HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

Matter No M17/2008

BHP BILLITON IRON ORE PTY LTD APPELLANT

AND

THE NATIONAL COMPETITION COUNCIL & ANOR RESPONDENTS

Matter No P6/2008

BHP BILLITON IRON ORE PTY LTD & ANOR APPELLANTS

AND

THE NATIONAL COMPETITION COUNCIL & ANOR RESPONDENTS

BHP Billiton Iron Ore Pty Ltd v National Competition Council
BHP Billiton Iron Ore Pty Ltd v National Competition Council
[2008] HCA 45
24 September 2008
M17/2008 & P6/2008

ORDER

Matter No M17/2008

1. *Appeal dismissed with costs.*

Matter No P6/2008

1. *Appeal dismissed with costs.*

On appeal from the Federal Court of Australia

Representation

A C Archibald QC with M H O'Bryan and P D Crutchfield for the appellants (instructed by Blake Dawson Waldron)

C M Scerri QC with I B Stewart for the first respondents (instructed by Clayton Utz Lawyers)

S J Gageler SC with N J O'Bryan SC and J C Giles for the second respondents (instructed by D L A Phillips Fox)

N J Young QC with P W Collinson SC intervening on behalf of Rio Tinto Limited (instructed by Allens Arthur Robinson)

CATCHWORDS

BHP Billiton Iron Ore Pty Ltd v National Competition Council
BHP Billiton Iron Ore Pty Ltd v National Competition Council

Trade practices – Competition – Access to services – "Service" defined in s 44B of *Trade Practices Act* 1974 (Cth) to include use of "infrastructure facility" such as road or railway, but not to include use of "production process" – Federal Court of Australia declared railway line service to be s 44B service – Whether access sought by third party to railway line service use of production process.

Words and phrases – "access agreement", "infrastructure facility", "facility", "service", "use of a production process".

Trade Practices Act 1974 (Cth), Pt IIIA.

1 GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ. These appeals from the Full Court of the Federal Court of Australia[1] were heard together. By majority (Sundberg, Greenwood JJ; Finkelstein J dissenting) the Full Court dismissed appeals against the decision of the primary judge (Middleton J)[2].

2 The litigation arises from an application ("the Application") made on 11 June 2004 by the second respondent, Fortescue Metals Group Limited ("Fortescue"), to the National Competition Council ("the NCC"). The introduction to the Application stated:

> "[Fortescue] wishes to access the service provided by part of the Mt Newman Railway Line and part of the Goldsworthy Railway Line by having the relevant parts of those railway lines *Declared* as a service under Part IIIA of the [*Trade Practices Act* 1974 (Cth) ('the TPA')]."

Part IIIA (ss 44B-44ZZQ) is headed "Access to services". It was added to the TPA by the *Competition Policy Reform Act* 1995 (Cth) ("the 1995 Act") and has been amended from time to time.

The Application

3 Clause 5.1 of the Application described the service and the facility used to provide the service under the proposed declaration as follows:

> "(1) the use of the Facility, being:
>
> (a) that part of the Mt Newman Railway Line which runs from a rail siding that will be constructed near Mindy Mindy in the Pilbara to port facilities at Nelson Point in Port Hedland, and is approximately 295 kilometres long ... and
>
> (b) the part of the Goldsworthy Railway Line that runs from where it crosses the Mt Newman Railway Line to port

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1 *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234.

2 *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2007] ATPR 42-141.

facilities at Finucane Island in Port Hedland, and is approximately 17 kilometres long ...

(2) access to the Facility's associated infrastructure, including, but not limited to:

(a) railway track, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of the railway);

(b) bridges;

(c) passing loops;

(d) train control systems, signalling systems and communication systems;

(e) sidings and refuges to park rolling stock;

(f) maintenance and protection systems; and

(g) roads and other facilities which provide access to the railway line route".

4 By the Application, Fortescue sought to set in motion the procedures in Pt IIIA whereby it might ultimately be at liberty to transport the product of its mining operations from Mindy Mindy to Finucane Island over the two lengths of the railway lines identified in the Application. However, it should be remarked immediately that the Application also stated:

> "[Fortescue] does not seek access to any rail haulage service, and accordingly this Application is not directed at the Provider's locomotives and rolling stock, used in relation to the Facility".

