HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No M155/2011

THE PILBARA INFRASTRUCTURE PTY LTD & ANOR — APPELLANTS

AND

AUSTRALIAN COMPETITION TRIBUNAL & ORS — RESPONDENTS

Matter Nos M156/2011 & M157/2011

THE PILBARA INFRASTRUCTURE PTY LTD & ANOR — APPELLANTS

AND

AUSTRALIAN COMPETITION TRIBUNAL & ORS — RESPONDENTS

Matter No M45/2011

THE NATIONAL COMPETITION COUNCIL — APPLICANT

AND

HAMERSLEY IRON PTY LTD & ORS — RESPONDENTS

Matter No M46/2011

THE NATIONAL COMPETITION COUNCIL — APPLICANT

AND

ROBE RIVER MINING CO PTY LTD & ORS — RESPONDENTS

The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal
The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal
The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal
The National Competition Council v Hamersley Iron Pty Ltd
The National Competition Council v Robe River Mining Co Pty Ltd
[2012] HCA 36
14 September 2012
M155/2011, M156/2011, M157/2011, M45/2011 & M46/2011

ORDER

In matters M155/2011, M156/2011 and M157/2011:

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 4 May 2011 and 16 May 2011 and, in their place, order that a writ of certiorari, directed to the Australian Competition Tribunal, issue to quash the Australian Competition Tribunal's determination the subject of the proceeding.*

3. *Remit the matter to the Australian Competition Tribunal for determination according to law.*

4. *Each party and the intervener bear its own costs in this Court and in the Full Court of the Federal Court of Australia.*

In matters M45/2011 and M46/2011:

1. *Application for special leave to appeal dismissed.*

2. *No order as to costs.*

On appeal from the Federal Court of Australia

Representation

J T Gleeson SC and C A Moore SC with M I Borsky for the appellants in M155/2011, M156/2011 and M157/2011, for the twelfth and thirteenth respondents in M45/2011 and for the tenth and eleventh respondents in M46/2011 (instructed by DLA Piper Australia)

S J Gageler SC, Solicitor-General of the Commonwealth with P J Hanks QC and J P Slattery for the applicant in M45/2011 and M46/2011 and intervening on behalf of the National Competition Council in M155/2011, M156/2011 and M157/2011 (instructed by Clayton Utz Lawyers)

N J Young QC with P W Collinson SC and S H Parmenter for the second to tenth respondents in M155/2011, for the second to eighth respondents in M156/2011 and M157/2011, for the first to ninth respondents in M45/2011 and for the first to seventh respondents in M46/2011 (instructed by Allens Arthur Robinson)

A C Archibald QC with M H O'Bryan SC for the eleventh and twelfth respondents in M155/2011, for the ninth and tenth respondents in M156/2011 and M157/2011, for the tenth and eleventh respondents in M45/2011 and for the eighth and ninth respondents in M46/2011 (instructed by Ashurst Australia)

Submitting appearance for the first respondent in M155/2011, M156/2011 and M157/2011, for the fourteenth respondent in M45/2011 and for the twelfth respondent in M46/2011

CATCHWORDS

The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal
The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal
The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal
The National Competition Council v Hamersley Iron Pty Ltd
The National Competition Council v Robe River Mining Co Pty Ltd

Trade practices – Access to services – Minister's decision whether to declare services relating to railway lines in Pilbara pursuant to s 44F of *Trade Practices Act* 1974 (Cth) – Section 44H(4) required Minister to be satisfied of certain matters – Whether criterion for declaration of service in s 44H(4)(b) imposes test of private profitability – Whether public interest criterion in s 44H(4)(f) requires or permits inquiry into likely net balance of social costs and benefits – Whether any residual discretion.

Administrative law – Application to Australian Competition Tribunal ("Tribunal") under s 44K for review of Minister's decision to declare pursuant to s 44F – Review by Tribunal is re-consideration of the matter – Nature of review to be undertaken by Tribunal – Whether Tribunal could consider any material parties considered relevant.

Words and phrases – "public interest", "re-consideration of the matter", "re-hearing of the matter", "uneconomical for anyone to develop another facility to provide the service".

Trade Practices Act 1974 (Cth), Pt IIIA, ss 44B, 44F, 44H, 44K, 163A.

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. Iron ore mined in the Pilbara region of Western Australia is transported by train to ports at Dampier, Cape Lambert and Port Hedland. There it is loaded on to ships and exported from Australia.

2 BHP Billiton Ltd ("BHPB") and Rio Tinto Ltd ("Rio Tinto"), two of the world's largest iron ore producers, conduct mining operations in the Pilbara. The details of the corporate structures through which BHPB and Rio Tinto conduct these operations need not be noticed. It is enough, for present purposes, to refer compendiously to BHPB and Rio Tinto.

3 BHPB operates two railway lines which carry the ore mined by BHPB to port: the Goldsworthy line and the Mt Newman line which each terminate at Port Hedland. Rio Tinto operates two other railway lines which carry the ore mined by Rio Tinto to port: the Hamersley line which terminates at Dampier and the Robe line which terminates at Cape Lambert.

4 Fortescue Metals Group Ltd ("FMG") also conducts mining operations in the Pilbara. It wants access to the railway lines and associated infrastructure that BHPB and Rio Tinto own and use. Whether it would take up that access and on what terms access would be made available are questions that do not now arise.

5 Part IIIA of the *Trade Practices Act* 1974 (Cth) (now called the *Competition and Consumer Act* 2010[1]) ("the Act") provides for the processes by which third parties may obtain access to infrastructure owned by others. The Act provides for a process by which a particular "service" may be "declared". A "service" is defined[2] as:

> "a service provided by means of a facility and includes:
>
> (a) the use of an infrastructure facility such as a road or railway line;
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> (b) handling or transporting things such as goods or people;

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1 *Trade Practices Amendment (Australian Consumer Law) Act (No 2)* 2010 (Cth), Sched 5, item 2.

2 s 44B.

(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."

6 Part IIIA of the Act also provides (chiefly in Div 3 (ss 44R-44ZUA), Div 4 (ss 44ZV-44ZY) and Div 6 (ss 44ZZA-44ZZC)) for a second, distinct stage, following the declaration stage, in the processes for obtaining access to infrastructure: the making of agreements or arbitrated determinations regulating the terms on which a third party may have access to a declared service. Because there are still disputes about whether the relevant services should be declared, no step has yet been taken under this second stage of the processes for obtaining access to any of the four railway lines owned and operated by BHPB and Rio Tinto. The appeals to this Court concern only the first stage of the processes for which Pt IIIA provides: should any of the services be declared?

The process for declaration of a service

7 The process for declaration of a service proceeds by at least two steps: first, a recommendation made[3] by the National Competition Council ("the NCC") that a particular service be declared and second, a decision[4] by the "designated Minister" to declare the service.

8 The NCC is established by s 29A of the Act. Its functions include[5]:

"(a) carrying out research into matters referred to the Council by the Minister; and

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3 s 44F(2)(b).

4 s 44H(1).

5 s 29B(1).

(b) providing advice on matters referred to the Council by the Minister."

A person may not be appointed to the NCC unless the Governor-General is satisfied[6] (among other things) that "the person qualifies for the appointment because of the person's knowledge of, or experience in, industry, commerce, economics, law, consumer protection or public administration".

9 At each of the two steps for declaration of a service (recommendation by the NCC and decision by the Minister to declare) the Act provides[7], and provided at the times relevant to these matters, that the decision maker must be satisfied of all of six specified matters:

"(a) that access (or increased access) to the service would promote a material increase in 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;

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6 s 29C(3)(a).

7 ss 44G(2) and 44H(4).

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

10 In this Court attention focused principally on criteria (b) and (f). What does criterion (b) mean when it speaks of it being "uneconomical for anyone to develop another facility to provide the service"? What matters can be taken into account under criterion (f) when it requires the decision maker to be satisfied that access to the service "would not be contrary to the public interest"? And attention was also directed to a further question: if a decision maker *is* satisfied of each of the six matters stated in the Act, is there nonetheless a discretion to be exercised? If so, what are the criteria that inform the exercise of that discretion?

11 The Act provides for a further step in the process for declaration of a service, beyond the making of a recommendation by the NCC and a decision by the Minister. If the Minister decides (or is deemed to decide[8]) not to declare a service, the person who applied for the declaration recommendation may apply[9] for review of the Minister's decision by the Australian Competition Tribunal ("the Tribunal"). And if the Minister declares a service, the provider of the service may apply[10] for review of the declaration by the Tribunal.

12 Decisions made by the Tribunal on a review of a ministerial decision to declare or not to declare a service are amenable to judicial review in the Federal Court of Australia on application under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act") or s 39B of the *Judiciary Act* 1903 (Cth) or on application for declarations and orders (including orders by way of, or in the nature of, prohibition, certiorari or mandamus) under s 163A of the Act.

13 The present appeals to this Court and the associated applications for special leave to appeal by the NCC concern orders made by the Full Court of the Federal Court of Australia on applications of these kinds. Before identifying the issues that are raised by the appeals (and the NCC applications for special leave) a little more should be said about the history of the proceedings.

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8 s 44H(9).

9 s 44K(2).

10 s 44K(1).

The history of the proceedings

14 In 2004, FMG applied to the NCC for its recommendation that part of the Goldsworthy railway line and part of the Mt Newman railway line be declared. In 2007, a wholly owned subsidiary of FMG, The Pilbara Infrastructure Pty Ltd ("TPI"), applied to the NCC for its recommendation that the whole of the Goldsworthy railway line be declared. TPI made a similar application to the NCC in respect of the Hamersley railway line and two of its spur lines. In January 2008, TPI made a similar application to the NCC in respect of the Robe railway line. It is convenient to refer to FMG and TPI compendiously as "Fortescue", and to refer only to the railway lines which were the subject of the applications, although those applications extended to certain associated infrastructure.

15 In March 2006, the NCC recommended that the Mt Newman line be declared. In August 2008, it recommended that the Goldsworthy, Hamersley and Robe lines be declared.

16 The designated Minister[11], the Treasurer of the Commonwealth, did not make any declaration about the Mt Newman line within the period fixed by Pt IIIA of the Act and was therefore deemed[12] to have decided not to declare that service. The Minister declared each of the Goldsworthy, Hamersley and Robe railway lines for a period of 20 years.

17 Rio Tinto applied for review by the Tribunal of the declarations made in respect of the Hamersley and Robe lines; BHPB applied for review of the declaration made in respect of the Goldsworthy line; Fortescue applied for review of the refusal to declare the Mt Newman line.

18 The Tribunal set aside the decision to declare the Hamersley line and decided that the service provided by the Hamersley line should not be declared. The Tribunal varied the Minister's decision to declare the Robe line for a period

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11 Section 44D provided, in effect, that in declaring a service the Commonwealth Minister administering the Act was the designated Minister unless the service provider was by a State or Territory party to the Competition Principles Agreement, in which case the responsible Minister of that State or Territory was the designated Minister.

12 s 44H(9).

of 20 years so that it would expire after 10 years. The Tribunal affirmed the decision to declare the Goldsworthy line for 20 years and the (deemed) decision not to declare the Mt Newman line.

19 Fortescue brought proceedings in the Federal Court of Australia challenging the Tribunal's decision to set aside the Minister's decision to declare the Hamersley line. Fortescue alleged (among other things) that the Tribunal had misconstrued and misapplied s 44H(4)(a) and (f) and that the Tribunal had acted in breach of the requirements of procedural fairness because it received and acted on material provided by Rio Tinto after the conclusion of the proceedings before the Tribunal.

20 By notice of contention, Rio Tinto alleged that the Tribunal had misconstrued and misapplied s 44H(4)(b) in its application to the Hamersley line but that, properly applied, s 44H(4)(b) required the Tribunal to refuse to declare the Hamersley line.

21 In a separate proceeding, Fortescue also challenged the Tribunal's decision to vary the period for which the Robe line was to be declared. Fortescue alleged that the Tribunal's decision was unreasonable in light of the findings that it had made in relation to the application of s 44H(4)(f).

22 By another separate proceeding, Rio Tinto challenged the decision of the Tribunal not to set aside the Minister's declaration of the Robe line. Rio Tinto advanced its argument on the basis of the same construction of s 44H(4)(b) that underpinned its notice of contention in Fortescue's proceeding about the Hamersley line.

23 All of the proceedings were heard by a Full Court of the Federal Court (Keane CJ, Mansfield and Middleton JJ). The Full Court concluded[13] that the Tribunal had misconstrued and misapplied s 44H(4)(b). The Court also concluded[14] that the Tribunal had not accorded Fortescue procedural fairness. But the Court held[15] that, on the construction of s 44H(4)(b) which it favoured,

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13 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at 98 [99]-[100].

14 (2011) 193 FCR 57 at 109-110 [132]-[135].

15 (2011) 193 FCR 57 at 110 [136]-[138].

Fortescue was bound on the facts found by the Tribunal to fail in its application to the Tribunal in relation to the Hamersley line. The Court further held[16] that, because the Tribunal had misconstrued s 44H(4)(b), Rio Tinto's appeal in relation to the Robe line should be allowed and the Tribunal's decision set aside. The Court ordered that the Minister's decision to declare the Robe line should be set aside.

Appeals and applications for special leave to appeal to this Court

24 By special leave, Fortescue appeals to this Court against the orders dismissing Fortescue's application to the Federal Court in relation to the Hamersley line and against both the orders allowing Rio Tinto's application in relation to the Robe line and the orders dismissing Fortescue's application in relation to the period for which that line should be declared.

25 The NCC was granted leave to intervene in the proceedings in the Federal Court. The NCC applied for special leave to appeal against the orders made by the Full Court and was heard on the argument of the appeals by Fortescue. The issues which the NCC seeks to agitate in this Court are all raised by the appeals by Fortescue. That being so, there is nothing to be gained by granting the NCC special leave to appeal against the orders made by the Full Court. The NCC's arguments in this Court should be received and treated as made pursuant to leave to intervene in the appeals brought by Fortescue. In these circumstances, it is not necessary to consider any question that would otherwise arise about the standing of the NCC to appeal against orders made by the Full Court in proceedings in which the NCC had intervened. The applications by the NCC for special leave to appeal should be dismissed. There should be no order as to the costs of those applications.

26 As has been noted, attention in this Court focused, for the most part, on three questions. What does criterion (b) mean? What matters may be taken into account under criterion (f)? Is there a residual discretion? But before considering those questions it is necessary to consider the nature of the Tribunal's task and to begin that consideration by explaining how that issue arose in these proceedings.

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16 (2011) 193 FCR 57 at 110 [136]-[137], [140].

An issue emerges late

27 Late in the argument of the appeals to this Court, there emerged an issue which had not previously been raised by any party or by the NCC, whether in the Tribunal, the Federal Court or this Court. What was the nature of the task which the Tribunal was required to perform when asked to review the Minister's decision? Was it, as the Tribunal and those who were represented before the Tribunal took it to be, a fresh hearing on new evidence of whether a service should be declared? Or was the task more limited?

28 As the Tribunal recorded[17], the applicant for declarations (Fortescue) and the service providers (BHPB and Rio Tinto)

> "took the opportunity to present [to the Tribunal] material *far in excess* of that which had been placed before the minister. In all, the parties filed 130 affidavits from 73 witnesses, together with a large number of documents. This material took up approximately 70 large lever arch files. The transcript of the hearing runs for over 3300 pages. Of the witnesses, 15 were expert economists and 29 were, in alphabetical order, bankers, computer simulation experts, engineers, environmental scientists, geologists, metallurgists, quantity surveyors, rail modellers and train schedulers, among others." (emphasis added)

The hearing before the Tribunal occupied 42 sitting days. The Tribunal's reasons run to 1,351 paragraphs.

29 Should Fortescue now be permitted to allege that the Tribunal undertook a task which the Act did not give it?

Leave to amend?

30 In the course of submissions in reply in this Court, Fortescue sought leave to amend its notices of appeal to allege in each matter that the Tribunal's task neither required nor permitted it to conduct (as it had) a wholly fresh hearing on new evidence. The respondents to the appeals and the NCC opposed the grant of leave to amend.

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17 *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 at 268 [26].

31 Fortescue should have the leave that it seeks. These are not cases in which the principle applied in *Suttor v Gundowda Pty Ltd*[18] is engaged. The point that now arises could not have been met by any evidence led at any earlier stage of the matter. Had the point been taken earlier, less not more evidence would have been called.

32 The importance of the general principle stated in *Coulton v Holcombe*[19], that "[i]t is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial", is evident. That is why, as was said in *University of Wollongong v Metwally [No 2]*[20]:

> "It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

33 But in this case, the question that Fortescue now seeks to raise goes to the root of the judicial review applications that were mounted in the Federal Court. It is not to the point that the parties acquiesced in the Tribunal taking, and even encouraged it to take, the course it did.

34 The respondents and the NCC all pointed out in their submissions in answer to the application for leave to amend that s 44K of the Act has been substantially amended[21] since the Tribunal made its decisions in these matters. They submitted that leave to amend should therefore be refused on the ground that the point which Fortescue sought to raise was not one which would bear upon the Tribunal's conduct of future reviews. As will later be explained, the amendments that have been made to s 44K will not apply to these matters when they are remitted to the Tribunal. Resolution of the issue is thus necessary for the proper future disposition by the Tribunal of the present matters. But apart

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18 (1950) 81 CLR 418; [1950] HCA 35.

