



HIGH COURT OF AUSTRALIA

2 October 2012

JOHN ANDREW HENRY FORREST v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION & ANOR

FORTESCUE METALS GROUP LTD v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION & ANOR

[2012] HCA 39

Today the High Court unanimously held that Fortescue Metals Group Ltd and Andrew Forrest did not contravene the *Corporations Act* 2001 (Cth) in connection with public statements about agreements Fortescue made with three Chinese state-owned entities to build, finance and transfer the railway, port and mine components of Fortescue's proposed Pilbara Iron Ore and Infrastructure Project in Western Australia.

Each of the agreements was headed "Framework Agreement" and was four pages long. Each agreement recorded that it was to become binding upon approval by the parties' respective boards, and that the parties were jointly to agree and develop further general conditions of contract at a later date. The parties' boards approved the agreements. Fortescue and Mr Forrest, as Fortescue's chairman and chief executive, made public statements that Fortescue had entered into a "binding contract" with each of the Chinese entities to build, finance and transfer the relevant construction works.

In March 2006, ASIC commenced proceedings in the Federal Court of Australia alleging that because the agreements would not be enforceable under Australian law, Fortescue had therefore engaged in misleading or deceptive conduct when Fortescue and Mr Forrest represented that the agreements were "binding". ASIC further alleged that Fortescue and Mr Forrest had contravened the continuous disclosure requirements of the *Corporations Act* by not correcting the false or misleading information and that Mr Forrest had failed to discharge his duties as a director of Fortescue with the degree of care and diligence required by s 180(1).

The trial judge dismissed ASIC's claims, but the Full Court of the Federal Court allowed ASIC's appeal and made declarations that Fortescue had engaged in misleading or deceptive conduct and contravened its continuous disclosure obligations and that Mr Forrest had contravened his continuous disclosure obligations and directors' duties. In particular, the Full Court concluded that, because the agreements would not be enforceable under Australian law, it was misleading or deceptive to describe them as "binding" contracts. By special leave, Fortescue and Mr Forrest appealed to the High Court.

The High Court unanimously allowed the appeal. Four members of the Court held that the statements made by Fortescue and Mr Forrest represented to those hearing or reading them that Fortescue and the Chinese state-owned entities had entered into agreements that each intended to be binding. This representation was neither false nor misleading. There was no evidential basis for assuming that a person hearing or reading these statements would understand that the parties had

entered into agreements that would be enforced by an Australian court according to Australian law should a dispute ever arise between them.

Because the statements were neither misleading nor deceptive, the Court further found that Fortescue and Mr Forrest had not failed to meet their obligations under the *Corporations Act*. The Court therefore set aside the Full Court's decision and declarations and reinstated the primary judge's decision that Fortescue and Mr Forrest had not contravened the *Corporations Act*.

- *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.*