5 The railway lines are managed and operated by BHP Billiton Iron Ore Pty Ltd ("BHPBIO"), which was treated in the proceedings as the "Provider" of the services identified in the Application. This company conducts the business of mining, refining and selling iron ore from four discrete mining areas in the Pilbara region in Western Australia, namely the Newman mining area, the Yandi mining area, the Area C mining area and the Goldsworthy mining area. It does so in its capacity as the manager of various unincorporated joint ventures conducted under agreements approved by legislation of Western Australia, in

particular the *Iron Ore (Mount Newman) Agreement Act* 1964 (WA) ("the Mt Newman Act") and the *Iron Ore (Mount Goldsworthy) Agreement Act* 1964 (WA) ("the Mt Goldsworthy Act").

6 BHPBIO itself is not one of the joint venturers. The iron ore mined in the relevant mining areas is transported from mine to port using the Mt Newman railway line and the Goldsworthy railway line, which intersect at a point near Port Hedland. All train movements are conducted from a control centre at Port Hedland. Each line is a single gauge heavy haulage railway line constructed upon land in the State of Western Australia ("Crown land") which pursuant to the provisions of the Mt Newman Act[3] and the Mt Goldsworthy Act[4] is leased at a peppercorn rental from Western Australia by the participants in the relevant unincorporated joint ventures.

7 At Port Hedland port operations, using infrastructure located at Nelson Point and Finucane Island, involve the handling of iron ore which is crushed and screened (in some instances), blended in stockpiles (in most instances), reclaimed and loaded onto ships (where in some instances further blending occurs) for transportation to customers.

8 All mining tenements relevant to these proceedings are held from the State of Western Australia which has granted long term leases to explore and exploit the mineral resources in exchange for royalties paid to the State. The respective joint venturers are lessees, sub-lessees or assignees. In the Newman mining area the mines and pits, with one exception, are leased by participants in the Mt Newman Joint Venture. The exception, known as Jimblebar, is an asset of another joint venture with other participants. The Yandi mining area, with the exception of the "W4" area, is leased by the same participants as the Goldsworthy Joint Venture. W4 is an asset of another joint venture with other participants. The Area C mining area is an asset of the POSMAC Joint Venture and the Goldsworthy mining area is an asset of the Goldsworthy Joint Venture.

9 The primary judge found:

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3 Schedule 1, cl 8(1)(b)(i).

4 Schedule 1, cl 8(2)(b)(i).

> "The Mt Newman, Yandi and Goldsworthy Joint Ventures make payments to each other in respect of the use of the facilities owned by each joint venture by way of tolling formula. The tolling amount is calculated by BHPBIO. The Goldsworthy JV participants pay fees to the Yandi JV participants and the Mt Newman JV participants with respect to railing and, in the case of the Mt Newman JV participants, use of the Nelson Point port and Mt Newman rail infrastructure and railing of ore. However, there are no written terms and conditions concerning the railing arrangements, and the fees are calculated by reference to a rate of return on a notional value of the assets employed."

10 Fortescue is a public listed company and is a party to an agreement with the State of Western Australia relating to the development of a multi-user railway and port facilities in the Pilbara region and ratified by the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act* 2004 (WA). It is a participant in the Pilbara Iron Ore Joint Venture which holds tenements at Mindy Mindy, situated some 295 kilometres south east of Port Hedland. Fortescue proposes to construct a railway siding of about 17 kilometres in length from Mindy Mindy connecting to the Mt Newman railway line and thence to the Goldsworthy railway line, so enabling it to haul iron ore from Mindy Mindy to Port Hedland.

11 Fortescue envisaged in the Application that it would transport iron ore and iron ore products from its mines by what it identified as "the Service" and by:

> "(1) acquiring and utilising its own locomotives and rolling stock in accordance with all relevant rail and associated legislation;
>
> (2) utilising reputable, reliable and experienced employees, contractors and consultants to conduct regular operation and maintenance work where applicable, to the Service; and
>
> (3) utilising reputable, reliable and experienced employees and/or contractors to carry out loading and unloading, delivery and monitoring of iron ore and iron ore products on and off the Service".