19 (1986) 162 CLR 1 at 7; [1986] HCA 33.

20 (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71; [1985] HCA 28.

21 *Trade Practices Amendment (Infrastructure Access) Act* 2010 (Cth), s 3, Sched 1, items 11-13.

from this consideration, the point that has already been made – that the question which Fortescue raises is one that goes to the root of the applications for judicial review – compels the grant of the leave which Fortescue seeks. The applications for judicial review that were made to the Federal Court could not be decided without first deciding what was the task which the Act committed to the Tribunal. That requires identification of the tasks committed to the NCC and the Minister. Only when the Tribunal's task has been properly identified can this Court decide what orders the Full Court should have made on the applications for relief under the ADJR Act, s 39B of the *Judiciary Act* or s 163A of the Act.

The Tribunal's task

35 The task given to the Tribunal was identified in s 44K of the Act which, at the times relevant to these matters, provided:

> "(1) If the designated Minister declares a service, the provider may apply in writing to the Tribunal for review of the declaration.
>
> (2) If the designated Minister decides not to declare a service, an application in writing for review of the designated Minister's decision may be made by the person who applied for the declaration recommendation.
>
> (3) An application for review must be made within 21 days after publication of the designated Minister's decision.
>
> (4) The review by the Tribunal is a re-consideration of the matter.
>
> Note: There are target time limits that apply to the Tribunal's decision on the review: see section 44ZZOA.
>
> (5) For the purposes of the review, the Tribunal has the same powers as the designated Minister.
>
> (6) The member of the Tribunal presiding at the review may require the Council to give information and other assistance and to make reports, as specified by the member for the purposes of the review.
>
> (7) If the designated Minister declared the service, the Tribunal may affirm, vary or set aside the declaration.

(8) If the designated Minister decided not to declare the service, the Tribunal may either:

(a) affirm the designated Minister's decision; or

(b) set aside the designated Minister's decision and declare the service in question.

(9) A declaration, or varied declaration, made by the Tribunal is to be taken to be a declaration by the designated Minister for all purposes of this Part (except this section)."

36 Obviously, a centrally important question is what is meant by saying that "[t]he review by the Tribunal is a re-consideration of the matter".

37 First, what is "the matter"? The "matter" referred to in s 44K(4) was identified in s 44K(1) and (2). In a case where the Minister has declared a service, the "matter" is "the declaration" made by the Minister. In a case where the Minister decided not to declare a service, the matter is "the designated Minister's decision" not to make a declaration. In both cases, the hinge about which the identification of the "matter" turns is what the Minister has done, not what the NCC did when it made its declaration recommendation. The requirement of s 44K(4) – that the Tribunal review the matter and that the review be "a re-consideration of the matter" – necessitates identification of the Minister's task. It is that task, and the result of its performance, which is to be subject to "re-consideration" by the Tribunal.

38 It will be necessary to consider the Minister's task in more detail. Immediately, however, it is enough to notice that the Minister's task was identified by s 44H(1) as being, "[o]n receiving a declaration recommendation" by the NCC, to "either declare the service or decide not to declare it". This task began when the Minister was given "a declaration recommendation" by the NCC. What was the NCC's task?

The NCC's task

39 As the Act stood at the times relevant to these matters, when the NCC received an application for a declaration recommendation, it was obliged[22]

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22 s 44F(2)(a).

(unless the provider was the applicant) to tell the provider of the service that the application had been received. The Act required[23] the NCC to use its best endeavours to make a recommendation on an application under s 44F within four months of receiving the application (or such further period as the NCC fixed). If the NCC did extend the time for making its recommendation it was bound[24] to notify the applicant and the provider of the service of the day to which it had extended the period and to give public notice of its decision.

40 The NCC was given power to invite[25] public submissions on an application for a declaration recommendation. But the Act was silent about what steps the NCC should take to allow the provider of the service to answer any submissions or other material advanced either by the applicant or in public submissions in support of the application for a declaration recommendation. And although the NCC was bound to publish[26] both its recommendation and its reasons for the recommendation and to give a copy of that publication to both the applicant and the provider of the service, s 44GC(3) required the NCC to take these steps "on the day the designated Minister publishes his or her decision on the recommendation or as soon as practicable after that day".

The significance of the six mandatory criteria

41 It is next necessary to consider whether the content of the criteria of which both the NCC and the Minister had to be satisfied before recommending declaration of a service and deciding to declare a service sheds any light on the tasks that the Act required the NCC, the Minister and the Tribunal to perform. Those criteria have been set out earlier in these reasons.

42 Criterion (f) was "that access (or increased access) to the service would not be contrary to the public interest". It is well established[27] that, when used in

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23 s 44GA.

24 s 44GA(3) and (5).

25 s 44GB.

26 s 44GC.

27 See, for example, *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; [1989] HCA 61; *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 443-444 [55]; [2006] HCA 45; *Osland v Secretary to Department of Justice* (2008) 234

(Footnote continues on next page)

a statute, the expression "public interest" imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*[28], when a discretionary power of this kind is given, the power is "neither arbitrary nor completely unlimited" but is "unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view". It follows that the range of matters to which the NCC and, more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access) would *not* be contrary to the public interest is very wide indeed. And conferring the power to *decide* on the Minister (as distinct from giving to the NCC a power to *recommend*) is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office.

43 Another criterion of which the NCC and the Minister must be satisfied (criterion (c)) may also direct attention to matters of broad judgment of a generally political kind. It required the NCC and the Minister to be satisfied that the facility in question is of *national* significance having regard to its size, or the importance of the facility to constitutional trade or commerce, or the importance of the facility to the *national* economy.

44 The other criteria that were to be considered (like criterion (a) about competition and criterion (b) about development of another facility) were of a more technical kind. The legislative scheme is consistent with it being expected that the conclusions reached, and reasoning adopted, by the NCC in relation to these more technical issues would likely be influential on the Minister.

CLR 275 at 300 [57], 323 [137]; [2008] HCA 37; *Osland v Secretary to Department of Justice [No 2]* (2010) 241 CLR 320 at 329 [13]; [2010] HCA 24. See also *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505; [1947] HCA 21.

28 (1947) 74 CLR 492 at 505.

The Minister's task

45 The Minister had only a short time to decide how to respond to a declaration recommendation. While the NCC could extend[29] the time for making its recommendation about an application for a declaration, the Minister was given 60 days after receiving the NCC's declaration recommendation to decide whether to declare the service. Section 44H(9) provided that, if the Minister did not publish his or her decision on the declaration recommendation within 60 days after receiving it, the Minister was taken, at the end of that period, to have decided not to declare the service and to have published that decision. In such a case, the Minister would publish no reasons for decision but the NCC's reasons for recommending a declaration would be published pursuant to s 44GC. If the Minister made a decision, the Act obliged[30] the Minister to publish that decision and the reasons for it.

46 There is one other aspect of the Act's treatment of the Minister's task to which attention should be drawn. The Minister, unlike the Tribunal[31], was given no express power to request any further information, assistance or report from the NCC. The statutory supposition appears to have been that the Minister could and would make a decision on the NCC's recommendation without any need for further information from the NCC.

47 The content of those provisions of Pt IIIA to which reference has been made suggests that it was expected that, armed with a recommendation from an expert and non-partisan body (the NCC), the Minister would make a decision quickly and would do so according to not only the Minister's view of the public interest but also the expert advice given by the NCC about the more technical criteria of which the Minister had to be satisfied before a declaration could be made. And it is the Minister's decision, not the NCC's recommendation, that was the matter that was to be reviewed by the Tribunal.

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29 s 44GA.

30 s 44HA(1).

31 s 44K(6).

Section 44K(4) – a "review" which is a "re-consideration"

48 Section 44K(4) is the central provision defining the Tribunal's task. The text of s 44K is set out earlier in these reasons and it will be recalled that it provided that "[t]he review by the Tribunal is a re-consideration of the matter". The requirement that the Tribunal review the Minister's decision neither permits nor requires a quasi-curial trial between the access seeker and the facility provider as adversarial parties, on new and different material, to determine whether a service should be declared. That would not be a "review" of the Minister's decision which was "a re-consideration of the matter". To explain why that is so, it is desirable to begin by noticing some aspects of relevant legislative history.

49 As originally enacted, the Act gave two kinds of task to the Tribunal (then known as the Trade Practices Tribunal): first, the Tribunal was given power to conduct a review under Pt IX (ss 101-110) of a determination by what was then the Trade Practices Commission (now the Australian Competition and Consumer Commission) made in relation to an application for, or the revocation of, certain authorisations under Pt VII (ss 88-95) in respect of restrictive trade practices; and second, the Tribunal was given power, on reference by the Minister, to inquire and report into any matter relevant to the exercise of certain powers by the Governor-General under Pt X (ss 111-146) in relation to overseas cargo shipping[32].

50 The first kind of task was described by s 101(2) as "[a] review by the Tribunal" of the determination by the Commission and as "a re-hearing of the matter". Given that the Commission, in determining an application for authorisation, was bound[33] to "take into account any submissions in relation to the application made to it by the applicant or any other person" and was given[34] power, "where it considers it appropriate to do so, [to] hold a public hearing in relation to the application", the reference to the review by the Tribunal being "a re-hearing" was evidently apt.

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32 The provisions of Pt X were repealed and new provisions substituted by *Trade Practices (International Liner Cargo Shipping) Amendment Act* 1989 (Cth), s 4. The detail of those changes need not be noticed.

33 s 90(2).

34 s 90(2).

51 Division 2 of Pt IX (ss 103-110) made more particular provision for the procedure of and evidence before the Tribunal in reviews by the Tribunal of determinations of the Commission. Section 103 made general provision for the procedure of the Tribunal including a provision[35] that the Tribunal was not bound by the rules of evidence. Section 105(1) gave the Tribunal power to take evidence on oath or affirmation and for that purpose permitted a member of the Tribunal to administer an oath or affirmation. Both by their location as a division of Pt IX, and in their terms, the provisions of Div 2 of Pt IX regulating the procedure of and evidence before the Tribunal were apt to apply only to the particular kind of proceeding for which Div 1 of Pt IX provided – an application under s 101(1) for a review of a determination by the Commission regarding authorisation.

52 The second kind of task which, as originally enacted, the Act gave to the Tribunal was initiated by the Minister referring[36] to the Tribunal "for inquiry and report any matter relevant to the exercise of the power of the Governor-General" to make certain orders under Pt X (a part of the Act dealing with overseas cargo shipping). A Tribunal inquiry of that kind was regulated by Div 5 of Pt X (ss 132-143). Those provisions regulating an inquiry by the Tribunal were evidently intended to operate separately from the provisions of Div 2 of Pt IX. That is why s 132(2)(b) of the Act provided, as it did, that s 43 (concerning composition of the Tribunal) applied "*as if* ... the inquiry ... were the hearing and determination of proceedings" (emphasis added). The provisions of Div 2 of Pt IX (regulating proceedings before the Tribunal on a review of a determination of the Commission as a re-hearing) did not apply to the performance of this second kind of task.

53 The *Trade Practices Amendment Act* 1977 (Cth) made some amendments to Pt IX of the Act, including[37] repealing the existing s 102 and substituting a new s 102 to provide for the functions and powers of the Tribunal. The essential framework of the provisions of Pt IX was, however, unaltered. In particular, the provisions of Div 2 of Pt IX applied to reviews by the Tribunal of identified

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35 s 103(1)(c).

36 s 132(1).

37 s 65.

kinds of decision by the Commission and s 101(2) as substituted[38] continued to provide that a review by the Tribunal "is a re-hearing of the matter".

54 In 2006 further substantial amendments were made to the Act. The *Trade Practices Legislation Amendment Act (No 1)* 2006 (Cth) ("the 2006 Amendment Act") added[39] a new division to Pt VII of the Act (Div 3) dealing with merger clearances and authorisations. Subdivision B of the new Div 3 of Pt VII provided for the Commission to give merger clearances and subdiv C provided for the Tribunal to give merger authorisations. A new division was added[40] to Pt IX (Div 3) to provide for the review by the Tribunal of the Commission's determination on merger clearances.

55 Of greatest significance for present purposes, the 2006 Amendment Act inserted[41] a new s 102A in Div 1 of Pt IX. The new section defined "proceedings" and provided:

> "In this Part:
>
> ***proceedings*** includes:
>
> (a) applications made to the Tribunal under Subdivision C of Division 3 of Part VII; and
>
> (b) applications made to the Tribunal under section 111 (about review of Commission's decisions on merger clearances)."

Although the new s 102A was expressed as an inclusive definition, it is notable that no reference was made to applications to the Tribunal of the kind for which Pt IIIA of the Act then provided and had provided since Pt IIIA was inserted[42] in the Act in 1995.

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38 *Trade Practices Amendment Act* 1977 (Cth), s 64(b).

39 s 3, Sched 1, item 27.

40 s 3, Sched 1, item 36.

41 s 3, Sched 1, item 33.

42 *Competition Policy Reform Act* 1995 (Cth), s 59.

56 Two points of present relevance are to be made. First, there was and is no textual link between s 44K and its specification of the functions of the Tribunal on review of a declaration or decision not to make a declaration and the provisions of Div 2 of Pt IX dealing with the procedure of and evidence before the Tribunal in "proceedings" as that term is defined in s 102A. BHPB submitted that "proceedings" should be understood in s 102A as embracing any and every "formal process by which a matter is determined by the Tribunal" and as thus including reviews undertaken pursuant to s 44K. Rio Tinto and the NCC made submissions to the same general effect. Reference was made to other provisions of the Act (notably ss 37, 41 and 42(1) and (2)) which it was said contemplated the Tribunal conducting a proceeding in the general sense identified. But if "proceedings" is used in the all-embracing sense put forward by BHPB, it was unnecessary to specify two identified kinds of applications as included in the word. That construction of the Act should not be adopted. There is then no textual link between s 44K and Div 2 of Pt IX. Second, there is an evident contrast to be drawn between the provision made in Div 1 of Pt IX (by s 101(2)) – that the Tribunal's review of decisions of the kind with which that Division deals "is a re-hearing" – and the provision made by s 44K(4) that "[t]he review by the Tribunal is a re-consideration of the matter".

57 Contrary to the submissions of Rio Tinto and BHPB, that contrast is not sufficiently explained by noticing that the Tribunal's review of decisions of the kind with which Div 1 of Pt IX deals is a review of a decision made after a hearing, whereas a review of the kind now under consideration is a review of a decision by the designated Minister that ordinarily, even invariably, would be made without any hearing. Rather, as BHPB correctly pointed out by reference to several decisions of this Court[43], the nature of the review must be determined by reference to the terms of the statute. And a review that "is a re-hearing of the matter"[44] must be understood as being different from a review that "is a re-consideration of the matter"[45]. If, as Rio Tinto and BHPB submit, it is

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43 See, for example, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 261; [1995] HCA 10; *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 295 [25], 311-312 [92], 324 [132]; [2008] HCA 31; *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* (2011) 85 ALJR 1183 at 1184 [5]; 281 ALR 687 at 688-689; [2011] HCA 41.

44 s 101(2).

45 s 44K(4).

important to notice that decisions which are reviewed as a rehearing are decisions made only after a hearing, and decisions of the kind now in question will ordinarily be made without a hearing, the observation serves only to reinforce the conclusion that would otherwise follow from the different language used in the relevant provisions that the Act provides for different kinds of review of the two kinds of decisions.

58 To observe, as Rio Tinto did, that the procedures which have been followed in these matters have taken a very long time does not shed any light on that question of construction. The matters have taken a very long time because of the assumptions that were made about the Tribunal's task. That conditions in the iron ore industry may have changed over that time in ways that could be relevant to whether the particular services should be declared does not affect the proper construction of the relevant provisions. In particular, in construing the relevant provisions, it is not useful to ask whether the Tribunal, on remitter, could or should now seek under s 44K(6) some further information or assistance from the NCC, or to ask whether obligations of procedural fairness would permit or require the Tribunal to allow either the applicant for a declaration or the incumbent service provider to say how the industry has or has not changed since the Minister made the decision under review. Both of those inquiries that have been identified arise only because of the prolonged course which these particular matters have taken. Neither inquiry would arise had the matters taken the more timely course that should have been followed. Neither inquiry bears at all upon what s 44K(4) means.

59 There have been many judicial decisions about the meaning to be given to the word "rehearing" when used in connection with appeals. In *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd*, Mason J rightly described[46] the expression "the appeal is by way of rehearing" as a "Delphic utterance" which did not greatly illuminate the determination in that case of the nature of the task given to a court in reviewing by way of "appeal" a decision by an administrative body. And it has long been recognised[47] that different meanings can be given to the word "rehearing" even when used in connection with an appeal from one court to another.

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46 (1976) 135 CLR 616 at 622; [1976] HCA 62.

47 *Powell v Streatham Manor Nursing Home* [1935] AC 243 at 249.

60 When s 101(2) of the Act used "re-hearing" to describe the task of the Tribunal reviewing a determination of the Commission, it was using "re-hearing" in a context wholly divorced from the exercise of judicial power. And when s 44K(4) referred to "re-consideration", it too used that word in a context divorced from the exercise of judicial power. Nonetheless, some different meaning must presumably be intended by the use of the different words in identifying the review to be undertaken by the Tribunal. The contrast is best understood as being between a "re-hearing" which requires deciding an issue afresh on whatever material is placed before the new decision maker and a "re-consideration" which requires reviewing what the original decision maker decided and doing that by reference to the material that was placed before the original decision maker (supplemented, in this kind of case, only by whatever material the NCC provides in answer to requests made by the Tribunal pursuant to s 44K(6)).

