

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
BETWEEN:

No. M45 of 2011

The National Competition Council
Applicant
and
Hamersley Iron Pty Ltd
(ACN 004 448 276) & Others
Respondents

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
BETWEEN:

No. M46 of 2011

The National Competition Council
Applicant
and
Robe River Mining Co Pty Ltd
(ACN 008 694 246) & Others
Respondents

APPLICANT'S CHRONOLOGY

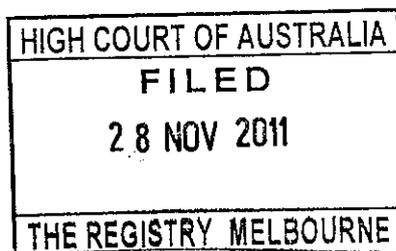
Part I: Certification

1. This chronology is in a form suitable for publication on the Internet.

Part II: The Chronology

2. The shaded entries below record the development of the relevant legislation.

Date	Description	Page
25 August 1993	National Competition Policy: Report by the Independent Committee of Inquiry (Hilmer Report)	
September 1994	Explanatory outline to the COAG <i>National Competition Policy - Draft Legislative Package</i> (COAG package) Draft <i>Competition Policy Reform Bill</i> (included in COAG package)	



DATE	DESCRIPTION	REFERENCE
29 March 1995	Second Reading Speech of the <i>Competition Policy Reform Bill</i> 1995 Explanatory Memorandum for <i>Competition Policy Reform Bill</i> 1995	
11 April 1995	Competition Principles Agreement	
1 March 2000	Australian Competition Tribunal (Tribunal) decision in <i>Re Review of Freight Handling Services at Sydney International Airport</i> (2000) 156 FLR 10 (<i>Sydney Airport No 1</i>)	
11 October 2000	Terms of reference issued to the Productivity Commission	
4 May 2001	Tribunal decision <i>Re Duke Eastern Gas Pipeline Ltd & Ors</i> (2001) 162 FLR 1 (<i>Duke</i>)	
17 September 2002	Productivity Commission Report No. 17, <i>Review of the National Access Regime</i> released by Government together with Government's Interim Response to the report which included the response to the Productivity Commission recommendation 7.1 regarding amending Criterion (a).	
20 February 2004	Government Response to the Productivity Commission report. No change to the government's position on the response regarding Criterion (a).	
13 June 2004	Fortescue Metals Group Ltd (FMG) applied to the National Competition Council (Council) under s 44F(1) of the Trade Practices Act (Act) for a recommendation that the service comprising the Mt Newman rail line owned and operated by BHP Billiton Iron Ore Pty Limited and BHP Billiton Minerals Pty Ltd (together, BHPB) from a rail siding to be constructed in the geographical vicinity of Mindy Mindy to port facilities at Port Hedland and use of associated infrastructure (Mt Newman Service) be declared for a period of 20 years.	
2 June 2005	Second Reading Speech and Explanatory Memorandum to the <i>Trade Practices Amendment (National Access Regime) Bill</i> 2005 by which the government introduced an objects section into Part IIIA (s.44AA) and amended Criterion (a) in response to the Productivity Commission report.	
24 March 2006	The Council issued a recommendation that the Mt Newman Service be declared for a period of 20 years.	
23 May 2006	As the Treasurer did not publish a decision within 60 days, he was deemed under s 44H(9) of the Act to have decided not to declare the Mt Newman Service and to have published that decision.	
9 June 2006	FMG sought review of the Minister's deemed Mt Newman Service decision by the Tribunal.	

1 October 2006	Amendments made by <i>Trade Practices Amendment (National Access Regime) Act 2006</i> take effect.	
16 November 2007	The Pilbara Infrastructure Pty Ltd (TPI) applied to the Council under s 44F(1) of the Act for a recommendation that services provided by certain parts of the Hamersley rail network (Hamersley Service) be declared for a period of 20 years	
16 November 2007	TPI applied to the Council under s 44F(1) of the Act for a recommendation that a service comprising the use of the Goldsworthy rail line owned and operated by BHPB from a location near Yarrie to Finucane Island in Port Hedland and all points in between and use of associated infrastructure (Goldsworthy Service) be declared for a period of 20 years	
18 January 2008	TPI applied to the Council under s 44F(1) of the Act for a recommendation that services provided by certain parts of the Robe rail network (Robe Service) be declared for a period of 20 years	
29 August 2008	The Council issued a recommendation that each of the Hamersley Service, the Goldsworthy Service and the Robe Service be declared for a period of 20 years	
27 October 2008	The Treasurer published his decision to accept the Council's recommendations and declare those services under s 44H of the Act for a period of 20 years	
13 November 2008	Robe River Mining Co Pty Ltd, North Mining Ltd, Pilbara Iron Pty Ltd, Rio Tinto Limited, Mitsui Iron Ore Development Pty Ltd, Nippon Steel Australia Pty Ltd and Sumitomo Metal Australia Pty Ltd (collectively Rio Robe) sought review of the Minister's Robe Service declaration by the Tribunal	
13 November 2008	Hamersley Iron Pty Ltd, Hamersley Iron-Yandi Pty Ltd, Robe River Mining Co Pty Ltd, North Mining Ltd, Pilbara Iron Pty Ltd, Rio Tinto Limited, Mitsui Iron Ore Development Pty Ltd, Nippon Steel Australia Pty Ltd and Sumitomo Metal Australia Pty Ltd (collectively Rio Hamersley) sought review of the Minister's Hamersley Service declaration by the Tribunal	
14 November 2008	BHPB sought review of the Minister's Goldsworthy Service declaration by the Tribunal	