12 The NCC treated the application by Fortescue as two applications for distinct services provided by means of the two railway lines. One consequence of this is the bifurcation in the litigation and the two appeals now before this Court.

Part IIIA of the TPA

13 The developments in national competition policy which provide the background against which the 1995 Act introduced Pt IIIA to the TPA have been traced in detail in several decisions of the Full Court of the Federal Court[5] and it is unnecessary to repeat the detailed consideration to be found there. However, it should be noted that in the second reading speech in the Senate on the Bill for the 1995 Act[6] the Minister said:

> "A new legal regime will be created which facilitates businesses obtaining access to the services of certain essential infrastructure facilities."

and continued, under the heading "Access"[7]:

> "The bill inserts a new Part into the [TPA], to establish a legal regime to facilitate third parties obtaining access to the services of certain essential facilities of national significance. The notion underlying the regime is that access to certain facilities with natural monopoly characteristics, such as electricity grids or gas pipelines, is needed to encourage competition in related markets, such as electricity generation or gas production. Access to such facilities can be achieved if a person seeking access is successful in having the service 'declared' and then negotiates access with the service provider.
>
> The new [NCC] will consider applications for declaration of particular services. It may recommend declaration of a service if it is satisfied that access to the service would promote competition, that it would be uneconomical for anyone to develop another facility to provide the service, that the facility is of national significance, that access would

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5 *Rail Access Corporation v New South Wales Minerals Council Ltd* (1998) 87 FCR 517 at 518-520 per Black CJ, Wilcox and Goldberg JJ; *Sydney Airport Corp Ltd v Australian Competition Tribunal* (2006) 155 FCR 124 at 125-132 per French, Finn and Allsop JJ.

6 Australia, Senate, *Parliamentary Debates* (Hansard), 29 March 1995 at 2435. The legislation was first introduced into the Senate rather than the House of Representatives.

7 Australia, Senate, *Parliamentary Debates* (Hansard), 29 March 1995 at 2438.

not cause undue risk to health or safety, that access is not already the subject of an effective access regime, and that access would not be against the public interest.

The [NCC's] recommendation will be considered by the designated Minister, who will decide whether or not to declare the service ...

Once a service is declared, parties will be free to negotiate their own terms and conditions of access, including through private arbitration. If it is not possible to reach agreement, they can notify the Australian Competition and Consumer Commission ['the ACCC'] of a dispute, and the [ACCC] can make a determination setting the terms and conditions of access. Private arbitration can be enforced using the new access regime if, subject to a public interest test, they are registered by the [ACCC]. Determinations by the [ACCC] may be appealed to the [Australian Competition Tribunal ('the Tribunal')].

As an alternative to this process, the owner or operator of a facility can offer an undertaking to the [ACCC] about the terms and conditions on which it will provide access to third parties. If the [ACCC] accepts such an undertaking, the services provided by the facility cannot be declared by the [NCC]. This provides a means by which the owner or operator can obtain certainty about access arrangements, before a third party seeks access."

14 The critical provision for this litigation is the definition in s 44B of "service" as that term is used in Pt IIIA. It is convenient to delay setting out the text of this definition until an outline is given of the relevant substantive provisions of Pt IIIA.

15 It was pursuant to s 44F(1) that Fortescue made the Application to the NCC; an application may be made by the Minister "or any other person". The NCC must recommend to the Minister either that the service in question be declared or that it not be declared. The NCC may only recommend the making of a declaration if satisfied of the six matters specified in pars (a)-(f) of s 44G(2) as follows:

"(a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;

(b) that it would be uneconomical for anyone to develop another facility to provide the service;

(c) that the facility is of national significance, having regard to:

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy;

(d) that access to the service can be provided without undue risk to human health or safety;

(e) that access to the service is not already the subject of an effective access regime;

(f) that access (or increased access) to the service would not be contrary to the public interest".