61 Contrary to the submissions of the respondents, the amendments that were made to s 44K in 2010 by the *Trade Practices Amendment (Infrastructure Access) Act* 2010 (Cth)[48] ("the 2010 Act") shed no light on the proper construction of that section as it stood before those amendments were made. It may be accepted that, as was submitted, the amendments proceeded on the assumption that, when conducting a review under s 44K, the Tribunal would otherwise proceed in the manner in which it did in these matters. But that assumption was based upon what the Tribunal had done in the past. It was not based upon any authoritative consideration of the question of construction that now arises.

62 Both Rio Tinto and BHPB drew attention to the power in s 44ZZP to make regulations "in relation to the functions of the Tribunal under [Pt IIIA]". In particular, s 44ZZP(e) provides for the making of regulations about "procedure and evidence". It by no means follows, however, that the particular function which the Tribunal is given by s 44K is one which is to be performed by the taking of evidence. Part IIIA does give functions of that kind to the Tribunal. For example, s 44ZP provides for the review of certain determinations as "a re-arbitration of the access dispute" and that is a function that would require the taking of evidence. The engagement of s 44ZZP depends upon first identifying the relevant function of the Tribunal. And in this case that depends upon

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48 s 3, Sched 1, items 11-13.

construing s 44K. Neither the power given by s 44ZZP, nor any of the regulations made under it, sheds any light on the construction of s 44K.

63 Rio Tinto and the NCC also drew attention to s 44K(5), which provides that "[f]or the purposes of the review, the Tribunal has the same powers as the designated Minister". It was said that the Minister, in deciding whether to declare a service, has "incidental" or "implied" power to request additional information beyond the NCC's recommendation. And, the argument continued, it followed by reason of s 44K(5) that the Tribunal also had extensive incidental or implied power to obtain information. Whether, or to what extent, the Minister has an incidental or implied power to obtain additional information need not be decided. Any such power that is given to the Tribunal by s 44K(5) must be "[f]or the purposes of the review". The scope of any such incidental or implied power depends upon first identifying the nature of the Tribunal's review, which in turn depends upon construing s 44K.

64 Fortescue submitted that its construction of the relevant provisions was supported by constitutional considerations. Fortescue argued that if the Tribunal was required to consider afresh, on new material, what was in the public interest, the task given to the Tribunal was one which could not be given to a Ch III judge acting as President of the Tribunal persona designata. Because the relevant provisions should be construed in the manner described for the reasons that have already been given, it is not necessary to consider the constitutional point raised by Fortescue.

The Tribunal did not perform its statutory task

65 As has already been noted, the Tribunal treated its task as being to decide afresh on the new body of evidence and material placed before it whether the services should be declared. That was not its task. Its task was to review the Minister's decisions by reconsidering those decisions on the material before the Minister supplemented, if necessary, by any information, assistance or report given to the Tribunal by the NCC in response to a request made under s 44K(6). The Tribunal not having performed the task required by the Act, the Federal Court should have granted Fortescue's applications for certiorari to quash the Tribunal's decision.

66 Rio Tinto submitted that the Court should none the less dismiss Fortescue's appeals. It submitted that, on the construction of criterion (b) which it advanced, the material which was before the Minister (and before the NCC) could not satisfy that criterion. The appeal books prepared for use in this Court

do not include the material that was made available to the Minister or the NCC. Neither written nor oral argument was directed in this Court to what that material might show. This Court should make the orders which the Full Court of the Federal Court should have made.

67 Fortescue submitted that in addition to granting certiorari, the Full Court of the Federal Court should have gone on to "reinstate the Minister's decisions" because, so it was submitted, "on its own consideration of the Minister's decisions in [par 1347 of the Tribunal's reasons[49]], the Tribunal would have upheld the Minister's decisions had it approached its task correctly". How, on applications for judicial review, the Federal Court could have "reinstate[d] the Minister's decisions" was not explained. And the factual premise for the submission – that the Tribunal would have upheld the Minister's decisions – was not established.

68 In the passage of the Tribunal's reasons to which Fortescue referred, the Tribunal said[50] that:

> "while we set aside two ministerial decisions, it does not follow that we disagree with those decisions. ... The nature of the industry that was before the minister when the decisions were first taken is significantly different from the industry that we have here."

This statement may very well not amount to a positive adoption by the Tribunal of the Minister's decisions when made. But even if it were, it would be an endorsement by the Tribunal arrived at otherwise than on the basis of reviews of the kind which it was bound to undertake and to which the applicants for review were entitled. The matters should be remitted to the Tribunal for further consideration according to law.

69 Because that is so, it is not necessary to consider the arguments which Fortescue advanced about denial of procedural fairness. It is, however, both necessary and desirable to consider the three questions that have been raised about the construction and application of the disputed criteria for those are questions that will arise when the reviews are remitted to the Tribunal.

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49 (2010) 271 ALR 256 at 474 [1347].

50 (2010) 271 ALR 256 at 474 [1347].

The six criteria – three questions

70 As noted earlier in these reasons, these appeals were said to present three questions about the construction of the six criteria of which the Minister had to be satisfied[51] before declaring a service. What does criterion (b) mean when it says that "it would be uneconomical for anyone to develop another facility to provide the service"? What matters can be taken into account under criterion (f) which requires the Minister to be satisfied "that access (or increased access) to the service would not be contrary to the public interest"? If satisfied of all six criteria, does the Minister nonetheless have a discretion to refuse to declare the service in question?

Extrinsic material

71 Extensive reference was made in the course of argument to the very large body of extrinsic material associated with the introduction of, and consideration of subsequent amendments to, the provisions of Pt IIIA. Reference was made to the report of the National Competition Policy Review ("the Hilmer Report")[52] and in particular to Ch 11 of that report entitled "Access to 'Essential Facilities'". Reference was made to the draft legislative package prepared for the Council of Australian Governments[53] which incorporated draft provisions not materially different from those provisions of Pt IIIA of immediate relevance to these appeals. Reference was also made to the Second Reading Speech[54] and Explanatory Memoranda for the Competition Policy Reform Bill 1995 by which Pt IIIA was introduced into the Act. And reference was also made to the terms of the Competition Principles Agreement originally made on 11 April 1995 between the Commonwealth, the States and the Territories to record the agreement of the Council of Australian Governments to the principles of competition policy articulated in the Hilmer Report. Particular reference was made to cl 6 of the Competition Principles Agreement as that agreement stood at 13 April 2007.

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51 s 44H(4).

52 Australia, National Competition Policy Review, *National Competition Policy*, (1993).

53 Australia, Council of Australian Governments, *National Competition Policy: Draft Legislative Package*, (1994).

54 Australia, Senate, *Parliamentary Debates* (Hansard), 29 March 1995 at 2434.

72 In 2001, the Productivity Commission published a report entitled *Review of the National Access Regime*[55]. In that report, the Productivity Commission proposed what it described[56] as "a range of modifications to the architecture of Part IIIA to ensure that access regulation is better targeted and more workable". Reference was made in argument to what was said in that report and what was said in a written response by the Federal Government to the recommendations made in the report[57]. Following the Productivity Commission report and the Government response, the Trade Practices Amendment (National Access Regime) Bill 2005 was introduced into the Federal Parliament to make a number of amendments to the provisions of Pt IIIA. Reference was made in argument to the Second Reading Speech[58] and the Explanatory Memoranda for that Bill.

73 The Court was also provided with the Explanatory Memorandum for the Trade Practices Amendment (Infrastructure Access) Bill 2009. Enacted as the 2010 Act, a number of amendments were made to the administrative processes associated with the application of the National Access Regime. The alterations made to Pt IIIA did not apply[59] to any of the steps taken with respect to the applications by Fortescue for access to any of the four railway lines mentioned at the outset of these reasons. And the provisions of the 2010 Act will not apply to the reviews of the declaration recommendations the subject of the proceedings in the Federal Court of Australia when they are remitted to the Tribunal for further consideration. It may be noted, however, that one important element of the amendments made by the 2010 Act was to limit[60] expressly the material to which the Tribunal could have regard in conducting a review of the declaration of a

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55 Australia, Productivity Commission, *Review of the National Access Regime*, Report No 17, (2001).

56 Australia, Productivity Commission, *Review of the National Access Regime*, Report No 17, (2001) at XII.

57 Australia, *Government Response to Productivity Commission Report on the Review of the National Access Regime*, (2004).

58 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 June 2005 at 1.

59 s 2.

60 s 3, Sched 1, items 11-13, 70.

service or the Minister's decision not to declare a service. Subject to some qualifications whose detail need not be noticed, the Tribunal is to be limited[61] in reviewing such a matter to the material that was before the Minister.

74 With this volume of extrinsic material available, it is unsurprising that those advocating competing constructions of the disputed provisions emphasised different parts of the extrinsic material and suggested that the use of particular expressions or phrases found in the material supported the particular construction being urged. Subject to one possible qualification concerning the relevance of the assumptions that underpinned the 2006 amendments, little is to be gained by trawling through the extrinsic material with a fine gauge net. The resolution of the contested question of construction of criterion (b) is not to be found by noticing no more than that the Hilmer Report referred more than once to "essential facilities" and "natural monopoly". Neither is a phrase that appears anywhere in the text of Pt IIIA. Nor can the contested question of construction be resolved by selecting particular quotations from the Hilmer Report and then attempting to construe the different and particular words of criterion (b) on the assumption that they give effect to those isolated passages. It is necessary to give meaning to the relevant statutory text and demonstrate why that meaning is to be adopted.

75 It was suggested by the NCC that the extrinsic material shows that the 2006 amendments were enacted on an assumption that criterion (b) was to be understood as requiring the application of a net social benefit test. As was pointed out in argument, the Productivity Commission noted[62] in its report that such consideration as had by then been given by the Tribunal to criterion (b) favoured reading it as requiring the application of a net social benefit test. But the report went on to say[63] that the Productivity Commission was "not as sanguine as some participants [in the Commission's inquiry] that judicial interpretation of the declaration criteria is fully settled". Accordingly, the

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61 s 44ZZOAA.

62 Australia, Productivity Commission, *Review of the National Access Regime*, Report No 17, (2001) at 165, 170-173, 180-182, 191.

63 Australia, Productivity Commission, *Review of the National Access Regime*, Report No 17, (2001) at 192.

Productivity Commission said[64] that "[g]iven that case law in this area is still in the developmental phase, the Commission considers that it would be prudent to monitor developments regarding declaration/coverage/revocation activities". In these circumstances, contrary to the submissions of the NCC, it cannot be concluded that the 2006 amendments were enacted against a background of an accepted or settled understanding of the meaning or operation to be given to criterion (b).

Criterion (b) – three construction questions

76 At least three questions are presented by the text of criterion (b): "that it would be uneconomical for anyone to develop another facility to provide the service". First, what is meant by "uneconomical"? Does it use the word as an economist would use it, to refer to an "inefficient" use of society's resources? Or does it mean "unprofitable"? Second, when it is said that "it would be uneconomical for anyone to develop another facility" does the criterion require the postulation of a hypothetical circumstance (if someone – anyone – were to develop another facility) and the determination of whether that hypothesised circumstance "would be uneconomical"? Or does the phrase "it would be uneconomical for anyone" direct attention to whether it is demonstrated to the decision maker's satisfaction that no one *will* develop another facility because there is not "anyone" for whom it would be "economical" (profitable) to do so? And third, how is the reference to "anyone" to be understood? Is it to be understood as anyone other than (say) the incumbent supplier of the service? Is it, as Fortescue submitted, used to make the relevant inquiry wholly general or "anonymous"?

77 The better view of criterion (b) is that it uses the word "uneconomical" to mean "unprofitable". It does not use that word in some specialist sense that would be used by an economist. Further, criterion (b) is to be read as requiring the decision maker to be satisfied that there is not anyone for whom it would be profitable to develop another facility. It is not to be read as requiring the testing of an abstract hypothesis: *if* someone, anyone, were to develop another facility. When used in criterion (b) "anyone" should be read as a wholly general reference that requires the decision maker to be satisfied that there is no one, whether in the market or able to enter the market for supplying the relevant service, who would

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64 Australia, Productivity Commission, *Review of the National Access Regime*, Report No 17, (2001) at 192.

find it economical (in the sense of profitable) to develop another facility to provide that service.

78 It is convenient to explain and justify these conclusions by beginning with consideration of the three different constructions that have been proffered for criterion (b).

Criterion (b) – three possible constructions

79 Two constructions of criterion (b) give the word "uneconomical" a meaning drawn from the study of economics. Although distinct, the two meanings are closely related. The first of these "economic" constructions of criterion (b) directs attention to whether the facility in question can provide society's reasonably foreseeable demand for the relevant service at a lower total cost than if it were to be met by providing two or more facilities[65]. This construction directs attention to the costs of producing the service. The Tribunal adopted this test in these cases and described[66] it as a "natural monopoly approach".

80 A second, and different, understanding of criterion (b) drawing from the study of economics would adopt what was described[67] as a "net social benefit approach". That test, adopted[68] in earlier Tribunal decisions, would seek to decide what is "uneconomical" by taking account not only of productive costs and benefits but also considerations of allocative efficiency and dynamic efficiency. Allocative efficiency was described in the Hilmer Report[69] as being "where resources used to produce a set of goods or services are allocated to their highest valued uses (ie, those that provide the greatest benefit relative to costs)".

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65 *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 at 394 [850].

66 (2010) 271 ALR 256 at 391 [838]; see also at 386 [815].

67 (2010) 271 ALR 256 at 391 [838].

68 *Re Sydney Airports Corporation Ltd* (2000) 156 FLR 10; *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1.

69 Australia, National Competition Policy Review, *National Competition Policy*, (1993) at 4.

Dynamic efficiency was described[70] as reflecting "the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities". The central question, if a net social benefit approach were to be adopted, was described by the Tribunal in *Re Duke Eastern Gas Pipeline Pty Ltd*[71] as being "whether for a likely range of reasonably foreseeable demand for the services provided by means of the [facility], it would be more efficient, in terms of costs and benefits to the community as a whole, for one [facility] to provide those services rather than more than one".

81 The third and preferable construction that has been proffered for criterion (b) (described[72] by the Tribunal in the present matters as a "privately profitable test") directs attention to whether any person (including the incumbent operator of the facility to which access is sought) would find it profitable to establish a second or competing facility.

82 The first two constructions of criterion (b) treat the words "for anyone to develop another facility" as identifying an abstract hypothesis. That is, the first two constructions read criterion (b) as requiring the application of the standard embodied in the word "uneconomical" to a hypothetical case: *if* someone (who need not be identified – "anyone") were to develop another facility to provide the service. The standard to be applied then requires assessment of the resulting costs and benefits (either the productive costs and benefits, or the productive, allocative and dynamic costs and benefits) of that hypothesis. If the balance of costs and benefits is negative, the hypothesised development is classed as "uneconomical" and criterion (b) would be met; if the balance is positive, the criterion would not be met. So understood, criterion (b) requires no prediction of likely market behaviour. In particular, on neither of these readings of criterion (b) is it relevant to ask whether there is "anyone" – existing market participant or new entrant – who would likely "develop another facility to provide the service" under consideration. The expression "for anyone to develop another facility" is thereby stripped of much, if not all, of its natural meaning. The sole focus of inquiry is upon the *circumstance* of development of another

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70 Australia, National Competition Policy Review, *National Competition Policy*, (1993) at 4.

71 (2001) 162 FLR 1 at 32 [137].

72 (2010) 271 ALR 256 at 390 [835].

facility to the exclusion of consideration of the *agent* who brings about that circumstance.

83 By contrast, the "privately profitable test" (or to adopt a phrase used[73] by the Full Court, the "economically feasible" test) focuses only upon whether it is shown to be likely that anyone could profitably, and therefore would be likely to, develop another facility to provide the service. That is, the central assumption informing and underpinning this construction of criterion (b) is that no one will develop an alternative service unless there is sufficient prospect of a sufficient return on funds employed to warrant the investment. And criterion (b) is read as directing attention to whether there is "anyone" for whom it would be economical (in the sense of profitable, or economically feasible) to develop another facility to provide the service.

Criterion (b) – three Tribunal decisions

84 It is convenient to refer to three Tribunal decisions to identify what the Tribunal has seen as being the competing merits of each of the three constructions that have been identified. Those decisions are *Re Sydney Airports Corporation Ltd* [74], *Duke Eastern*[75] and the Tribunal's decision in the present matter. *Duke Eastern* concerned the National Third Party Access Code for Natural Gas Pipeline Systems and not Pt IIIA of the Act. Because the processes for accessing pipelines that the Code established are not materially different from those established by Pt IIIA, the Tribunal's treatment of the Code is, and has been treated by the Tribunal and the Federal Court as, pertinent to the construction of Pt IIIA.

85 In both *Sydney Airports* and *Duke Eastern* the Tribunal expressed[76] a preference for the view that:

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73 (2011) 193 FCR 57 at 98 [100].

74 (2000) 156 FLR 10.

75 (2001) 162 FLR 1.

76 *Duke Eastern* (2001) 162 FLR 1 at 13 [59]; see also *Sydney Airports* (2000) 156 FLR 10 at 67-68 [204].

