and 1996: Heyting statement [CB7], par 16. He prepared the first draft of the CREC framework agreement, but was not involved in all of the negotiations with CREC on 5 August 2004: TJ [146]. Given that FMG made public statements that it had entered into agreements binding the counterparties to build and finance a $1.85bn infrastructure Project, reasonable steps to ensure the accuracy of those statements required more than reliance on someone in Heyting's position. In the circumstances, Forrest ought to have relied on the expertise of one of the three external law firms that had been used by FMG over this period of time: see FMG's 2004 Annual Report [**TB1417**, pg 4599].

57.4 **A number of people were involved in drafting the announcements (par 62.3).** The people involved in drafting the FMG's announcements included its public relations consultants. None of FMG's directors other than Forrest drafted or approved the announcements prior to publication.

57.5 **The Board was given the agreements prior to the announcements (par 62.4).** The FMG Board approved the terms of the framework agreements prior to FMG public announcements about them. However, Board members were not given the 23 August or 5 and 8 November 2004 announcements prior to their publication. The reasonableness of this omission should be evaluated in light of two important facts. First, FMG was at the same time telling the market in its annual report that it had an audit committee in place whose duties included monitoring compliance with the *Corporations Act* and ASX Listing Rules and that the Board ensured that shareholders were kept fully informed of developments affecting FMG through "[c]ompliance with Australian Stock Exchange's continuous disclosure requirements" [**TB1417** at pp 4610-4611]. Secondly, the minutes of a meeting of the FMG board on 3 November 2004, at which Forrest was present, record that a director had raised a concern to ensure that at least one non-executive director and preferably someone on the Audit Committee should review any sensitive public statement being issued by FMG [**TB809**, at pg 3188]. Notwithstanding these external and internal statements regarding Board oversight, the announcements were not reviewed by the Board or the Audit Committee before publication.

57.6 **Forrest sought and obtained CREC's approval of the 23 August 2004 announcement (par 62.5).** The 23 August 2004 letter to the ASX was not provided to or approved by CREC. While a draft of the 23 August 2004 media release was provided to CREC (TJ [151]), there was no evidence of CREC expressly approving it. The trial judge inferred that CREC approved it: TJ [155].

57.7 In any event, the fact that Forrest sought CREC's approval of the 23 August 2004 media release provides no support for the reasonableness of FMG's asserted belief. The media releases were not of significant concern to the Chinese contractors. They were not joint announcements: cf Forrest Submissions, par 48. It was important for FMG to ensure the accuracy of its releases to satisfy its obligations under the *Corporations Act*. That imperative did not apply to the Chinese companies. As Keane CJ said (FC [134]):

> "It is hardly surprising that both sides to the framework agreements were eager to proclaim the success of their negotiations to that point. Any involvement on the part of the Chinese Contractors in the Project was a positive development, both for them and for FMG. That each side was enthusiastic about that involvement – and the potential benefits of that involvement – does not afford a reliable indication of the extent of the mutual involvement upon which they had actually achieved agreement."

57.8 **Other releases were provided to CHEC and CMCC (par 62.6).** CHEC and CMCC were not asked for their approval of the 5 and 8 November 2004 announcements and media releases. Copies of the 5 November 2004 media release were left on chairs at the signing ceremony on that day and no objection was taken: TJ [177].

57.9 **Forrest's cautionary approach to the issue of Government approval (par 62.7).** It is difficult to see the basis for the trial judge's inference. It is clear on the facts that no particular steps were taken by Forrest to check the accuracy of FMG's announcements.

57.10 **Huston's involvement (pars 62.8 and 62.9).** On the issue of legal advice or Forrest asserted reliance on Huston, ASIC refers to its submissions at paragraphs 29-37 above.

(e) Conclusion regarding s 674(2B)

58 None of the matters relied on by Forrest supports the submissions that he took all reasonable steps to ensure compliance and that he had reasonable grounds for believing that FMG was complying with its disclosure obligations under the Listing Rules. The Full Court's conclusion that Forrest was unable to satisfy the defence in s 674(2B) of the *Corporations Act* was correct.

(5) Forrest's contravention of s 180(1)

59 The authorities have consistently recognised that conduct of a director contributing to a company's breach of the *Corporations Act* which exposes a company to prejudice and jeopardy may give rise to breaches of s 180(1): *ASIC v Maxwell (No 2)* (2006) 59 ACSR 373 at [104]-[105], [110]; *ASIC v PFS Business Development Group Pty Ltd* (2006) 57 ACSR 553 at [381], [390]; *ASIC v Macdonald (No 11)* (2009) 256 ALR 199

at [236]-[237], [335]-[336], [348]-[349];[5] *ASIC v Citrofresh International (No 2)* (2010) 77 ACSR 69 at [45]-[57].

60 Contrary to Forrest's submission (at par 100), this line of authority does not result in s 180(1) of the Act becoming "a backdoor method for visiting on company directors civil liability for contraventions of the Act in respect of which the Act does not otherwise provide for civil liability". The nature of the conduct which constitutes a lack of due care and diligence on the part of a director is distinct from that which constitutes involvement in a contravention of provisions such as ss 674(2) or 1041H of the *Corporations Act*.