16 Upon receiving such a recommendation, the Minister must either declare or decide not to declare the service, having regard to "whether it would be economical for anyone to develop another facility that could provide part of the service" (s 44H(2)). The Minister cannot declare a service unless satisfied of all of the six matters stated in s 44H(4) in the same terms as those appearing in s 44G(2) and set out above. If the Minister does not publish either a declaration or a decision not to declare the service within 60 days after receiving the declaration recommendation, the Minister is deemed to have decided not to declare the service (s 44H(9)). A refusal attracts the right given to an applicant by s 44K to seek review by the Tribunal.

17 The consequence of a declaration of a service is that a "third party" (which is defined in s 44B to include "a person who wants access to the service") is given what may be described as an enforceable right to negotiate access to the service. The right to negotiate may be considered "enforceable" because, subject to constitutional limits (stated in s 44R[8]), if a third party and a provider are

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8 These rely upon the power of the Parliament with respect to corporations and trade and commerce.

unable to agree upon an arrangement for the third party to have access to the declared service, the third party may notify the ACCC of the dispute (s 44S). The ACCC then has the power to arbitrate such an access dispute and, in general, "must make a written determination on access by the third party to the service" (s 44V(1)).

18 Access to the declared service is, however, not a necessary or ultimate result of the arbitration (s 44V(3)). Further, s 44W provides that the ACCC must not make a determination that would have any of certain prescribed effects. These include the effect of "preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified" (s 44W(1)(a)).

19 It appears that if either of the services to which Fortescue seeks access are services within the meaning of Pt IIIA, then BHPBIO would properly be regarded as providing that service to itself. Therefore it would be an "existing user" whose interests would be afforded the protection given by par (a) of s 44W(1), which is described above. The ACCC must also take into account the seven matters listed in s 44X(1), in addition to any other matters which it considers relevant[9]. A party to a determination has the right to apply in writing to the Tribunal for review of the determination (s 44ZP(1)). Such a review is a "re-arbitration" of the access dispute, for which purpose the Tribunal has the same powers as the ACCC (s 44ZP(3) and (4)).

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9 The seven matters are as follows:

> "(a) the legitimate business interests of the provider, and the provider's investment in the facility;
>
> (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
>
> (c) the interests of all persons who have rights to use the service;
>
> (d) the direct costs of providing access to the service;
>
> (e) the value to the provider of extensions whose cost is borne by someone else;
>
> (f) the operational and technical requirements necessary for the safe and reliable operation of the facility;
>
> (g) the economically efficient operation of the facility".

20 It should be added that s 44ZZN confers an entitlement to payment of compensation by the Commonwealth in some circumstances where a determination would result in an acquisition of property[10].

The jurisdiction of the NCC

21 It should be emphasised that the litigation which has reached this Court does not concern a dispute as to the terms of access to a declared service. It has arisen at the first stage of the Pt IIIA processes, namely the response by the NCC to the Application made by Fortescue.

22 In September 2004 the NCC invited submissions on a preliminary matter concerning the jurisdiction of the NCC to deal with the Application. This was whether the service defined by Fortescue was a "service" within the meaning of the definition in s 44B of the TPA. In November 2004 the NCC published its decision and reasons determining that it had jurisdiction over the Application as it pertained to the Mt Newman railway line, but not with respect to the Goldsworthy railway line.

23 As already mentioned, the NCC considered that since the Mt Newman railway line and Goldsworthy railway line were "two services provided to two separate facilities each of which is owned by a different group of operators", the Application should be treated as two separate applications for the declaration of the two specified and distinct services provided by means of the two railway lines, respectively referred to as "the Mt Newman railway line service" and "the Goldsworthy railway line service".

24 BHPBIO submitted to the NCC that the railway lines were an integral and non-subsidiary part of its production processes for saleable iron ore. In November 2004 the NCC concluded that since at least one marketable commodity produced at the Area C mining area was transported over the Mt Newman railway line, the Mt Newman railway line service was not the use of a production process and therefore was a "service" within the meaning of s 44B. On the other hand, the NCC considered that no marketable commodity was transported by BHPBIO over the Goldsworthy railway line. It followed that the

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10 cf *Telstra Corporation Ltd v The Commonwealth* (2008) 82 ALJR 521 at 528-529 [36]-[38]; 243 ALR 1 at 11-12; [2008] HCA 7.

use of the Goldsworthy railway line service was "use of a production process" and was therefore excluded from the definition of "service". The jurisdiction of the NCC was said by it to depend upon whether a service within the meaning of s 44B could be identified and, accordingly, it had jurisdiction with respect to access to the Mt Newman railway line service but not to the Goldsworthy railway line service.