> "in deciding whether it is 'uneconomic' for a person other than the provider of the existing [facility] to develop another [facility] the inquiry is not limited to a narrow accounting view of 'uneconomic', or simply issues of profitability. Rather, 'uneconomic' is to be construed in a broader social cost benefit sense, in which the total costs and benefits of developing another facility are brought to account."

86 Adopting this view of "uneconomic" was said[77] in *Duke Eastern* to follow from the Hilmer Report which the Tribunal said[78] "suggests that criterion (b) was intended to describe a [facility] which exhibits 'natural monopoly characteristics'". The Tribunal referred[79] to the view expressed by the NCC that a single facility does exhibit those characteristics where that facility can meet market demand at less cost than two or more facilities. And that was a view that accepted[80] that, "to an economist, 'efficiency' has three dimensions ... productive efficiency, allocative efficiency and dynamic efficiency". But it is important to notice that in no decision of the Tribunal has it been necessary to attempt to identify or measure the allocative or dynamic costs or benefits associated with the building of another facility to provide the service in question. How those costs or benefits could be identified or measured was not explored in either *Sydney Airports* or *Duke Eastern*.

87 In *Duke Eastern*, the Tribunal made two further observations of present relevance. First, the Tribunal referred[81] to, and appears to have embraced, expert evidence given in that case to the effect that:

> "On the basis of many studies and long experience, economists have concluded that the main virtue of competition is that it provides a very powerful means of securing important gains in allocative and especially dynamic efficiency."

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77 (2001) 162 FLR 1 at 13-14 [58]-[62].

78 (2001) 162 FLR 1 at 13 [60].

79 (2001) 162 FLR 1 at 13 [60].

80 (2001) 162 FLR 1 at 14 [63]; see also at 14 [64].

81 (2001) 162 FLR 1 at 14 [63].

Second, in terms equally applicable to Pt IIIA, the Tribunal referred[82] to the absence of any mechanism in the National Third Party Access Code for Natural Gas Pipeline Systems for deterring an economically "inefficient" duplication of facilities. As the Tribunal rightly observed[83], owners of facilities will generally "act on private cost, rather than social cost considerations". If there is a profit to be made by duplicating a facility, those who would invest in such a duplication can be expected to consult only their own private financial interests, not any wider social consideration. Construing criterion (b) as providing for a net social benefit test would permit access to infrastructure facilities where provision of an alternative facility would be "inefficient" according to that test, but the Act would neither deter nor prevent "inefficient" duplication of facilities.

88 In the present matters, the Tribunal rejected[84] the construction of criterion (b) that would require application of a net social benefit test and rejected[85] a construction of criterion (b) that would require application of a privately profitable test. Instead, the Tribunal concluded[86] that "a natural monopoly approach is preferable to a net social benefit approach adopted in previous tribunal decisions". The Tribunal explained[87] that "[n]atural monopoly rests upon a production cost function which does not take into account social benefits or net social benefits" and that "natural monopoly characteristics are concerned with the costs of production based on the available technology". In the Tribunal's view[88], "a net social benefit test gives criterion (b) a role which overlaps substantially, and perhaps usurps, the role of criterion (f)".

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82 (2001) 162 FLR 1 at 14 [64].

83 (2001) 162 FLR 1 at 14 [64].

84 (2010) 271 ALR 256 at 391 [838].

85 (2010) 271 ALR 256 at 390 [835].

86 (2010) 271 ALR 256 at 391 [838].

87 (2010) 271 ALR 256 at 391 [838].

88 (2010) 271 ALR 256 at 391 [838].

89 To determine whether a facility is a natural monopoly, the Tribunal said[89]:

> "it is necessary, first, to determine the reasonably foreseeable potential demand for the facility (strictly the service proved by the facility), and then compare the capital and operating costs of a shared facility to the sum of the capital and operating costs of an existing facility (or an expanded existing facility) and a new facility".

The Tribunal acknowledged[90] that "[t]esting for a natural monopoly is notoriously difficult". Among the difficulties that the Tribunal noted[91] was that, although a facility must have the characteristics of a natural monopoly at the time of declaration, it is appropriate to consider what the future holds. And, as the Tribunal went on to point out[92], "[t]he problem with that approach is that as cost structures change with ever-changing demand and, as technology changes, what is a natural monopoly today may not be one tomorrow". The solution proffered[93] by the Tribunal to this conundrum was to take account of the future only to the extent to which "the future is predictable with some measure of confidence". What could not be predicted was to be ignored.

90 Chief among the reasons given by the Tribunal for adopting a "natural monopoly" test were its rejection of a privately profitable test and its identification of the difficulties in applying a net social benefit test. The Tribunal's reasoning about a privately profitable test will be considered separately. In relation to a net social benefit test, the Tribunal said[94] that it is important to bear in mind:

> "that many social costs and benefits are necessarily difficult, and sometimes impossible, to quantify. Accordingly, it may be difficult to

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89 (2010) 271 ALR 256 at 395 [855].

90 (2010) 271 ALR 256 at 394 [849].

91 (2010) 271 ALR 256 at 394 [852].

92 (2010) 271 ALR 256 at 394 [852].

93 (2010) 271 ALR 256 at 394 [852].

94 (2010) 271 ALR 256 at 391 [838].

> conclude, at least in quantifiable terms, that there is or is not a 'net social benefit'. A requirement to be positively satisfied of such a matter – which would be a requirement if criterion (b) were a net social benefit test – would create a threshold which may, in practical terms alone, be difficult to satisfy."

And the Tribunal contemplated[95] that if a net social benefit test were to be applied under criterion (b), the same or at least similar considerations would likely be engaged under criterion (f) and yet, when considered in connection with criterion (f), yield a different result from that obtained when considered under criterion (b).

91 In its reasons[96], the Tribunal examined whether the privately profitable test "ignores efficiency considerations, in particular, the allocative efficiency associated with the use of a natural monopoly facility"[97]. The examples given[98] by the Tribunal considered only productive costs of the kind with which it dealt later in its reasons when considering the "natural monopoly" test. Those examples shed no light on the allocative or dynamic costs or benefits of establishing another and profitable facility to provide the service. And the examples that were given by the Tribunal assumed rather than demonstrated that the productive costs of meeting existing and future demand for the service through the existing facility, together with a second *profitable* facility, would be greater than the costs of meeting that demand through sharing the existing facility. Necessarily underpinning that analysis were unstated assumptions about how the profitability of the new facility was to be assessed. In particular, the analysis appears not to have taken into account how or why it would be that the *new* facility would be expected to generate an appropriate return on funds employed if the same demand could be met from the use of an *existing* facility. The existing facility must itself already be generating a sufficient return on funds employed to justify its continued operation. A new facility would be profitable only if it too would generate an appropriate return. Why is the deployment of

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95 (2010) 271 ALR 256 at 391-392 [839].

96 (2010) 271 ALR 256 at 387-388 [820]-[824].

97 (2010) 271 ALR 256 at 387 [820].

98 (2010) 271 ALR 256 at 388 [823]-[824].

capital in building and operating a new facility inefficient if it, like the existing facility, provides a reasonable return on investment?

92 The reasons given by the Tribunal in this matter drew attention to the essential difficulties that follow from adopting an economist's understanding of "uneconomical". No reason is shown for doubting the correctness of the Tribunal's conclusion[99] that dynamic and allocative costs cannot be measured satisfactorily if a net social benefit test is applied. Nor is any reason shown to doubt the correctness of the observation made[100] in *Duke Eastern* that dynamic and allocative costs are best minimised, and dynamic and allocative benefits are best enhanced, by competition. And it would follow that development of another facility to provide the service (if competing with the existing facility) would best minimise those costs and enhance those benefits.

93 Although the Tribunal concluded that criterion (b) should be read as requiring a natural monopoly test, it expressly acknowledged[101] that "[t]esting for a natural monopoly is notoriously difficult ... because of the difficulty in obtaining relevant cost information". Yet the Tribunal said that the test should be applied because, in the words of an expert witness adopted[102] by the Tribunal, the test "*tries* to answer the *right* question" (emphasis added). Why the Act should be construed as requiring the application of a test that is "notoriously difficult" to apply and why the question posed by the natural monopoly test was "the right question" was not elucidated by reference to any consideration beyond the frequency of reference in the Hilmer Report to "natural monopoly". And as the Tribunal rightly pointed out[103], the legislation and the Competition Principles Agreement that followed the Hilmer Report "adopted a more elaborate series of criteria for declaring access than those which were originally recommended". Further, as the Tribunal also recognised[104], a facility may be a natural monopoly at the time of declaration but it may not be one tomorrow. Why the Act should

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99 (2010) 271 ALR 256 at 391 [838].

100 (2001) 162 FLR 1 at 14 [63].

101 (2010) 271 ALR 256 at 394 [849].

102 (2010) 271 ALR 256 at 394 [849].

103 (2010) 271 ALR 256 at 389 [826].

104 (2010) 271 ALR 256 at 394 [852].

be construed as requiring the application of a test that now can be applied only with difficulty, and cannot be applied at all in respect of the long period for which a service may be declared, was not explained.

Criterion (b) – the test to be applied

94 As has already been pointed out, the extrinsic material to which reference may be made in connection with the construction of Pt IIIA (what the Tribunal referred[105] to as the "enacting history") is very large. As has also already been observed, the Hilmer Report in particular referred more than once to the notion of a "natural monopoly". But the statutory expression of the criteria is much more elaborate than the discussion of the issues in the Hilmer Report. And those criteria do not include any that use the expression "natural monopoly".

95 Despite the frequency with which reference may be found in the extrinsic material to "natural monopoly" and the absence of any reference to a "privately profitable" test by that name, no conclusion can safely be drawn about the proper construction of the relevant provisions of Pt IIIA from those observations alone. Attention must focus upon the language of the relevant provisions. Nor can the relevant question of construction be answered by attaching more or less pejorative epithets to one of the competing views. That is, the question of construction is not to be resolved by describing[106] a privately profitable test as a "narrow accounting view"; it is not to be resolved by using the word "profitable" as a term of disapproval.

96 Textual considerations point away from the construction adopted by the Tribunal and point towards adopting a privately profitable construction of criterion (b). First, the Full Court was right to conclude, as it did[107], that criterion (b) is framed in a way that directs attention, "not to whether the NCC or the Minister or the Tribunal judged that it would be 'economically efficient' from the perspective of society as a whole for another facility to be developed to provide the service, but [to] whether 'it would be uneconomical for anyone' to do so". Second, as the Full Court[108] and the Tribunal[109] both noted,

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105 (2010) 271 ALR 256 at 390 [835].

106 *Sydney Airports* (2000) 156 FLR 10 at 68 [204].

107 (2011) 193 FCR 57 at 92 [76].

108 (2011) 193 FCR 57 at 93 [78].

s 44H(5) requires the Minister, when deciding whether a State or Territory access regime is an effective access regime, to apply the principles set out in the Competition Principles Agreement and, so far as presently relevant, those principles direct[110] attention to whether it is "economically feasible to duplicate the facility". And as the Full Court decided[111], correctly, that expression points away from reading criterion (b) as requiring an evaluation of efficiency from the perspective of society as a whole rather than an evaluation of what would be feasible or practical for an actual or potential participant in the market place.

97 In considering how criterion (b) should be construed, due weight must be given, as this Court has previously emphasised[112], to "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". More particularly, it may be accepted that the Tribunal was right to emphasise[113] that criterion (b), like all other provisions of Pt IIIA, is to be construed in the light of the objects of the Part as they have been stated, since 2006, by s 44AA.

98 The extrinsic material (especially the Hilmer Report) and the stated objects of Pt IIIA show that the Part is intended to operate in a way that will contribute to national economic efficiency. Duplication of a "natural monopoly" may be one form of economic inefficiency. That is, if the entire output of a relevant market can be supplied by a single firm at lower cost than by any combination of two or more firms, it would be inefficient to have more than one firm supplying the relevant market. And in such a case the incumbent firm, or the industry, can be described as a "natural monopoly". But several further points must be made about these propositions.

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109 (2010) 271 ALR 256 at 390 [830]-[831].

110 Competition Principles Agreement, 11 April 1995 (as amended to 13 April 2007), cl 6.1(a).

111 (2011) 193 FCR 57 at 93 [78]-[79].

112 *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at 161 [42]; [2008] HCA 45.

113 (2010) 271 ALR 256 at 386-387 [818]-[819].

99 First, duplication of a facility provided by a firm of the kind described would be "inefficient" or "wasteful" only if the duplication is not necessary and the duplication leads to increased cost. That is, the attribution of terms like "inefficient" and "wasteful" depends upon the accuracy of the conclusion that the entire output of the market not only *could* be supplied by the incumbent but also could be supplied at *lower cost* than by two or more firms. Asking about an incumbent's ability to meet demand at a lower overall cost than supply by two or more firms focuses upon existing conditions. As the Tribunal rightly observed[114] in the present matters, it is difficult to predict future demand and changes in technology cannot be predicted. The inquiries required by Pt IIIA necessarily look to an extended period into the future. Deciding that there is *now* a "natural monopoly" considers only a snapshot of economic efficiency. Yet the decision to declare a service under Pt IIIA must hold good for the whole of the period of the declaration. Although the Minister can decide to revoke a declaration upon receiving a revocation recommendation from the NCC, the existence of this power does not justify the adoption of an inappropriate test for making a declaration in the first place.

100 Second, and no less importantly, it must be recognised that efficiency of the kind considered by reference to "natural monopoly" is not the only relevant economic consequence. A single supplier may be able to exploit users of the supplier's service by using its market power to raise prices, at least if not restrained by regulation or the threat of competitive entry into the market. And if the single supplier does face a credible threat of new entry, it is probable that the natural monopoly is not sustainable. But more importantly, the existence of a credible threat of entry will contribute to the efficiency of the relevant market by inducing the monopolist to produce and price its services efficiently. To say this is simply to restate basal competition principles which underpin the whole of the Act.

101 These considerations of competition principles, together with the considerations of national economic efficiency that have been already noted, do not point away from adopting a privately profitable test. In order to show why that is so, it is useful to consider what different outcomes would follow from applying a private profitability test and from applying a natural monopoly test, if the facility being considered for declaration under Pt IIIA is or is not in fact a

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114 (2010) 271 ALR 256 at 394 [852].

natural monopoly and the only criterion that remains for consideration before declaring the service is criterion (b).

102 If criterion (b) is read as a privately profitable test, there may be cases where there would be a duplication of a natural monopoly. But duplication would occur only if it were profitable for another to develop an alternative facility to provide the service (despite the fact that total market output could be supplied at lowest cost by one facility). It *would* be profitable for another to develop an alternative facility if the new facility is more efficient than the existing facility, for example, because of some form of cost or technological advantage. And if the new facility is *not* more efficient than the existing facility, it is to be doubted that development of the new facility in competition with a natural monopoly would be profitable. Especially would that be so where, as here, the capital costs of establishing the new facility would necessarily be very large.

103 By contrast, if criterion (b) is read as a natural monopoly test, a facility that is *not* a natural monopoly cannot be declared even if there is no (profit) incentive to duplicate it. In that case, the sole supplier would be left in control of the field with the attendant risks of abuse of market power and, no less importantly, with no incentive to price and produce efficiently. An outcome of that kind does not sit easily with the requirement that criterion (b) be understood in a way that will "promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets"[115]. The Tribunal was wrong to conclude, as it did[116], that adoption of a privately profitable test of the kind being considered by the Tribunal would not adequately meet those objectives. A privately profitable test serves those objectives better than a natural monopoly test.

Applying a "privately profitable" test

104 It would not be economical, in the sense of profitable, for someone to develop another facility to provide the service in respect of which the making of a declaration is being considered unless that person could reasonably expect to obtain a sufficient return on the capital that would be employed in developing

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115 s 44AA(a).

116 (2010) 271 ALR 256 at 390 [835].

that facility. Deciding the level of that expected return will require close consideration of the market under examination. What is a sufficient rate of return will necessarily vary according to the nature of the facility and the industry concerned. And if there is a person who could develop the alternative facility as part of a larger project it would be necessary to consider the *whole* project in deciding whether the development of the alternative facility, as part of that larger project, would provide a sufficient rate of return. But the inquiry required by criterion (b) should be whether there is *anyone* who could profitably develop an alternative facility.

105 The Full Court said[117] that the reference in criterion (b) to "anyone" should be read as *not* including the incumbent owner of the facility to which access is sought. The Full Court relied, in this respect, on what was said by the Tribunal in *Sydney Airports*[118] in the course of its rejection of a privately profitable test. The Tribunal concluded[119] in that case that if uneconomical was interpreted "in a private sense then the practical effect would often be to frustrate the underlying intent of the Act". But that conclusion, said[120] to be "closely connected to the question of whether 'anyone' should include the owner of the facility providing the service to which access is sought", was a conclusion that proceeded from the premise that the net social benefit test was consistent with the "underlying intent of the Act". That is, the conclusion proceeded from an incorrect construction of criterion (b). No reason is shown to read "anyone" in criterion (b) as limited in its application. In criterion (b), "anyone" includes existing and possible future market participants.

