PILBARA INFRASTRUCTURE PTY LTD & ANOR v AUSTRALIAN COMPETITION TRIBUNAL & ORS (M155/2011; M156/2011; M157/2011);
THE NATIONAL COMPETITION COUNCIL v HAMERSLEY IRON PTY LTD & ORS (M45/2011);
THE NATIONAL COMPETITION COUNCIL v ROBE RIVER MINING CO PTY LTD & ORS (M46/2011)

Court appealed from:	Full Court of the Federal Court of Australia [2011] FCAFC 58
Date of judgment:	4 May 2011
Date special leave granted:	28 October 2011

Pilbara Infrastructure Pty Limited, a subsidiary of Fortescue Metals Group (together "Fortescue") sought access to four railway lines and associated infrastructure in the Pilbara region pursuant to Pt IIIA of the *Trade Practices Act* 1974 (Cth) and its successor the *Competition and Consumer Act* 2010 (Cth) ("the Act"). Two of the lines were owned by BHP entities ("BHP") (the Goldsworthy and Mt Newman lines) and two were owned by Rio Tinto Ltd and associated entities ("Rio Tinto") (the Hamersley and Robe lines). Under Pt IIIA, a service could be declared by the relevant Minister, in which case, an enforceable right to negotiate the terms of access to the service vested in any interested person. The Commonwealth Treasurer, on the recommendation of the National Competition Council ("the Council"), made a declaration over the lines for a period of 20 years. Of particular importance for these matters is s 44H(4) of the Act which provided:

> *The designated Minister cannot declare a service unless he or she is satisfied of all of the following matters: ...*
> *(b) that it would be uneconomical for anyone to develop another facility to provide the service; . . .*
> *(f) that access (or increased access) to the service would not be contrary to the public interest.*

BHP and Rio Tinto sought review of the Minister's decisions in the Australian Competition Tribunal. The Tribunal set aside the Minister's decision with respect to the Hamersley line and varied the decision with respect to the Robe line so that it would expire in 10 years. The Tribunal found that criterion (b) involved a "natural monopoly" test, to the effect that the criterion would not be satisfied because the existing facility could not meet market demand at a total cost less than that required to construct a new line. It further found that criterion (f) was not met in relation to the Hamersley line because access would be contrary to the public interest.

Both Fortescue and Rio Tinto sought judicial review by the Full Federal Court. The Council sought, and was granted, leave to intervene. The Court (Keane CJ, Mansfield and Middleton JJ) dismissed Fortescue's application and allowed Rio Tinto's. It found that criterion (b) established a test of private economic feasibility, that is, not whether it would be economically efficient from the perspective of society as a whole, but whether it was not economically feasible for a participant in the marketplace to develop an alternative facility. To the extent that the "natural monopoly" test relied on by the Tribunal required an evaluation of

efficiency in terms of costs and benefits, that approach was inconsistent with the legislative intent that access should not be made available because it would be convenient to some parties or society more generally. The word “anyone”, in the phrase “*uneconomical for anyone*” in s 44H(4)(b), did not include the incumbent owner of the facility. On the proper interpretation of criterion (b), Fortescue’s application failed.

In relation to criterion (f), the likely consequences of access, assumed to be on reasonable terms, including matters of economic efficiency and competition policy, were to be considered in evaluating public interest. The costs of the second stage might also be relevant. Although the same evidence in relation to the same issues might be considered at each stage, the perspective of each decision-maker would be different.

Both Fortescue and the Council applied to this Court for special leave to appeal. On 28 October 2011 the Court granted special leave to Fortescue and referred the applications by the Council to an enlarged Bench. The Council has also sought leave to intervene in the Fortescue appeals.

Appeals M155 to M157 of 2011

The grounds of appeal in the Fortescue matters include:

- The Court erred in concluding that the criterion in s 44H(4)(b) of the Act “*that it would be uneconomical for anyone to develop another facility to provide the service*” should be construed as a test of private financial profitability, measured by accounting standards rather than a test of economic efficiency.
- The Court erred in concluding that the criterion for declaration of a service specified in s 44H(4)(f) of the Act “*that access (or increased access) to the service would not be contrary to the public interest*” requires or permits a complex inquiry into the likely net balance of social benefits and costs if a declaration is made as opposed to a declaration not being made.
- The Court erred in concluding that s 44H of the Act conferred a broad, general discretion upon the Minister, if otherwise appropriately satisfied that all specific matters in s44H pointed in favour of declaration, to conduct a free ranging inquiry into matters referred to in s 44H(4)(f) so as to reach a decision of non-declaration.

Applications M45 and M46 of 2011

The questions of law said to justify a grant of special leave in the Council matters are:

- what is the proper construction of the phrase "*uneconomical for anyone to develop another facility to provide the service*", in s 44H(4)(b) of the Act?
- whether criterion (b) should be construed by reference to:
  - (i) a social cost test, adopting either:
    - A. the "net social benefit test" approach adopted by the Australian Competition Tribunal in, inter alia, *Re Review of Freight Handling Services at Sydney International Airport* (2000) 156 FLR 10; or
    - B. the "natural monopoly test" approach articulated by the Tribunal in the matter of *Fortescue Metals Group Ltd* [2010] ACompT 2; or
  - (ii) the "private feasibility test" adopted by the Full Federal Court in the current matter?