25 The NCC then considered the Application in relation to the Mt Newman railway line service and, on 22 March 2006, recommended to the Minister pursuant to s 44F(2)(b)(i) of the TPA that the Mt Newman railway line service be declared. After 60 days, the Minister having taken no steps in relation to the recommendation, the Minister was deemed by s 44H(9) to have taken a decision not to declare the Mt Newman railway line service.

Proceedings in the Federal Court of Australia

26 The jurisdiction of the Federal Court includes that in matters arising under a law of the Commonwealth such as Pt IIIA of the TPA. That jurisdiction is conferred by s 39B of the *Judiciary Act* 1903 (Cth)[11].

27 On 24 December 2004, BHPBIO applied to the Federal Court seeking relief including a declaration that "the bulk iron ore rail track transportation services provided by the [Mt] Newman rail facility ... [are] not a service within the meaning of s 44B of the [TPA]" and a declaration that the NCC did not have jurisdiction to recommend that the Mt Newman railway line service be declared.

28 On 25 February 2005, Fortescue applied to the Federal Court seeking relief including declarations that "the bulk iron ore rail track transportation services provided by the Goldsworthy rail facility ... [are] a service within the meaning of s 44B of the [Act]" and that the NCC had jurisdiction with respect to the Application. Fortescue joined as second respondent BHPBIO and participants in the Goldsworthy Joint Venture including BHP Billiton Minerals Pty Ltd. This company is the second appellant in the second appeal. BHPBIO is the first appellant in the second appeal and the sole appellant in the first appeal.

29 The primary judge heard the applications together and on 18 December 2006 ordered that the application by BHPBIO be dismissed, and that on its

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11 Section 39B(1A)(c).

application Fortescue have declaratory relief in respect of the Goldsworthy rail facility. The appeals were dismissed by the Full Court on 5 October 2007.

30 In this Court Rio Tinto Limited, without significant opposition by Fortescue, was granted leave to intervene and presented written and oral submissions favouring the case of the appellants. The NCC presented submissions on questions of construction of Pt IIIA to some degree supporting those of both Fortescue and the appellants.

The definition of "service" in s 44B

31 Section 44B relevantly provides:

"In this Part, unless the contrary intention appears:

...

service means a service provided by means of a facility and includes:

(a) the use of an infrastructure facility such as a road or railway line;

(b) handling or transporting things such as goods or people;

(c) a communications service or similar service;

but does not include:

(d) the supply of goods; or

(e) the use of intellectual property; or

(f) the use of a production process;

except to the extent that it is an integral but subsidiary part of the service."

32 The structure of the definition is to give a meaning to the term "service" (namely, "a service provided by means of a facility") and then to state what this meaning "includes" and what this meaning "does not include". As a general proposition, the adoption of the definitional structure "means and includes" indicates an exhaustive explanation of the content of the term which is the subject of the definition, and conveys the idea both of enlargement and

exclusion[12]. In doing so, the definition also may make it plain that otherwise doubtful cases do fall within its scope[13].

33 In the present case, the notion of exclusion, whether to remove otherwise uncertain cases, or to remove cases that otherwise fall within the ordinary meaning of "a service provided by means of a facility", is given an explicit form by the closing words of the definition. The term "service" is one which does not include the supply and uses identified in any of pars (d), (e) and (f), except to the extent that this supply or use is "an integral but subsidiary part of the service".

34 The subject of the Application, as set out in cl 5, answers the description of "a service provided by means of ... the use of an infrastructure facility such as a ... railway line". The expression "railway line", in the context given by the preceding phrase "infrastructure facility", should be understood as including the infrastructure associated with the railway tracks and identified by Fortescue in par (2) of cl 5.1 of the Application. This is set out earlier in these reasons.