106 Contrary to Fortescue's submissions asking whether it would be uneconomical in the sense of unprofitable for anyone to develop an alternative facility does not ask a question to which no answer can be given with any sufficient certainty. Of course it is a question that would require the making of forecasts and the application of judgment. But the converse question – whether it would be economically feasible to develop an alternative facility – is a question that bankers and investors must ask and answer in relation to any investment in

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117 (2011) 193 FCR 57 at 94 [83].

118 (2000) 156 FLR 10 at 67-68 [204]-[205].

119 (2000) 156 FLR 10 at 68 [205].

120 (2000) 156 FLR 10 at 68 [205]; see also at 68 [204].

infrastructure. Indeed, it may properly be described as *the* question that lies at the heart of every decision to invest in infrastructure, whether that decision is to be made by the entrepreneur or a financier of the venture.

107 If the Minister is satisfied that it would be uneconomical (in the sense of not profitable) for anyone to develop an alternative facility, criterion (b) is met.

Criterion (f)

108 Criterion (f) requires the Minister (and the NCC) to be satisfied "that access (or increased access) to the service would not be contrary to the public interest". The great breadth of matters that can be encompassed by that criterion has already been described[121].

109 The Tribunal's reasons in these matters show[122] that it considered that criterion (f) (and what it identified[123] as a residual discretion to be exercised before a service was declared) required the examination of all costs and benefits of access to each service and the striking of a balance between all of those costs and all of those benefits. The Tribunal said[124] that:

> "criterion (f) and the discretion do not require a precise quantifiable cost/benefit analysis. None the less, in what follows [in the Tribunal's reasons] we have attempted to *compare the benefits and costs of access*, where possible giving them some order of magnitude value." (emphasis added)

The Full Court noted[125] that "[t]he Tribunal brought into account under criterion (f) considerations of costs and benefits which had in previous decisions of the Tribunal been considered under the rubric of criterion (b)". And in the

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121 See above at [42].

122 (2010) 271 ALR 256 at 444-468 [1160]-[1305].

123 (2010) 271 ALR 256 at 445 [1163].

124 (2010) 271 ALR 256 at 468 [1305].

125 (2011) 193 FCR 57 at 101 [104].

proceedings in the Full Court, Fortescue submitted[126] that the Tribunal had erred in adopting this approach. The Full Court rejected[127] Fortescue's submissions. The Full Court said[128]:

> "It is apparent from the Tribunal's reasons that the costs which it took into account under criterion (f) would have been taken into account under criterion (b) if the net social benefit approach to criterion (b) had been applied by the Tribunal. Whether or not these costs fall for consideration in relation to criterion (b) or criterion (f), it cannot be right to say that these costs should be ignored altogether. To say that is to assert the irrelevance of the legitimate interests of the incumbent provider and the public interest in productive and allocative efficiency. That assertion does not conform to the legislation's intention."

110 The conclusion reached by the Tribunal and by the Full Court about criterion (f) depended upon the assumption that the Tribunal was bound to make its own assessment, on the new body of evidence and material placed before it, of whether access or increased access would be contrary to the public interest. But, as has been explained, that was not the Tribunal's task. Its task was to reconsider what the Minister had decided. And performance of that task directed attention immediately to the bases on which the Minister was satisfied that access would not be contrary to the public interest.

111 Because so many different kinds of consideration may be relevant to an assessment of what is "contrary to the public interest", many if not all of those matters which can be described as "social costs" *could* be relevant to that assessment. And the significance to be attached to such social costs would, no doubt, be affected by the existence of any countervailing social benefits. But it is important to keep at the forefront of consideration that, when the Tribunal is required to review a ministerial decision to make a declaration, the Minister has been satisfied that access or increased access would *not* be contrary to public interest. And when the Tribunal is required to review a ministerial refusal to make a declaration the Minister will have said, in any reasons for decision required by s 44HA(1), whether or not he or she was satisfied of criterion (f).

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126 (2011) 193 FCR 57 at 102 [106].

127 (2011) 193 FCR 57 at 102 [108].

128 (2011) 193 FCR 57 at 102 [108].

112 In neither case is it to be expected that the Tribunal, reconsidering the Minister's decision, would lightly depart from a ministerial conclusion about whether access or increased access would not be in the public interest. In particular, if the Minister has not found that access would not be in the public interest, the Tribunal should ordinarily be slow to find to the contrary. And it is to be doubted that such a finding would be made, except in the clearest of cases, by reference to some overall balancing of costs and benefits.

113 No question arises in these matters about the Tribunal's decision to affirm the Minister's deemed decision to refuse to declare the Mt Newman line. The Minister's deemed decision will not be the subject of further consideration by the Tribunal. It is therefore neither necessary nor appropriate to examine the difficulties that may be presented by the circumstance that the Tribunal's re-consideration of a deemed decision to refuse to declare a service cannot begin from any statement of the Minister's reasons.

114 There remains for consideration whether there is some residual discretion.

Is there a residual discretion?

115 Section 44H(1) provides that:

> "On receiving a declaration recommendation, the designated Minister must either declare the service or decide not to declare it."

Section 44H(4) provides that:

> "The designated Minister cannot declare a service unless he or she is satisfied of all of the following matters ..."

116 Section 44H(1) obliges the Minister to decide whether or not to declare the service. Although expressed negatively – "[t]he designated Minister cannot declare a service unless ..." – the six criteria specified in s 44H(4) should be understood as stating an exhaustive list of the considerations that may bear upon the decision to declare a service. Read as a whole, s 44H should be understood as conferring a power on the Minister which must be exercised by declaring the service if the Minister is satisfied of all of the six criteria specified in s 44H(4). If the Minister is satisfied of all of the six criteria, including in particular that access (or increased access) to the service would not be contrary to the public interest, no satisfactory criterion or criteria could be devised which would guide the exercise of some residual discretion. Though drafted very differently, the provisions of s 44H are not different in effect from provisions of the kind

considered in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation*[129]. That is, if the Minister, having considered the matter, is satisfied of all of the six criteria, the Minister must declare the relevant service.

117 BHPB submitted in this Court that there is a residual discretion. In aid of that submission, BHPB relied upon the decision of the Full Court of the Federal Court in *Sydney Airport Corporation Ltd v Australian Competition Tribunal*[130] and the Explanatory Memorandum for the Competition Policy Reform Bill 1995, which introduced Pt IIIA into the Act. Those submissions drew attention to s 44H(2), which provides:

> "In deciding whether to declare the service or not, the designated Minister must consider whether it would be economical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the designated Minister may make a decision whether to declare the service or not."

118 The second sentence of s 44H(2) is, by its terms, limited to that sub-section and so has no relevance to the existence or otherwise of a residual discretion. And in so far as the Explanatory Memorandum referred[131] to a discretion whether or not to declare a service, those references simply emphasised that the Minister has to consider whether it would be economical for anyone to develop another facility to provide part of that service.

119 There is no residual discretion and it follows that, on review, the Tribunal has no residual discretion to exercise. The Tribunal, and the Full Court, were wrong to proceed on the footing that there was a residual discretion to be exercised.

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129 (1971) 127 CLR 106; [1971] HCA 12.

130 (2006) 155 FCR 124.

131 Australia, House of Representatives, Competition Policy Reform Bill 1995, Explanatory Memorandum at 26-27 [180], 28 [188].

Conclusion and orders

120 The Full Court concluded that Fortescue's application for judicial review should be dismissed because the Tribunal found[132] that it could not be satisfied that it was not profitable to build rail lines that would duplicate the services to which Fortescue had sought access. But again, the conclusions reached by the Tribunal in this respect were reached on evidence and material far beyond the evidence and material to which it should have had regard in conducting a review of the kind required by the Act. There having been no review by the Tribunal of the kind for which the Act provided, the orders made by the Full Court of the Federal Court in these matters should be set aside. In their place there should be orders in each matter that a writ of certiorari, directed to the Tribunal, issue to quash the Tribunal's determination the subject of that proceeding. The matters should be remitted to the Tribunal for determination according to law.

121 Having regard to the stage at which and circumstances in which the determinative issue in these matters arose, there should be no order for the costs of the proceedings in this Court or in the Full Court of the Federal Court. Each party and the NCC as intervener should bear its own costs.

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132 (2010) 271 ALR 256 at 410 [960].

122 HEYDON J. The appeals concern Pt IIIA of the *Trade Practices Act* 1974 (Cth) ("the Act"). Part IIIA created a process by which persons could gain access to infrastructure owned by others. In connection with this process, Pt IIIA imposed a duty on the National Competition Council ("the Council"). That duty was to recommend either that a particular "service" be "declared" by the "designated Minister", or that it not be declared. Whether the Council would recommend that a particular "service" be "declared" depended on whether it was satisfied that the criteria described in s 44G(2) were met. The Minister's decision to make the declaration depended on satisfaction of the same criteria, which were set out again in s 44H(4).

123 The appellants are The Pilbara Infrastructure Pty Ltd and Fortescue Metals Group Ltd. They enjoyed success before the Council. They enjoyed less success before the Minister. That success was reduced even further on review of the Minister's decision by the Australian Competition Tribunal ("the Tribunal"). And it was reduced further still after an appeal to the Full Court of the Federal Court of Australia ("the Full Court"). This procedural history and other material background circumstances are set out in the plurality reasons[133]. Below, the expression "respondents" will be used to refer to the active respondents as well as the Council, an intervener. The active respondents are certain companies in the BHP Billiton Group and certain companies in the Rio Tinto Group. The Council advanced submissions generally supporting the active respondents on the first two questions in these appeals.

124 After oral argument concluded, there were three main questions in these appeals. The first question was: did the appellants' tardiness in raising the question whether the Tribunal correctly conceived its task under s 44K(4) preclude this Court from considering it? The second question was: did the Tribunal correctly conceive its task under s 44K(4)? And the third question was: did the Full Court adopt the correct interpretation of s 44H(4) of the Act? The answer to each question is "No".

Is this Court barred from considering the role of the Tribunal?

125 The appellants raised a point about the role of the Tribunal under s 44K(4) only at a late stage in oral argument in this Court. They then sought leave to amend their notices of appeal. The respondents opposed that leave. Does the appellants' tardiness prevent the point now being raised? No.

126 The appellants did protest about the over-elaborate course that the Tribunal was taking earlier, albeit briefly, and in a somewhat different context

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133 See above at [1]-[4], [14]-[23].

from the present. That course involved massive testimonial and documentary tenders.

127 In *Suttor v Gundowda Pty Ltd*, Latham CJ, Williams and Fullagar JJ said[134]:

> "The circumstances in which an appellate court will entertain a point not raised in the court below are well established. Where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards."

Strictly speaking, this principle cannot apply to these appeals. Contrary to the impression its lengthy determination in these proceedings may convey, the Tribunal is not a court. However, analogous considerations apply. On that approach, there is no procedural bar to considering the appellants' point. Assuming, contrary to the conclusion reached below[135], that it was open to the Tribunal to receive evidence which had not been before the Minister, no evidence could have been given in the Tribunal which, by any possibility, could have prevented the point which the appellants now take from succeeding there.

128 The respondents also contended that amendments to the Act in 2010 made the grant of leave futile. They submitted that those amendments meant that any decision by this Court construing the pre-2010 form of s 44K would have no general significance. Even if that is so, the question vitally affects the interests of the parties in these proceedings, and those of the nation. Those interests are of such considerable practical significance that it is appropriate to grant the appellants leave to amend their notices of appeal.

The role of the Tribunal under s 44K

129 Was it open to the Tribunal in its review of the Minister's decision to conduct a wholly fresh inquiry involving a mass of evidence which was, in large measure, not before the Minister when he made his decision? The answer depends on the proper construction of s 44K in its pre-2010 form. The appellants submitted that the question should be answered in the negative. According to the Council, that negative answer had never been given before.

130 Section 44K enabled a service provider or access-seeker aggrieved by the Minister's decision to apply to the Tribunal for review of it. Sub-section (4) imposed on the Tribunal a duty to conduct that review by way of a

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134 (1950) 81 CLR 418 at 438; [1950] HCA 35.

135 See below at [154].

"re-consideration of the matter". When those words are taken in isolation, their meaning is not clear. But examined in their statutory context, they mean that the Tribunal is not entitled to consider material other than that which was before the Minister, apart from any information, assistance and reports obtained from the Council pursuant to s 44K(6). On the respondents' construction of s 44K(4), participants in the review could raise issues and tender material whether those issues or that material had been before the Minister or not. On that construction, "re-consideration" in the Tribunal could have permitted a completely fresh start. That construction must be rejected. That is so for the following six reasons.

Reasons why the Tribunal's role is narrow

131 *The significance of s 44K(6).* First, the very existence of s 44K(6) is significant. Section 44K(6) empowered the presiding member of the Tribunal at the review to "require the Council to give information and other assistance and to make reports … for the purposes of the review." Very commonly what the Council might have supplied under s 44K(6) would not have been in the Council's reasons for its recommendation and would not have been otherwise before the Minister. Section 44K(6) tells against an untrammelled liberty in those appearing before the Tribunal to tender, and in the Tribunal itself to consider, material which had not been before the Minister. If those appearing before the Tribunal and the Tribunal itself had untrammelled liberties of these kinds, s 44K(6) would have been unnecessary. Parties appearing before the Tribunal would have been in a position to provide the material. Indeed, the Rio Tinto respondents fixed upon this point to argue that the appellants' amendment of their notices of appeal to raise this "re-consideration" ground should not be allowed as a matter of discretion. They submitted that leave to amend should not be given because the material the Tribunal was said to have received wrongly could have been received under s 44K(6) after the Rio Tinto respondents had given it to the Council for that purpose. The provision of a specific and demarcated power to obtain material that the Minister did not have when making the decision points against enlarging that power by implication. Some of the respondents argued that:

(a) the Minister had an incidental or implied power to request relevant and up-to-date information additional to that which underlay the Council's recommendation;

(b) s 44K(5) conferred on the Tribunal "the same powers as the … Minister";

(c) therefore the Tribunal could obtain evidence which went beyond what it could request under s 44K(6).

Step (a) may be assumed[136]. Step (b) is correct. But the reasoning leading to step (c) begs the question: what was the scope of the Tribunal's power to review under s 44K(4)? The powers conferred on the Tribunal by s 44K(5) were conferred "[f]or the purposes of the review". The scope of the review necessarily limited the powers which s 44K(5) conferred.

132 *Time factors.* Secondly, s 44GA(1) of the Act required the Council to use its best endeavours to make a recommendation on an application made to it under s 44F within four months. Section 44H(9) provided that the Minister had only 60 days after receiving a declaration recommendation from the Council to decide whether to declare the service and to publish reasons for that decision. If he failed to do so, he was taken to have decided not to declare the service. Section 44ZZOA(1) required the Tribunal to use its best endeavours to make a review decision within four months. Section 44ZZOA(2) required it to extend this standard period if it was unable to make a decision within that time. These provisions compelled a certain briskness in the procedures leading up to and including review in the Tribunal. This is not surprising in view of their importance. It was important that third parties with a good case for obtaining access to infrastructure have that case considered promptly at the declaration stage. It was also important that infrastructure owners achieve some commercial certainty by ensuring that an unsoundly based application be rejected promptly at the declaration stage. Even when the Minister declared a service, and all procedures by way of review and appeal in relation to that declaration were exhausted, the process of obtaining access was not complete. An agreement about the detailed aspects of access to the declared service would then be negotiated. Failing agreement, arbitration could then ensue. Section 44AA(a) provided that an object of Pt IIIA was to:

> "promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets".

In view of the dynamism, instability and fluidity of commercial life, that object could not have been fulfilled if there were substantial delays at either stage of the process by which access was either gained or successfully resisted. Delays – very substantial delays – could occur if the Tribunal hearing was wider in scope than the Minister's consideration of the Council's declaration recommendation. The risk of delays was particularly acute where excessive zeal on the part of the participants in the hearing rendered the materials to be considered bulkier. The Tribunal could not complete its review speedily if those materials assumed the enormous proportions they did in relation to these appeals. If the respondents'

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136 The Council's submissions referred to *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 45; [1986] HCA 40.

construction of s 44K(4) were accepted, the Tribunal's control over what it had to examine in a review would be weakened. If the appellants' construction of s 44K(4) is accepted, then the Tribunal would retain control. The Tribunal would have had to examine only what the Minister examined, and additional material procured only by means of s 44K(6).

133 *Inter partes proceedings?* Thirdly, there were no "parties" in a s 44K review. This is another factor that points against the respondent's construction of s 44K(4). It was not necessary that the person seeking access to services apply to the Council for a declaration recommendation. Under s 44F(1), the application could be made by the "designated Minister, or any other person". Section 44GB conferred power on the Council to invite submissions from the public. But the Act made no more specific provision for an access-seeker or a service provider to make submissions to the Council. And neither the access-seeker nor the service provider enjoyed a more privileged role before the Minister in any substantive respect. The Council submitted that the proceedings before the Tribunal were inter partes proceedings. The "proceedings" before the Minister were not. The Tribunal had the same powers as the Minister pursuant to s 44K(5). The Council did not explain how review of a decision that was not inter partes by a Tribunal having the same powers as the decision-maker became inter partes. Nor did the Council explain how the inter partes character of the review gave those participating a right to adduce evidence in an unconstrained way. If the respondents' interpretation of s 44K(4) were correct, both the access-seeker and the service provider would have the capacity to tender fresh material and raise new issues before the Tribunal. That capacity would stand in sharp contrast with their inability, other than as members of the public, to widen the material that the Council considered. It would also stand in sharp contrast with their inability to expand the material that the Minister considered.

