



HIGH COURT OF AUSTRALIA

14 September 2012

THE PILBARA INFRASTRUCTURE PTY LTD & ANOR v AUSTRALIAN COMPETITION
TRIBUNAL & ORS; THE NATIONAL COMPETITION COUNCIL v HAMERSLEY IRON
PTY LTD & ORS; THE NATIONAL COMPETITION COUNCIL v ROBE RIVER MINING CO
PTY LTD & ORS

[2012] HCA 36

The High Court today held that the Australian Competition Tribunal's review of the Minister's decision whether to declare certain services relating to railway lines in the Pilbara under Part IIIA of the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)) ("the Act") had not been undertaken according to law. Part IIIA of the Act provides for processes by which third parties may obtain access to infrastructure owned by others. The High Court quashed the Tribunal's determinations and remitted the matters to the Tribunal for determination according to law.

The dispute related to four railway lines in the Pilbara: the Goldsworthy line and the Mt Newman line operated by BHP Billiton Iron Ore Pty Ltd and BHP Billiton Minerals Pty Ltd (together, "BHPB"), and the Hamersley line and the Robe line operated by Rio Tinto Ltd and its associated entities ("Rio Tinto"). Fortescue Metals Group Limited ("FMG") or its wholly owned subsidiary, The Pilbara Infrastructure Pty Ltd ("TPI"), applied to have the services declared under the Act. The Minister declared the services relating to the Hamersley, Robe and Goldsworthy lines for a period of 20 years but did not declare the Mt Newman line services.

FMG, BHPB and Rio Tinto appealed to the Tribunal. At the hearing before the Tribunal, the parties presented materials and evidence far in excess of what was placed before the Minister. The

Tribunal ruled the Mt Newman line services should not be declared, the Goldsworthy line services should be declared for 20 years, the Hamersley line services should not be declared and the Robe line services should be declared for 10 years until 2018.

FMG and Rio Tinto both applied to the Full Court of the Federal Court for judicial review of the Tribunal's decision. The Full Court dismissed FMG's applications and allowed Rio Tinto's application, and set aside the decision of the Tribunal regarding the Robe line services. By special leave, FMG and TPI appealed to the High Court.

The appeal to the High Court raised three issues. First, what is the meaning of the expression, "uneconomical for anyone to develop another facility to provide the service" under s 44H(4)(b) of the Act? Second, what matters can be taken into account under s 44H(4)(f) of the Act when the section requires the decision maker to be satisfied that access to the services "would not be contrary to the public interest"? Third, if a decision maker was satisfied as to the matters stated in s 44H(4) of the Act, was there a residual discretion to be exercised? During the hearing of the appeal, an issue was raised as to the nature of the task the Tribunal was required to perform when asked to review the Minister's decision.

The High Court held that the Tribunal should have considered only those materials considered by the Minister supplemented, if necessary, by any information, assistance or report given to the Tribunal by the National Competition Council in response to a request made under s 44K(6) of the Act. On the other issues considered on appeal, a majority of the High Court ruled that the expression, "uneconomical for anyone to develop another facility to provide the service" in s 44H(4)(b) of the Act required an inquiry whether there was anyone who could profitably develop another facility. The Court held that the requirement that the decision maker be satisfied that access to the services "would not be contrary to the public interest" needed to be applied in the context of the limited scope of review by the Tribunal. Finally, the Court held that, if a decision

maker was satisfied as to the matters stated in s 44H(4) of the Act, there was no residual discretion to be exercised.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*