10 61 In the present case, Forrest's involvement in the contraventions of ss 674(2) and 1041H of the Act by FMG was established by the facts that he was intimately and directly involved in the execution of the framework agreements and the formulation of FMG's notifications to the ASX and other disclosures (TJ [895], FC [190]) and that it could reasonably be inferred that he knew of the disparity between these terms and FMG's representations about them: FC [190]-[191].

62 Forrest breached his duty of care and diligence under s 180(1) not only because of his involvement in these contraventions but because he failed to take reasonable care to ensure that FMG did not engage in the contravening conduct. As Keane CJ held, he "was unable to point to any steps he took to ensure that the framework agreements
20 were, in law, binding agreements to the effect represented by FMG" (FC [193]). Forrest's submission (pars 98-99) that it was not reasonably foreseeable that his conduct may expose FMG to potential civil liability is again based on the argument that he honestly and reasonably believed that the framework agreements bound the Chinese parties to build, finance and transfer the Project infrastructure. For the reasons given in pars 38-56 above, that submission should be rejected. In the circumstances of this case, it was reasonably foreseeable that a failure to obtain legal advice as to the effect of the framework agreements before allowing FMG to make public announcements about the legal effect of those agreements in terms that differed significantly from the terms of the agreements themselves would expose FMG to
30 potential civil liability should the announcements prove to be inaccurate and misleading.

(6) Forrest's s 180(2) defence: the business judgment rule

63 In ASIC's submission, the "business judgment" rule in s 180(2) of the *Corporations Act* was not applicable to this case. The concept of a business judgment, for the purposes of s 180(2), concerns decisions about transactions involving commercial considerations where it is not possible for a court to assess the risks, wisdom or merits of the decision: see *ASIC v Rich* (2009) 75 ACSR 1 at [7271]-[7274], [7277], [7278]. It is not apt to include a decision which involves a breach of s 674(2) or 1041H.

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5 Overturned on appeal, but on different grounds: *Morley v Australian Securities & Investments Commission* (2010) 274 ALR 275.

64 In any event, in order to satisfy the "business judgment rule", Forrest had to establish that:

64.1 he made a judgment in good faith and for a proper purpose;

64.2 he did not have a material personal interest in the subject matter of the judgment;

64.3 he informed himself about the subject matter of the judgment to the extent that he reasonably believed to be appropriate; and

64.4 he rationally believed that the judgment was in the best interests of the corporation.

65 As Keane CJ held, the absence of evidence from Forrest makes it difficult to see how Forrest could discharge the onus which he bore to establish the first of these two elements: FC [197].

66 Forrest asserts that he made a judgment that the disclosures made by FMG were correct and satisfied FMG's obligations under the *Corporations Act*. Even if that is so, in the absence of evidence, Forrest could not show that his substantial shareholding in FMG was not a material personal interest in a judgment about the accuracy of public announcements which could have a material impact on FMG's share price. The evidence showed that Forrest sold substantial parcels of shares during the period of the contraventions: FC [234] per Finkelstein J.

67 Further, Forrest cannot show that he informed himself about the subject matter of the judgment to the extent that he reasonably believed to be appropriate. That would require that he take reasonable steps to ascertain the true effect of the framework agreements, which ought to have included seeking legal advice. He did not do so.

68 The Full Court held, as a "separate but related answer to Forrest's attempt to rely upon the business judgment rule", that s 180(2) cannot be construed as affording a ground of exculpation for a breach of s 180(1) where a director's want of diligence results in a contravention of another provision of the Act which has a specific exculpatory provision: FC [199]. Forrest submits that the Full Court erred in this respect because s 1041H does not have an exculpatory provision: Forrest submissions, par 106. The Full Court was clearly referring to the exculpatory provision in s 674(2B), with which it had just dealt: FC [192]-[195]. In the circumstances of this case, if, as the Full Court held, Forrest could not make out the s 674(2B) defence because he could not show that he had taken reasonable steps to ensure FMG's compliance with s 674(2) and believed on reasonable grounds that it was complying, it followed that he could not show that he had made a legitimate business judgment about that very thing. In particular he could not show that he had informed himself about the subject matter of the judgment to the extent that he reasonably believed to be appropriate.

(7) No miscarriage of justice occurred

69 Forrest submits (pars 63-66) that, in coming to its conclusions, the Full Court failed to refer to the 122 documents listed in the "aide-memoire" upon which Forrest's counsel relied and that this resulted in a miscarriage of justice. A court does not commit error

by failing to refer to every piece of evidence or argument put by a party. It is necessary to demonstrate that the failure to do so led the court to reach a wrong conclusion.

70 None of the factual matters referred to in Forrest's submissions (at pars 22-60) support the conclusion that the Full Court erred in holding that Forrest failed to take any reasonable steps to ensure FMG was complying with its continuous disclosure obligations in respect of the framework agreements or that he did not believe, reasonably or at all, that the framework agreements bound the Chinese contractors to build, finance and transfer the Project infrastructure. The matters relied on by Forrest have been dealt with in paragraphs 39-56 above.

71 No miscarriage of justice has been established.

Part VII: STATEMENT OF THE FIRST RESPONDENT'S ARGUMENT ON ITS NOTICE OF CONTENTION AND NOTICE OF CROSS-APPEAL

72 ASIC relies on its submissions in the FMG appeal in relation to its notice of contention and cross-appeal.

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