134 To widen the roles of the access-seeker and the service provider in the Tribunal beyond their roles in relation to the recommendations of the Council and the decisions of the Minister would have called for statutory language to support that expanded role. The legislation did widen their roles a little, but not enough to support the respondents' construction. Section 44K(1) provided for a disappointed service provider to apply to the Tribunal for review. And s 44K(2) empowered the person who applied unsuccessfully for the declaration recommendation to apply to the Tribunal for review. Regulation 22B(1) of the Trade Practices Regulations 1974 (Cth) ("the Regulations") provided for the original applicant to "participate in the review" triggered under s 44K(1). Regulation 22B(2) provided for the service provider to "participate in the review" triggered under s 44K(2). But these references to participation did not suggest a right of participation so extensive as to permit the Tribunal to enlarge the field of material that the Minister considered.

135 *Connection between the declaration recommendation and the declaration decision.* The fourth point against the respondents' interpretation of s 44K(4)

concerns the connection between the declaration recommendation and the declaration decision. The Council had power to invite public submissions, and it was obliged to have regard to them in deciding what recommendations to make. The Act contained no express grant of power to the Minister to seek submissions from interested persons, the public or anyone else. It is true that there was no express prohibition on the Minister adopting this course. However, the Act contemplated that it was to be primarily the Council, a body composed of experts, which engaged in expert analysis of the issues an application raised. And the Act contemplated that the Minister, who would not necessarily possess the same expertise, but who would be experienced in resolving broader political questions, would decide in the light of that experience whether to follow the expert recommendation. Like the Council, the Minister was not cast in the role of an inter partes decision-maker. And like the Council, the Minister was cast more in the role of a guardian of the public interest. Section 44H(1) imposed on the Minister a duty either to declare or not declare the service. Section 44HA(1) imposed on the Minister a duty to publish "his or her decision on a declaration recommendation and his or her reasons for the decision." It was implicit in these duties that the Minister had a duty to consider the Council's declaration recommendation.

136 There was plainly a close connection between the Council's declaration recommendation and the Minister's declaration decision. The respondents denied this close connection. Their argument compelled this denial. If they had not denied it, the foundation for their contention that the Tribunal could act entirely independently of events before the Council and the Minister would vanish. The respondents' argument did not accommodate the language of s 44H(9). Section 44H(9) spoke of the Minister making a "decision on the declaration recommendation". Its words did not admit of that decision being based on some new issue unconnected with the recommendation. Further, the respondents' argument did not accommodate the importance of the declaration recommendation in the case of a deemed refusal. In that case, there are no reasons from the Minister. The Council's reasons only are published. The respondents' argument set at naught the considered process the Act created. Under that process, the Council, which was both expert and independent, consulted the public and then gave a reasoned recommendation to an elected official. Whether a declaration was made or refused, that official was responsible to the legislature for the course taken. And the respondents' argument ignored s 44K(7). That section gave the Tribunal powers to "affirm, vary or set aside the declaration". This language concentrated the Tribunal's attention on whether the Minister's "decision on the declaration recommendation" was correct, rather than on what decision it should make of its own volition, after a fresh inquiry unconnected with the past. The Council's recommendation and the Minister's decision to declare or not to declare a service are not mere formal steps to be accomplished before the Tribunal may commence "re-consideration". They are integrally connected with that "re-consideration".

137 *The generality of criteria (a)-(f).* Fifthly, criteria (a)-(f) in ss 44G(2) and 44H(4) were all somewhat general[137]. The most general were criterion (a) ("material increase in competition"), criterion (b) ("uneconomical"), criterion (c) ("national significance") and criterion (f) ("public interest"). Some of the criteria depended on questions of economic expertise – for example, criterion (a) and criterion (e) ("effective access regime"). Others depended on different types of expertise – for example, criterion (d) ("health or safety"). Taken together, the criteria raised issues apt for consideration by an official responsible to the legislature acting with the benefit of an expert recommendation from the Council. Introducing further issues and fresh material after the Minister had reached a decision on such a recommendation was not consistent with the statutory scheme. That is particularly so if the Tribunal hearing became excessively forensic. The process that led to the Minister's decision lacked both publicity and forensic formality. It is true that under s 44GC the Council's recommendation had to be made public on or soon after the day the Minister's decision was published. And, so long as the decision was not a deemed refusal, under s 44HA(1), publication of the Minister's reasons for decision was also obligatory. However, the Act imposed no obligations on the Council to conduct hearings or to respond to submissions. It did not impose those obligations on the Minister either. That fact is hardly congruent with the Tribunal undertaking a process that considerably widened the approach taken by the Minister.

138 *The improbability of wide review.* Sixthly, in our system of responsible government, legislation is generally initiated by the Ministers of State who superintend other executive officers – the Cabinet. Legislation is generally enacted because the initiating Ministers come from, or are supported by, parties having majorities in the houses of the legislature. It was notorious in 1995, when s 44K was introduced, that commercial litigation was becoming cumbersome, bloated and therefore slow. It was notorious that these trends could be observed in some Trade Practices Tribunal hearings which permitted the reception of material that had not been before the original decision-maker. It was also notorious in 1995 that while administrative decisions were often subject to *judicial review*, and some were subject to *merits appeal*, the personal decisions of Ministers were not commonly subject to merits appeal to non-judicial tribunals on issues and using materials wider than those that had been before the Minister. The meaning which "re-consideration" in s 44K(4) would have had to contemporaries aware of these states of affairs is highly unlikely to have been a wide one. It was "re-consideration" of a decision which had to be made within a 60 day non-extendable period by the Minister with no duty to elicit materials beyond the Council's recommendation and the reasons for it. That recommendation was usually made within four months. Neither the Council nor the Minister was under any duty to permit any forensic process. It is improbable

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137 See above at [9].

that contemporary observers would have construed "re-consideration" as permitting an examination of wider issues in the light of ampler materials than those looked at in the original "consideration". It is improbable that contemporary observers would have seen "re-consideration" as permitting anything akin to contemporary commercial litigation. It is improbable that contemporary observers would have read s 44K(4) as permitting personal decisions of the Minister under s 44H, unlike those of most other Ministers, to be subjected to so intense and lengthy a scrutiny on the merits as happened before the Tribunal in this case.

The respondents' arguments in favour of the Tribunal's approach

139 It is necessary now to deal with eight arguments put by the respondents against the construction advocated by the appellants and accepted above.

140 *The irrelevance of ss 103-110.* First, some attention was paid in argument to what could be drawn from the contrast between "a re-consideration of the matter", as used in s 44K(4), and a "re-hearing", as used in s 101(2) in Pt IX. The word "re-hearing" was used to describe reviews by the Tribunal of certain determinations of the body formerly known as the Trade Practices Commission and now known as the Australian Competition and Consumer Commission ("the Commission"). Those determinations involved the grant or refusal by the Commission of authorisations under Pt VII Div 1. In considering applications for authorisations, s 90(2) obliged the Commission to take into account submissions by the applicant, the Commonwealth, a State, or any other person. Section 90A obliged the Commission to prepare draft determinations in relation to authorisation applications (other than applications under s 88(9)) and to invite interested persons to an oral conference. In these two senses, there had been a hearing before the Commission. It was therefore appropriate for the Act to provide that the review of the Commission's determination be undertaken as a "re-hearing" in s 101(2). The Minister's decision under s 44H, on the other hand, did not involve a hearing which was in any sense like those the Commission conducted under Pt VII Div 1.

141 That is not of fundamental significance. What is of fundamental significance is that nothing in the provisions in Pt IX Div 2 (ss 102A-110) suggested that they applied to s 44K reviews. Those provisions referred to various matters of evidence and procedure in "proceedings" before the Tribunal. Part IX concerned, as its heading said, "[r]eview by [the] Tribunal of [d]eterminations of Commission". Section 44K, on the other hand, concerned reviews by the Tribunal of determinations of the Minister. Nothing in Pt IX extended the provisions it contained beyond review of Commission determinations to s 44K reviews. The respondents argued that Pt IX did apply to s 44K reviews. They argued that ss 103-110 in Pt IX Div 2 dealt with the Tribunal's powers in "proceedings" before it. They submitted that s 44K fell

within the definition of "proceedings" in s 102A. That definition provided that in Pt IX:

> "***proceedings*** includes:
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> (a) applications made to the Tribunal under Subdivision C of Division 3 of Part VII [which deals with merger authorisations by the Tribunal]; and
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> (b) applications made to the Tribunal under section 111 (about review of Commission's decisions on merger clearances)."

The respondents contended that a proceeding before the Tribunal is a "formal process by which a matter is determined by the Tribunal". They submitted that a s 44K review was a proceeding. Accordingly they said that a s 44K review fell within the word "includes" in the s 102A definition.

142 If the respondents' argument were sound, it would not have been necessary to include pars (a) and (b) in the definition of "proceedings" in s 102A. The respondents attributed their inclusion to an abundance of caution. However, their argument is at odds with the statutory context. It cannot be reconciled with the heading to Pt IX (Review by Tribunal of Determinations of Commission). It cannot be reconciled with the terms of ss 101 (review of Commission determinations), 101A (review of exclusive dealing and collective bargaining notices given by the Commission), and 102 (review of Commission authorisation determinations). It cannot be reconciled with the terms of pars (a) and (b) of the s 102A definition (which dealt with the Tribunal's role in relation to mergers, not with Pt IIIA). And it cannot be reconciled with ss 111-119 (review of Commission's determinations on merger clearances). Section 109(1) dealt with review of Commission determinations about authorisations only. Section 109(1A) dealt with review of exclusive dealing and collective bargaining notices given by the Commission only. It is true that ss 103-108 and 110 were cast in quite general terms. But there was simply no statutory link between s 44K and the regime provided for by Pt IX Div 2 (particularly ss 103-108 and 110). And the context in which ss 103-108 and 110 appeared strongly suggested that they were limited to the topics specifically referred to in Pt IX; namely, various forms of Tribunal review of Commission determinations, and applications to the Tribunal about mergers under Pt VII Div 3 subdiv C. Hence the respondents' lengthy submissions about the powers ss 103-110 conferred did not demonstrate that the appellants' construction of s 44K(4) was inconsistent with Pt IX.

143 The respondents relied on Tribunal determinations supportive of their general approach. But for the most part those determinations rested on

assumptions[138] or concessions[139]. One did not. In *Re Fortescue Metals Group Ltd*, the Tribunal decided the point after argument[140]. With respect, for the reasons just given, the determination is not correct in that respect.

144 *The rules of procedural fairness.* Secondly, the respondents contended that the rules of procedural fairness compelled the Tribunal to afford persons likely to be adversely affected by its decision the right to bring forward evidence. Therefore, they submitted, their construction of s 44K should be preferred. Even if the rules of procedural fairness confer that right, they may be abrogated or qualified by statute. For the reasons stated above[141], s 44K did qualify them. And claims for a fair hearing at the Tribunal stage can be met by a request from the Tribunal to the Council under s 44K(6). To some extent the Tribunal's reasoning in this case rested on that argument by the respondents. So far as it did, the Tribunal's reasoning must be rejected. The Tribunal observed that one consequence of the rules of procedural fairness was that it was required:

> "to afford a party which may be adversely affected by its decision, the right to be heard, to be legally represented at a hearing before the tribunal and to lead evidence and cross-examine witnesses. Speaking very generally, the tribunal is master of its own forms and procedures. But the rules of procedural fairness act as a strong brake on the tribunal's ability to control the parties' conduct in a proceeding. One consequence is that proceedings before the tribunal have every appearance of a court-style hearing."[142]

The Tribunal's tendency in some of its activities to adopt the "appearance of a court-style hearing" probably influenced the wide view it took of its powers under s 44K. To some extent, the Tribunal operates procedurally like a court when conducting reviews or hearing applications governed by ss 103-110. But, as just noted, those "proceedings" take place pursuant to powers unconnected with Pt IIIA. The opinion as to the conduct of s 44K reviews that the Tribunal

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138 For example, *Re Freight Victoria Ltd* (2002) ATPR ¶41-884 at 45,127 [17]; *Re Asia Pacific Transport Pty Ltd* (2003) ATPR ¶41-920 at 46,836 [7].

139 *Re Lakes R Us Pty Ltd* (2006) 200 FLR 233 at 238-239 [26]-[28].

140 *Re Fortescue Metals Group Ltd* (2006) 203 FLR 28 at 32-33 [15]-[20].

141 See above at [129]-[142].

142 *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 at 267-268 [24].

expressed in this and other instances[143] appears to have been influenced by the powers it had for purposes other than conducting s 44K reviews.

145 *An analogy with the Administrative Appeals Tribunal.* Thirdly, the respondents submitted that the Tribunal was in the same position as the Administrative Appeals Tribunal under the *Administrative Appeals Tribunal Act* 1975 (Cth). They submitted that it was thus able to take into account evidence that had not been before the primary decision-maker. This submission does not support the respondents' construction of s 44K(4). Section 40(1) of that Act gives the Administrative Appeals Tribunal express powers to receive evidence. Section 40(1A) of that Act gives it express powers to make orders in the nature of subpoenas. Section 44K did not give the Tribunal these powers. Each of the two statutes must be considered in its own terms. They cannot be treated as identical or as generating relevant analogies.

146 *The assumptions behind the 2010 amendments.* Fourthly, the respondents relied on amendments relating to s 44K made in 2010, and on statements in Explanatory Memoranda about those amendments. They submitted that the amendments rest on a legislative assumption that the respondents' construction of the unamended s 44K – the provision at issue in these appeals – is correct. It is true that the function of the 2010 amendments was to overturn assumptions made by the Tribunal about its powers in certain earlier determinations. The impetus for the 2010 amendments came from a Competition and Infrastructure Reform Agreement reached by the Council of Australian Governments on 10 February 2006. That was less than two months after the Tribunal made two of those determinations.

147 However, subject to one exception noted above[144], no argument was advanced to the Tribunal challenging or analysing the correctness of those assumptions[145]. Hitherto, no judicial decision has analysed the correctness of those assumptions. On analysis, the assumptions are incorrect. In amending s 44K, the legislature may have been mistaken as to what the meaning of the unamended s 44K was. In *Cape Brandy Syndicate v Inland Revenue*

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143 See below at [146]-[147].

144 See above at [143].

145 For example, *Re Sydney International Airport* (2000) ATPR ¶41-754 at 40,755 [8]; *Re Freight Victoria Ltd* (2002) ATPR ¶41-884 at 45,128 [22]; *Re Virgin Blue Airlines Pty Ltd* (2005) 195 FLR 242 at 248-249 at [13]; *Re Services Sydney Pty Ltd* (2005) 227 ALR 140 at 144 [9]. In *Re Application by Fortescue Metals Group Ltd* (2006) 203 FLR 28 at 35 [29], in contrast, the matter was argued: the Tribunal saw itself as able to control the materials relied on by the parties, and denied that it was "bound to consider any submissions or material placed before the Minister."

Commissioners, Lord Sterndale MR said[146]: "subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation". In *Ormond Investment Co Ltd v Betts*, Lord Buckmaster quoted that statement with approval[147]. So did Dixon, Evatt and McTiernan JJ in *Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor Co Ltd*[148].

148 *Implications from other parts of the Act.* Fifthly, the respondents relied on implications to be drawn from other parts of the Act. One proposed implication concerned s 44ZQ. That section gave the Tribunal power to review final determinations by the Commission of access disputes. Section 44ZQ specifically provided that ss 103-110 did not apply to reviews undertaken pursuant to it. This, the respondents submitted, raised a strong implication that ss 103-110 were intended to apply to reviews under s 44K. The same point was made about ss 10.82B and 10.82C in Pt X of the Act. This submission must fail. Sections 44ZQ, 10.82B and 10.82C concern review by the Tribunal of a decision made by the Commission, not by the Minister. It was therefore not inappropriate for a specific exclusion of ss 103-110 to be made. The respondents' argument rests on an express exclusion of ss 103-110 in provisions to which they would otherwise apply – provisions enabling review of Commission decisions by the Tribunal. The respondents sought to draw from that exclusion an implication that ss 103-110 apply to a review by the Tribunal of a decision not made by the Commission. The reasoning does not follow.

149 The respondents also relied on a note to s 10.82E, and on s 10.82G of Pt X. These provisions concern review by the Tribunal of certain decisions of the Minister relating to overseas cargo shipping under s 10.82D. The note to s 10.82E is to the effect that Pt IX Div 2 applies to proceedings before the Tribunal pursuant to that section. Section 10.82G provides that Pt IX Div 1 does not apply to a review by the Tribunal of a decision of a Minister under s 10.82D. These straws are too slender to support an argument that Pt IX Div 2 applies to s 44K. Part X of the Act is in many ways sui generis. It is a separate and self-contained code. It has its own distinctive numbering. Its special goals lie outside and to some degree contradict the goals of the rest of the Act. Review by the Tribunal of a s 10.82D decision by the Minister is not said to be a "re-consideration" of the matter. And at the time relevant to these proceedings s 13(3) of the *Acts Interpretation Act* 1901 (Cth) provided that the note to s 10.82E was not even part of the Act.

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146 [1921] 2 KB 403 at 414.

147 [1928] AC 143 at 156.

148 (1937) 57 CLR 610 at 626; [1936] HCA 64.