35 The appellants submit that the access sought by Fortescue would be "the use of a production process", namely the production process of BHPBIO, and that the words of exclusion in par (f) of the definition of "service" apply.

36 It is necessary here to say something more respecting the activities of BHPBIO. The primary judge found:

> "BHPBIO uses a Continuous Stockpile Management System ('CSMS') as a production and grade control system that involves its mining, rail and port operations. The CSMS is part of the production and grade control system that is involved in BHPBIO's operations from mine to ship loading at the port. It assists in the development of the daily blend for each mining area, and determines the required sequence of trains necessary for BHPBIO's operation and requirements for finished iron ore products. Essentially the CSMS was intended to be a more efficient and

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12 *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395 at 398-399, 401-402, 405; [1964] HCA 12.

13 *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329-330; [1996] HCA 31; *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at 369-370.

effective form of the 'batch system' which was employed prior to the introduction of the CSMS."

Conclusions

37 It may be accepted that the expression "a production process" in par (f) of the definition of "service" has what in *Hamersley Iron Pty Ltd v National Competition Council*[14] was identified as its ordinary meaning of "the creation or manufacture by a series of operations of some marketable commodity". It also may be accepted that the use of the rail tracks and associated infrastructure by BHPBIO is integral to the series of operations that constitute the CSMS. But this is the production process of BHPBIO to produce the marketable commodities in which the joint venturers trade. That is not the production process of Fortescue.

38 However, the appellants observe that Fortescue has applied for the declaration of a service for the use of rails, train control systems, signalling systems and communication systems. This is said to be a "service" which BHPBIO "provides to itself as part of its production process". The appellants conclude that because this is the service Fortescue seeks, "that service is properly characterised as 'the use of a production process'". They add that although the rail lines would be used by Fortescue for its own purposes rather than for the purpose of conducting the CSMS production process of BHPBIO, that circumstance is not relevant to the characterisation of the service.

39 As Fortescue rightly submitted, it does not follow from the fact that BHPBIO uses the relevant track and associated infrastructure as part of the production process of BHPBIO, that use by Fortescue (or another access seeker) of that track and infrastructure would be excluded from the definition of "service" as being "the use of a production process".

40 The Application does not seek access with use of the rolling stock of BHPBIO or the addition of its stock to trains operated by BHPBIO in the course of the CSMS. That would present a possibly decisive distinction from what is contemplated by the Application. But it is not this case.

41 No doubt BHPBIO uses the rail track and associated infrastructure as part of the integrated CSMS process which is directed to shipment of iron ore to Port

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14 (1999) 164 ALR 203 at 213.

Hedland. However, the issue before this Court is whether the use of the service, which engages par (a) of the definition, to meet the needs of the access seeker also answers the description of the use by the access seeker of the BHPBIO production process. The answer must be in the negative. What Fortescue seeks is the use of a facility that BHPBIO uses for the purposes of its production process. That use does not fall within par (f) and so does not deny the operation of the definition in s 44B and the engagement of Pt IIIA.

42 Only this construction of par (f) is consistent with a reading of the definition of "service" in s 44B of the TPA in a way that would advance the attainment of the large national and economic objectives of Pt IIIA, as revealed in the legislative text enacted by the Parliament, the report that preceded its enactment, and the Minister's second reading speech. Whilst it cannot be said that the appellants' construction is one that is untenable, the construction which is preferred by the respondents and which has been accepted is more appropriate to advancing the overall objectives of Pt IIIA than that urged for the appellants. It also is more consistent with the approach to construction of such legislation adopted by this Court many times over the past ten years[15].

43 The circumstance that the CSMS production process employed by BHPBIO involves the use of integers which the access seeker wishes to utilise for its own purposes does not deny compliance with the definition of "service". Further, if upon satisfaction of the six matters required by s 44H(4) the declaration sought by Fortescue were to be made, the terms on which access were granted would necessarily be determined by taking into account the legitimate business interests of BHPBIO (s 44X(1)(a)). That would be a question for another, and a later, day.

Orders

44 The appeals should be dismissed. The appellants should pay the costs of Fortescue and the NCC.

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15 See eg *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28.