Date	Description	Reference
29 October 2009	<p><i>Trade Practices Amendment (Infrastructure Access) Bill 2009</i> introduced and Explanatory Memorandum released. The Bill amended Part IIIA by introducing mandatory time frames, limiting the scope of merits review, providing a mechanism for parties contemplating the development of new facilities to obtain advance rulings that services provided by proposed infrastructure will be ineligible for declaration based on the criteria in s.44H(4) and changes to the access undertaking provisions. The Explanatory Memorandum says that, "The Bill gives effect to certain provisions of the Council of Australian Governments <i>Competition and Infrastructure Reform Agreement</i> and introduces other measures to increase regulatory certainty and to streamline administrative processes associated with the application of the National Access Regime."</p>	
March 2010	<p>Economics Legislation Committee Report on <i>Trade Practices Amendment (Infrastructure Access) Bill 2009</i> released.</p>	
30 June 2010	<p>The Tribunal determined that:</p> <ul style="list-style-type: none"> • the decision of the Treasurer deemed to have been made on 23 May 2006 not to declare the Mt Newman Service be affirmed; • the decision of the Treasurer made on 27 October 2008, to declare the Robe Service commencing on 19 November 2008 and expiring on 19 November 2028 be varied so as to expire on 19 November 2018; • the decision of the Treasurer made on 27 October 2008, to declare the Hamersley Service commencing on 19 November 2008 and expiring on 19 November 2028 be set aside; and • the decision of the Treasurer made on 27 October 2008 to declare the Goldsworthy Service be affirmed. 	
14 July 2010	<p>Amendments made by <i>Trade Practices Amendment (Infrastructure Access) Bill 2009</i> take effect.</p>	
13 August 2010	<p>FMG and TPI (together, Fortescue) applied to the Federal Court for review of:</p> <ul style="list-style-type: none"> • the Tribunal's determination in respect of the Hamersley Service (VID616 of 2010); and • the Tribunal's determination in respect of the Robe Service (VID687 of 2010). 	
13 August 2010	<p>Rio Robe applied to the Federal Court (VID686 of 2010) for review of to the Tribunal's determination in respect of the Robe Service.</p>	

Date	Description	Appeal Mark
27 September 2010	The Council sought leave to intervene in proceedings VID616 and VID686 of 2010 in relation to certain specified grounds including the test to be applied in criterion (b).	
1 October 2010	BHPB sought leave to be made parties to proceedings VID616, VID686 and VID687 of 2010.	
14 October 2010	<p>Orders were made that:</p> <ul style="list-style-type: none"> • the Council have leave to intervene in VID616 and VID686 of 2010; • BHPB be made parties to VID616, VID686 and VID687 of 2010 	
29 October 2010	<p>Rio Hamersley filed a notice of contention in VID616 of 2010, contending that the determination of the Tribunal should be affirmed on a number of grounds which were erroneously decided or not decided by the Tribunal in relation to:</p> <ul style="list-style-type: none"> • the application of criterion (b); • the Tribunal's failure to consider whether it would be economical for anyone to develop another facility that could provide part of the Hamersley Service; • the application of criterion (a); and • the Tribunal's consideration of the power of the Australian Competition & Consumer Commission to compel the expansion of the capacity of a facility. 	
29 October 2010	Fortescue filed a notice of contention in VID616, VID686 and VID687 of 2010, contending that if the Court were to hold that the Tribunal erred in adopting the "natural monopoly test" in applying criterion (b), then the Court should find that the Tribunal should have adopted a "net social benefit test" and found that that test was satisfied.	
16 May 2011	<p>The Full Federal Court (Keane CJ, Mansfield and Middleton JJ) made orders:</p> <ul style="list-style-type: none"> • dismissing the applications made by Fortescue; and • in respect of the application made by Rio Robe, that: <ul style="list-style-type: none"> • the determination of the Tribunal on 30 June 2010 to vary the period of declaration of the Robe Service be set aside; and • the decision of the Treasurer made on 27 October 2008 to declare the Robe Service be set aside. 	

Date	Description	Final Date
31 May 2011	Fortescue sought special leave to appeal the Full Federal Court's orders: <ul style="list-style-type: none"> • in VID616 of 2010, except for the conclusions as to procedural fairness at [122] to [135] of the reasons for judgment (M42 of 2011); • in VID686 of 2010 (M43 of 2011); and • in VID687 of 2010 (M44 of 2011). 	
1 June 2011	The Council sought special leave to appeal the Full Federal Court's orders: <ul style="list-style-type: none"> • in VID616 of 2010 (M45 of 2011); and • in VID686 of 2010 (M46 of 2011) 	
10 June 2011	The Council sought leave to intervene in proceedings M42, M43 and M44 of 2011 in relation to the test to be applied in Criterion B	
28 October 2011	The High Court (French CJ, Hayne and Kiefel JJ) made orders: <ul style="list-style-type: none"> • in M42, M43, and M44 of 2011 granting Fortescue special leave to appeal the judgment and orders of the Full Federal Court in VID616, VID686 and VID687 of 2010; and • in M45 and M46 of 2011, referring the Council's applications for special leave to appeal to a Full Court of this Court for argument as on an appeal 	

Dated: 25 November 2011



STEPHEN GAGELER SC
 T: (02) 6141 4145
 F: (02) 6141 4099
 E: stephen.gageler@ag.gov.au

PETER HANKS QC
 T: (03) 9225 8815
 F: (03) 9225 7293
 E: peter.hanks@jr6.com.au

JEREMY SLATTERY
 T: (03) 9225 8397
 F: (03) 9670 7086
 E: jeremyslattery@vicbar.com.au