150 *The Regulations.* Sixthly, some respondents submitted that ss 44ZZP(1) and 172 of the Act supported the respondents' construction of s 44K. Section 44ZZP(1)(e) granted power to make regulations relating to procedure and evidence. Section 172 granted power to make regulations relating to procedure in the Tribunal. It is debatable whether these powers permitted the making of regulations inconsistent with s 44K. In any event, neither power has been exercised to make a regulation concerning procedure or evidence before the Tribunal in relation to s 44K. Further, it may be that the regulation-making power in s 44ZZP(1) related only to s 44ZP (re-arbitration of access disputes).

151 It was also submitted that reg 22 supported the respondents' construction. That regulation conferred power on the Tribunal to give directions about preliminary statements of facts and contentions; the production of documents; and evidence. This power was said to demonstrate that the Tribunal could have regard to documents and other evidence which had not been before the Minister. However, reg 28Q(2) provided that reg 22 did not apply to a review. Further, reg 22 applied to "proceedings before the Tribunal". Regulation 22 was probably made under s 104, not s 44ZZP(1). This is because s 104 applies to regulations "with respect to evidence in proceedings before the Tribunal". For the reasons given above[149], the definition of "proceedings" in s 102A does not refer to s 44K reviews.

152 *Practical disadvantages?* Seventhly, some respondents claimed that the appellants' construction of s 44K would prevent the Tribunal from having regard to current information concerning the criteria raised by s 44H(4), particularly those requiring consideration of future circumstances. To this there are two answers. First, on the appellants' construction, the Tribunal's task was a confined one, capable of being accomplished quite soon after the Minister's decision was made. Secondly, any information which the Tribunal considered it needed in order to update the information that was before the Minister could be obtained from the Council under s 44K(6).

153 *Transmission of the "record".* Finally, some respondents submitted that if the Tribunal could consider only the material that had been before the Minister, one would expect s 44K to contain provisions "providing for the transmission of the record considered by the Minister to the Tribunal". They submitted that there are no such provisions. They also submitted that it might be difficult for the Tribunal to ensure that it was confining itself to the material before the Minister. This reveals the danger of over-curialising the Tribunal. In practice, it would be easy for the Tribunal to ascertain what had been and what had not been before the Minister. If the Minister made a decision under s 44HA(1) and (2), that decision, together with the reasons for it, had to be given to the applicant and the

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149 See above at [140]-[143].

service provider. If there was a deemed refusal because the Minister's decision on the declaration recommendation was not published within 60 days, the Council recommendation and the reasons for it would reveal the issues. That recommendation had to be published and given to the applicant under s 44F and to the service provider under s 44GC(1) and (4). If the Tribunal remained in doubt about whether it was confining itself to the material that had been before the Minister, it could make a s 44K(6) request for the Council's assistance.

154 *Conclusion.* The Tribunal exceeded the powers s 44K(4) conferred on it in its review of the Minister's decisions. It did not analyse either the Council's recommendation on which the Minister's decision was based, or the reasons for the Minister's decision. The Tribunal went a long way outside the issues and material referred to in those documents. It misapprehended its jurisdiction as being to deal with a fresh application, rather than being to reconsider the Minister's decision in a confined way. It said that s 44K(4)-(5) meant that it "must reconsider each application afresh. This allows the parties to put before the tribunal for its consideration any material that may be relevant to the issues raised, whether or not that material was before the minister."[150] That was a significant error in approach.

155 Thus the first two questions must be answered "No". One remedy contemplated by the parties was remitter to the Tribunal. That possibility enlivens the third question, concerning the construction of s 44H(4). Section 44H(4)(a)-(f) set out six criteria. The Minister needed to be satisfied that these criteria were met before declaring a service[151]. These appeals raised three discrete questions of construction in relation to them. First, when would it be "uneconomical for anyone to develop another facility" within the meaning of criterion (b)? Secondly, what matters might the Minister have taken into account in deciding whether access would be "contrary to the public interest" under criterion (f)? And, thirdly, did the Minister have a residual discretion to refuse to declare a service even if satisfied that the criteria in s 44H(4)(a)-(f) were met?

Criterion (b)

156 Criterion (b) was: "it would be uneconomical for anyone to develop another facility to provide the service."

157 The appellants submitted that "uneconomical" did not mean "unprofitable". Rather, they submitted that "uneconomical" meant "wasteful of society's resources". They submitted that it is "uneconomical" for society's resources to be wasted by duplicating an existing facility if the existing facility

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150 *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 at 267 [24].

151 See above at [9].

could meet reasonably foreseeable demand for the service it provided at a lower total cost than if the service was provided by two or more facilities.

158 The Tribunal accepted the appellants' construction of criterion (b). On that approach, it found that if the existing Hamersley railway line was used by third parties and not duplicated, there would be capital savings of up to $2.75 billion. It also found that if the existing Robe railway line were used by third parties and not duplicated, there would be capital savings of $455-651 million if the service provided by the Hamersley railway line were not declared and large capital savings if it were. Those findings demonstrate that economic waste would occur if the appellants did not gain access to the facilities. Capacity in excess of what was needed would be created, and the money used to create and operate that excess capacity would therefore be wasted. The result is an inefficient one.

159 The Full Court, on the other hand, considered that "uneconomical" meant "unprofitable". The appellants' construction of criterion (b) should be accepted for the following reasons.

160 *The appellants' construction accepted.* The first reason concerns some facts that were widely known when Pt IIIA was enacted. They involved infrastructure capable of delivering pay television services. One intended supplier of pay television services had equipment capable of transmitting its own signals and those of its rival. The former would not grant the latter access to its equipment. The latter then set about building its own equipment. This cost billions of dollars. It damaged the visual environment. It disturbed ordinary life across the whole of Australia during the processes of construction. Criterion (b) must be read as informed readers would have read it at the time of its enactment. Informed readers knowing those notorious and deplorable background facts would have read criterion (b) in the manner the appellants advocated.

161 Secondly, the appellants' construction is more consistent with s 44AA(a), which stated the first object of Pt IIIA[152]. The construction of a duplicate facility, where the existing facility was capable of meeting reasonably foreseeable demand for the services it provided, necessarily results in those services being provided at greater cost than they could have been if the existing facility alone were employed. This does not promote the "economically efficient operation of, use of, and investment in the infrastructure by which services are provided". And it probably fails to "[promote] effective competition in upstream and downstream markets". As the Tribunal said[153]:

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152 See above at [132].

153 *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 at 387 [818].

> "It is not hard to conceive of circumstances in which a market is less than effectively competitive because third parties, relying on marginally profitable alternative facilities, cannot truly compete with an incumbent using (a much more profitable) facility with natural monopoly characteristics."

162 Thirdly, the word "unprofitable" directs attention to the particular position of a particular trader. It involves subtracting that trader's costs from that trader's gross revenue. "Uneconomical" is a less than apt description of that idea. "Uneconomical" is more apt to refer to other matters. One lay meaning of "economical" is avoiding waste; "uneconomical" in that sense means not avoiding waste. Another lay meaning of "economical" is harmony with the principles of economics. In that sense, "uneconomical" means antithetical to the principles of economics – the study of the production, consumption, transfer and distribution of wealth. One principle of economics is the idea that social welfare is increased when resources are allocated so as to diminish excess capacity. Another is the idea that if there is excess capacity, resources have been misallocated. And another is the idea that productive efficiency is enhanced when goods and services are produced at the lowest possible cost. Thus in ordinary usage it is "uneconomical for anyone to develop another facility" if it would be wasteful to do so or would increase excess capacity or would result in an inefficient use of scarce resources.

163 These are appropriate meanings to attribute to a key provision of a statutory scheme the object of which is to promote the economically efficient operation of, use of, and investment in infrastructure. Further, the word "economically" in the statement of the first object of Pt IIIA in s 44AA(a) does not refer to questions of private profitability. There is no reason why "uneconomical" in s 44H(4)(b) should do so either, since s 44H(4)(b) is to be construed conformably with s 44AA(a) and with a view to effectuating the purpose that latter provision states.

164 The appellants' submission finds support in *Re Duke Eastern Gas Pipeline Pty Ltd*[154]. That determination was decided by a panel of the Australian Competition Tribunal presided over by Hely J. Speaking of legislation in similar form to s 44H(4)(b), Hely J said that the "test is whether for a likely range of reasonably foreseeable demand for the services provided by means of the [facility], it would be more efficient, in terms of costs and benefits to the community as a whole, for one [facility] to provide those services rather than more than one"[155]. Hely J saw efficiency as involving productive, allocative and

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154 (2001) 162 FLR 1.

155 *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1 at 32 [137].

dynamic efficiency. Hely J used these expressions in the following senses: "Productive efficiency is production at least cost. Allocative efficiency occurs when services are provided to those who value them most highly. Dynamic efficiency involves preserving incentives for innovation and investment."[156] Hely J added: "if a single [facility] can meet market demand at less cost (after taking into account productive allocative and dynamic effects) than two or more [facilities], it would be 'uneconomic', in terms of criterion (b), to develop another [facility] to provide the same services."[157]

165 This construction is intrinsically meritorious. But it has a further significance. In 2006, Pt IIIA was extensively amended. The amendments followed a report of the Productivity Commission on 28 September 2001. The report analysed the Tribunal's approach to criterion (b) in *Re Duke Eastern Gas Pipeline Pty Ltd*. The report concluded[158]:

> "In sum, the Commission considers that having criterion (b) operate as a screening device for natural monopoly technologies (at least for point-to-point transmission services like gas pipelines) is not necessarily inappropriate, provided that criterion (a) is strengthened …
>
> Finally, the Commission considers that it is essential that criterion (a) only be met where the facility in question can exercise *substantial and enduring market power*. It is therefore of the view that criterion (a) must be strengthened ..." (emphasis in original)

Like gas pipelines, railways are point-to-point transmission services. In 2006, s 44H(4)(a) was amended in response to that report. The amended criterion (a) required that access to a particular market would promote a material increase in competition in at least one market other than the market for the service in relation to which access was sought. But s 44H(4)(b) was left untouched. The report of the Productivity Commission did not suggest that criterion (b) created a private profitability test, or that the *Duke* test was wrong.

166 Fourthly, the Full Court's "private profitability" approach produces unsatisfactory results. The respondents' construction of criterion (b) creates a risk of two facilities being built in circumstances where building the second facility would waste resources and defy sound economic principles. That is because their construction compels the building of a duplicate facility whenever

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156 *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1 at 14 [63].

157 *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1 at 14 [64].

158 Australia, Productivity Commission, *Review of the National Access Regime*, Report No 17, (2001) at 182.

it is financially justifiable for a particular market participant, in view of its peculiar characteristics, to build a second facility. The appellants' construction of criterion (b) avoids this problem. On its construction, a duplicate facility will not be built if the existing facility is capable of satisfying reasonably foreseeable demand for the services it provides. The appellants' construction therefore better effects one of the purposes of Pt IIIA – the pursuit of economic efficiency. It is more efficient to have only one facility, provided it has capacity surplus to its owner's requirements, and for that owner to be allowed to charge others to use that capacity in return for being compelled to provide access.

167 The Full Court itself acknowledged that to interpret criterion (b) as imposing a "private profitability" test rather than adopting the appellants' interpretation "might occasion some wastage of society's resources in some cases"[159]. The appellants gave a powerful example:

> "the private profitability test focuses on a particular firm. Its satisfaction may depend upon the idiosyncratic position of that firm – for example, whether that firm has an integrated business that produces a valuable commodity. It considers whether the profit from the firm's activities, including related activities in upstream or downstream markets, may justify the construction of an alternative facility. The impact of this approach is exemplified by the circumstances of this case. Because there is significant profit to be made in iron ore (at least in the current circumstances), the Tribunal concluded that other companies could profitably duplicate the existing railway line, even though doing so would incur vastly greater costs than using the existing facility, because the profit from iron ore to be transported could more than cover the cost of the wasteful second facility.
>
> For example, if there are 10 independently-owned mining tenements for mining a valuable commodity some 50 km from a port, then it might be privately profitable for each tenement owner to build a separate railway line to the port that carries one train per day, in circumstances where a single existing line could carry 10 trains per day. On the Full Court's approach, there would be no declaration and 9 unnecessary lines would be built."

168 Why, then, did the Full Court conclude that criterion (b) rested on a "private profitability" test?

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159 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at 98 [100] per Keane CJ, Mansfield and Middleton JJ.

169 *Problems in the Full Court's reasoning.* One aspect of the Full Court's reasoning appears in the following passage, which criticised the Tribunal's adoption of the appellants' construction of criterion (b)[160]:

> "The Tribunal was influenced by the consideration reflected in the evidence of some economists that to give the phrase 'uneconomical for anyone' its natural meaning of 'any individual who can be identified' would be to countenance the possibility that an individual might be willing to subsidise the cost of developing another facility by subsidising the cost of that development from the profits of the sales of iron ore rather than sole reliance on the profits of providing the service … That argument may commend itself to some (though not all) economists; but nothing in the language of s 44H(4) or the extraneous materials … suggests that the legislature regarded that possibility as one which was not to be countenanced."

This passage illustrates the intentionalist fallacy in statutory construction. It is not the only passage that does so[161]. The question is not what possibilities the legislature regarded as those which were "not to be countenanced". The question is: what do the words in criterion (b) mean? If a particular consequence of one possible construction of criterion (b) is absurd or unreasonable, that is a factor legitimately to be taken into account in deciding whether another construction should be preferred. What the Full Court criticised is an instance of it. So is the appellants' example of the 10 mining tenements[162].

170 The Full Court referred to "the competing considerations at play in the compromise embodied" in criterion (b)[163]. It viewed one of those considerations as being a "philosophy" which it detected in Pt IIIA in general and in s 44H in particular. According to the Full Court, the philosophy in question[164]:

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160 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at 94 [84].

161 See *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at 95 [85], 97 [97] and 98 [99] and [100].

162 See above at [167].

163 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at 98 [100].

164 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at 95 [87].

> "makes the granting of access to override the otherwise legitimate interests of incumbent owners a distinctly exceptional occurrence which is simply not justified by an evaluation by a regulator that economic efficiency from the point of view of society as a whole would be served by a declaration of access. If the intention of the legislature had been to establish such a regime, it could have been expected to express its intentions in very different terms."

171 One matter should be cleared aside at the outset. The Tribunal spoke pejoratively of regulators in that passage (and elsewhere[165]). It made those remarks in the course of rejecting the appellants' construction of criterion (b). That construction gives no peculiarly enhanced role to this apparently despised class. Is it correct to describe an administrative decision made by a Minister on the recommendation of an expert, independent body like the Council as an evaluation by a regulator? If so, whatever construction is arrived at, criterion (b) will have to be applied by a regulator. That circumstance does not make any one test preferable to others. In fact, the Minister is probably not a "regulator" in any relevant sense. In his oral argument in these very appeals, counsel for the Rio Tinto respondents said: "It was important in the eyes of the Hilmer Committee … that the decision about the grant of access rights should be a high level governmental decision rather than a decision by a regulator." He referred to the following passage in the Hilmer Report[166]:

> "As the decision to provide a right of access rests on an evaluation of important public interest considerations, the ultimate decision on this issue should be one for Government, rather than a court, tribunal or other unelected body. A legislated right of access should be created by Ministerial declaration under legislation."

172 There is a common law rule of statutory interpretation that only clear words will suffice to remove property rights or to extinguish valuable rights relating to their exercise[167]. That common law rule reflects the "philosophy" of

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165 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at 93 [79] ("a regulator's evaluation of efficiency from the perspective of society as a whole"), 95 [85] ("the evaluation of a regulator") and 98 [99] ("a regulator's evaluation of productive efficiency").

166 Australia, National Competition Policy Review, *National Competition Policy*, (1993) at 250.

167 *The Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552 at 563; [1918] HCA 75; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 111; [1992] HCA 23; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 207 [175]; [2009] HCA 51.

which the Full Court spoke. Whether any further manifestation of the "philosophy" can be found in the Act itself depends on its terms. The terms of s 44H(4) certainly created significant hurdles to be jumped before a declaration could be made. However, it is not correct to treat the appellants' construction of the criteria in s 44H(4), and in particular their construction of criterion (b), as justifying the making of a declaration merely because of "an evaluation by a regulator that economic efficiency from the point of view of society as a whole would be served by a declaration of access." Criteria (a)-(f) were, as already noted, to some degree general[168]. But they were not open-ended. And the Minister had no capacity to take into consideration any other matter thought to be relevant[169]. Section 44H did not justify an open-ended inquiry into every possible aspect of social welfare.

173 Obviously, the access regime created by Pt IIIA was capable of having an impact on the exercise of private proprietary rights. The language of the Act did not suggest that interference with those rights would be lightly done, but it did not treat it as "distinctly exceptional". Indeed, the concerns of the "philosophy" were vindicated in later provisions of Pt IIIA. Those provisions provided safeguards for the service provider against whom access was granted.

174 One safeguard lay in the fact that a successful applicant for a declaration did not achieve access immediately. The making of a declaration gave only a right to negotiate for access, and, if negotiation failed, a right to submit to arbitration about access. If contractual agreement was achieved, the contract could be enforced by contractual remedies under the general law. If it was registered under s 44ZW of the Act, s 44ZY provided that it could be enforced instead by way of s 44ZZD relief. If contractual agreement was not achieved, access could be obtained only once the Commission had settled the terms and conditions of access after a process of arbitration under s 44V. Those terms and conditions might have been onerous to the service provider. Section 44V(2)(d) and (da) provided that the Commission could require the service provider to extend the facility or to permit interconnection to the facility by the access-seeker. But s 44W(1) forbade the making of a determination which would have any of the following effects:

> "(a) preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements …;

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168 See above at [137].

169 See below at [192]-[193].

(b) preventing a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet the person's actual requirements;

(c) depriving any person of a protected contractual right;

(d) resulting in the third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility, without the consent of the provider;

(e) requiring the provider to bear some or all of the costs of extending the facility or maintaining extensions of the facility;

(f) requiring the provider to bear some or all of the costs of interconnections to the facility or maintaining interconnections to the facility."

Further, s 44X(1) required the Commission to take the following matters into account in making a determination:

"(aa) the objects of this Part;

(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;

(ea) the value to the provider of interconnections to the facility 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;

(h) the pricing principles specified in section 44ZZCA."

The pricing principles specified in s 44ZZCA were:

"(a) that regulated access prices should:

(i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and

(ii) include a return on investment commensurate with the regulatory and commercial risks involved; and

(b) that the access price structures should:

(i) allow multi-part pricing and price discrimination when it aids efficiency; and

(ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

(c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity."

175 Another safeguard was s 44ZZN of the Act. It conferred an entitlement to reasonable compensation where an access determination by the Commission resulted in an acquisition of property. The amount of compensation was to be agreed between the access-seeker and the service provider, or to be determined by a court.

176 It follows that it was misconceived to construe s 44H(4)(b) as if it alone vindicated the philosophy which the Full Court identified in Pt IIIA. Many other provisions vindicated that philosophy before access could be granted under the Act.

177 The Full Court said the travaux préparatoires supported its construction of criterion (b) as referring to whether "it would be unprofitable for anyone" to provide the relevant service. The Full Court took the view that the Hilmer Report (the 1993 report of a Committee of Inquiry into National Competition Policy), the Competition Principles Agreement (an agreement made on 11 April 1995 between the Commonwealth, State and Territory Governments), and a 2001 report of the Productivity Commission, suggested that Pt IIIA was "intended to minimise regulatory intervention in the market place"[170]. To some

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170 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at 95 [89].

extent, the Full Court quoted from these documents selectively. It quoted a passage from the Hilmer Report demonstrating that as "a general rule, the law imposes no duty on one firm to do business with another", and stating this to be "an important and fundamental principle based on notions of private property and freedom to contract". However, the Full Court did not quote the immediately succeeding passage[171]:

> "The law has long recognised that this freedom may require qualification on public interest grounds in some circumstances, particularly where a form of monopoly is involved. Thus, for example, the natural monopoly character of certain transport functions gave rise to the common law notion of 'common carriers', where such carriers have an obligation to carry certain goods."

The Full Court also quoted a statement in the Hilmer Report that accepted the need carefully to limit the circumstances in which one business is required by law to make its facilities available to another. But it did not quote the passage which came straight after it[172]:

> "Nevertheless, there are some industries where there is a strong public interest in ensuring that effective competition can take place, without the need to establish any anti-competitive intent on the part of the owner for the purposes of the general conduct rules. The telecommunications sector provides a clear example, as do electricity, rail and other key infrastructure industries. Where such a clear public interest exists, but not otherwise, the Committee supports the establishment of a legislated right of access".

Indeed, giving the rail industry as an example, the Hilmer Report said[173]:

> "In some markets the introduction of effective competition requires competitors to have access to facilities which exhibit natural monopoly characteristics, and hence cannot be duplicated economically."

178 In fact, the Hilmer Report did not suggest that compulsory provision of access should be "distinctly exceptional". Nor did the other travaux

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171 Australia, National Competition Policy Review, *National Competition Policy*, (1993) at 242.

172 Australia, National Competition Policy Review, *National Competition Policy*, (1993) at 248.

173 Australia, National Competition Policy Review, *National Competition Policy*, (1993) at 239.

préparatoires. The travaux préparatoires do not support the Full Court's construction. But they are not decisive in favour of the appellants' construction either. The recommendations of the Hilmer Report, for example, are pitched at a very high level of generality. It recommended four criteria to be satisfied before a service was declared. The first Hilmer criterion was[174]:

> "Access to the facility in question is essential to permit effective competition in a downstream or upstream activity".

This foreshadowed s 44AA(a). The second Hilmer criterion was[175]:

> "The making of the declaration is in the public interest, having regard to:
>
> (a) the significance of the industry to the national economy; and
>
> (b) the expected impact of effective competition in that industry on national competitiveness."

This foreshadowed criterion (c). The third Hilmer criterion concerned the imposition of fair terms of access. This criterion was the forerunner of Pt IIIA Div 3. The fourth Hilmer criterion was that the creation of a right to access had been recommended by what is now the Council. Though its criteria prefigured some of the essential elements of Pt IIIA, the Hilmer Report did not recommend criteria (a)-(f) in terms. Hence it casts no useful light on the competing constructions of criterion (b) at issue in these appeals.

179 Studying the evolution of criterion (b) through the 1994 draft legislation, the draft intergovernmental agreement on "competition principles" released by the Council of Australian Governments in 1994, the Competition Policy Reform Bill 1995, and the Competition Principles Agreement of 1995 into its form as enacted does not offer any real assistance either. In the Explanatory Memoranda to the relevant Bills the statutory words are repeated, but no detailed explanation is given of their meaning.

180 In short, the Full Court appears to have misunderstood the appellants' submission on the construction of criterion (b); exaggerated the extent to which the "philosophy" it assigned to Pt IIIA was manifested in s 44H; overlooked later provisions in Pt IIIA that operated to safeguard service provider interests against

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174 Australia, National Competition Policy Review, *National Competition Policy*, (1993) at 251.

175 Australia, National Competition Policy Review, *National Competition Policy*, (1993) at 251.

the concerns underlying that "philosophy"; placed too much weight on the travaux préparatoires; and interpreted them too favourably to the respondents.

181 The principal textual point made by the Full Court – and this is the strongest point in favour of the construction it preferred – was that the words "uneconomical for anyone" required a search for a particular market participant for whom it might or might not be "uneconomical" to build a duplicate facility. The Full Court said of the phrase "it would be uneconomical for anyone"[176]:

> "The perspective of this phrase is that of a participant in the market place who might be expected to choose to develop another facility in that person's own economic interests.
>
> … It is tolerably clear that the phrase 'uneconomical for anyone' is a criterion based on the facts of the market place as to what is economically feasible for a participant in the market place to achieve, rather than a criterion based on evaluation by a regulator of what is economically efficient from the perspective of the community as a whole."

That conclusion is not in fact clear. The question criterion (b) posed was: would the development of another facility be uneconomical for anyone? It is the development of the other facility which must be uneconomical. The words "for anyone" do not refer to the particular circumstances of each possible developer. They focus on what would be true for anyone. They identify the activity of anyone developing another facility to provide the service. They sharpen that focus by inquiring whether the development of another facility by anyone would be uneconomical in the sense of being wasteful of resources. If the development is uneconomical as that word is used in ordinary English – wasteful and inefficient – no matter whom one contemplates as a developer, criterion (b) is satisfied.

182 In relation to the phrase "uneconomical for anyone" the Full Court also said[177]:

> "It is … significant … that s 44X(1)(g) requires that the [Commission] must take into account 'the economically efficient operation of the facility'. This provision shows that when the Parliament sought to speak of economic efficiency, it did so in terms of individual facility owners in the market. Thus, when s 44H(4)(b) speaks of 'uneconomical

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176 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at 92-93 [76]-[77].

177 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at 97-98 [98].

> for anyone', it is concerned, not with the economic efficiency from the point of view of the community as a whole, but with the ability of someone economically to duplicate the facility."

There are concrete difficulties in this reasoning. Criterion (b) concerns whether the Minister should make a *decision to declare a service*. It deals with whether it is "uneconomical for anyone" to build a new facility that duplicates an existing one. Section 44X(1)(g), on the other hand, concerns one of several matters relevant to the Commission's decision as to whether to *make an access determination* after the Minister has declared a service. And it deals with a completely different question from that dealt with by criterion (b). It deals with whether the *existing* facility, not the new one, is economically efficient in its operation. Section 44X(1)(g) thus casts no light on the meaning of the phrase "uneconomical for anyone" to develop another facility.

183 Another argument the Full Court employed related to criterion (e) – "access to the service is not already the subject of an effective access regime". In that regard, s 44H(5) provided:

> "In deciding whether an access regime established by a State or Territory that is a party to the Competition Principles Agreement is an effective access regime, the designated Minister:
>
> (a) must, subject to sub-section (6A), apply the relevant principles set out in that Agreement; and
>
> (aa) must have regard to the objects of this Part; and
>
> (b) must, subject to section 44DA, not consider any other matters."

One of the relevant principles in the Competition Principles Agreement for "third party access to services provided by means of significant infrastructure facilities" is: "it would not be economically feasible to duplicate the facility". The Full Court said[178]:

> "In seeking to discern the intent of the Parliament, it is important to note that s 44H(4)(e) and (5) … contemplate that an access regime established by a State will be an 'effective access regime' for the purposes of s 44H(4)(e) if it applies the principles set out in the Competition Principles Agreement. Insofar as those principles include the principle that one of the criteria for the granting of access to a service provided by a facility is that 'it would not be economically feasible to duplicate the

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178 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at 97 [97].

> facility', it is difficult to attribute to the Commonwealth Parliament the intention that a State-based 'effective access regime', the existence of which would preclude the making of a declaration under Pt IIIA … should stand on a different basis in relation to criterion (b) from that on which Pt IIIA … stands."

184 There are two flaws in this reasoning. First, it assumes that in relation to a State-based "effective access regime" the Minister must apply the same criteria as he applies to services declared under s 44H(1). This is not so. In deciding whether there is an effective access regime, the Minister must apply the principles in the Competition Principles Agreement and must have regard to the objects of Pt IIIA. The principles in the Competition Principles Agreement are not the same as criteria (a)-(f). There is no equivalent in the Competition Principles Agreement to criterion (f). In addition, criterion (a) is less onerously expressed in the agreement. The second flaw in the Full Court's reasoning is that it assumes that both "economically feasible" and "uneconomical for anyone" refer to "private profitability" rather than to "economic efficiency". That is, the reasoning is circular. It assumes the conclusion it is directed to establishing.

185 In a similar vein, the Full Court said of the Competition Principles Agreement that it indicated "that in the thinking which informed the introduction of Pt IIIA of the Act, the phrase 'uneconomical for anyone' in s 44H(4)(b) meant 'not economically feasible for anyone' in the market place."[179] That claim is also flawed. The Competition Principles Agreement did not say "not economically feasible for anyone". It said only "not … economically feasible". Further, "economically feasible" means "feasible or practicable taking into account the principles of economics". To develop a duplicate facility where an existing facility can already meet reasonably foreseeable demand, and thereby to increase excess capacity, is neither feasible nor practicable when the principles of economics are taken into account.

186 Finally, the Full Court considered that the "private profitability" test had "the attraction of being easier to apply than" the "economically wasteful" test. It said[180]:

> "The difficulties in identifying an individual who might profitably build the line are of a different order of concern from the evaluation of relative productive efficiency. Whether 'anyone' can be identified for whom the development of an alternative facility is economically feasible is a matter

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179 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at 92 [73].

180 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at 95 [86].

> of looking at the facts of the market place. If an examination of the facts shows that there is such a person, whoever that might be, and whatever that person's circumstances, then regulatory interference in the interplay of market forces is not warranted, even if the regulator might make an evaluation that access would be a convenient course by which to achieve effective competition in another market."

This reasoning does not demonstrate that the "economically wasteful" test is harder to apply. In this case, the Tribunal did not appear to have difficulty calculating the net capital savings that would follow the declaration of the service provided by the Hamersley line. The Tribunal simply determined the difference between the estimated cost of building a second facility and the estimated cost of the minimum expansions which would have to be made to the Hamersley line.

Criterion (f)

187 Criterion (f) was: "access (or increased access) to the service would not be contrary to the public interest." The appellants submitted that criterion (f) authorised a narrow inquiry only. They submitted that it was directed only to whether there could be concrete harm to an identified aspect of the public interest which was not otherwise caught by criteria (a)-(e). They pointed out that the earlier criteria largely relate to competition, efficiency and safety. And the appellants gave examples of the residual matters criterion (f) might capture – matters of national security, national sovereignty and environmental harm. The appellants correctly submitted that the Tribunal had engaged in a detailed factual and counterfactual analysis of the likely net balance of all the social costs and benefits of access. This analysis was based on assumptions about what the extent and conditions of access would be, when and if it was eventually granted. The appellants noted that the Full Court approved the Tribunal's analysis.

188 The Tribunal seemed to slide from correct statements to erroneous ones. For example, it correctly stated that criterion (f) should not be used to call into question the results obtained by application of criteria (a)-(e). But it wrongly stated that assumptions about the terms of access needed to be considered under criterion (f). It wrongly stated that not only cross-benefit issues, but "broader issues concerning social welfare and equity, and the interests of consumers"[181], fell for consideration under criterion (f). It also wrongly stated that the benefits found under criteria (a) and (b), "and other benefits not considered under earlier criteria, as well as the costs of access", had to be taken into account under criterion (f)[182]. The appellants were correct in contending that this approach was

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181 *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 at 446 [1168].

182 *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 at 445 [1162].

erroneous. The appellants' construction of criterion (f) should be accepted for three reasons.

189 First, the Tribunal's approach to criterion (f) is so wide in scope that criterion (f) must inevitably overlap with criteria (a)-(e). It thus tends either to make them redundant or to generate double-counting. These results are to be avoided, if an alternative construction is available.

190 Secondly, the Tribunal's construction asks whether declaration of the service would be better for the public than non-declaration. The Tribunal's construction assumes that to declare a service was ipso facto to grant access to it. But that is not so. A declaration gave an access-seeker an opportunity to negotiate with the service provider, and, if negotiation failed, to obtain an access determination after Commission arbitration. The access-seeker may never have achieved agreement. And the Commission may not have made a favourable access determination.

191 Thirdly, criterion (f) posed the question whether *any* access is contrary to the public interest. It did not call for an assessment of what type of access was likely to be granted either by contract or by an access determination. If that assessment had been called for, the Minister would have needed to predict the future within the relatively short period of time allowed for decision. The Minister would necessarily have been operating on inadequate information in making that prediction. The Tribunal's analysis, on the wide approach it adopted, was conducted after a very long hearing at which massive quantities of evidence had been received. Its analysis was extraordinarily sophisticated and lengthy[183]. The provisions of Pt IIIA called for significant expedition in the disposition of applications for declarations. The approach the Tribunal and the Full Court favoured is inconsistent with those provisions.

Discretion

192 The appellants submitted that if criteria (a)-(f) were satisfied, the Minister had no residual discretion to decide not to declare the service. The Tribunal, on the other hand, appeared to consider that a similar approach to that which it took in relation to criterion (f) could be undertaken as part of a residual discretion under s 44H(4). The Rio Tinto and BHP Billiton respondents relied on *Sydney Airport Corporation Ltd v Australian Competition Tribunal*[184]. But that case stated no argument of principle.

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183 *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 at 444-468 [1160]-[1305].

184 (2006) 155 FCR 124 at 137 [39].

193 There is no language in s 44H that suggests that a discretion exists. Section 44H(4) did not resemble, for example, s 44X in obligating decision-makers to have regard to a large range of factors, permitting the decision-makers to take any other relevant factor into account and then letting the decision-makers weigh those factors in whatever manner they saw fit. The breadth of criteria (a)-(f) pointed strongly against the existence of a discretion. It would be very difficult to divine from s 44H what principles would have governed any discretion. The concluding sentence of s 44H(2) provided that s 44H(2) did not limit the grounds on which the Minister might decide whether or not to declare a service; but s 44H(4) did limit them. For those reasons, s 44H conferred no residual discretion on the Minister. Section 44H(2) and (4) together obliged a Minister who had been satisfied of criteria (a)-(f) to declare the relevant service. *Sydney Airport Corporation v Australian Competition Tribunal* is incorrect on this point.

Orders

194 There was no dispute that if the appellants' submissions on criterion (b) were accepted, it was satisfied. The reasoning of the Full Court having been rejected, the Tribunal decision stands, but for its erroneous approach to the scope of the hearing, to criterion (f) and to the discretion question. Since the discretion does not exist, there is no factual matter still to be investigated in relation to it. The Tribunal's approach under criterion (f) has been rejected. Since neither it nor the Full Court pointed to any factual material relevant to criterion (f) which calls for future investigation, there is no need to return the matter to the Tribunal for that reason. And any further Tribunal hearing of a narrower kind than that which took place earlier will generate less factual material, not more. Hence there is no need to return the matter to the Tribunal. The appellants' application for the following orders should therefore be acceded to.

195 The appeals should be allowed with costs. The respondents should pay the costs of the appellants in this Court and in the Full Court of the Federal Court of Australia. The orders of the Full Court should be set aside. In lieu thereof orders should be made quashing the determinations of the Tribunal concerning the services in relation to the Hamersley railway line and the Robe railway line. That will leave in place the decision of the Treasurer of the Commonwealth of Australia to declare the relevant services in relation to Hamersley and Robe lines. It will also bring an end to these extraordinarily protracted proceedings.