FEDERAL COURT OF AUSTRALIA

Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal [2011] FCAFC 58

Citation:	Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal [2011] FCAFC 58
Appeal from:	In the matter of Fortescue Metals Group Limited [2010] ACompT 2
Parties:	**THE PILBARA INFRASTRUCTURE PTY LTD (ACN 103 096 340) and FORTESCUE METALS GROUP LIMITED (ACN 002 594 872) v AUSTRALIAN COMPETITION TRIBUNAL, HAMERSLEY IRON PTY LTD (ACN 004 558 276), HAMERSLEY IRON-YANDI PTY LTD (ACN 009 181 793), ROBE RIVER MINING CO PTY LTD (ACN 008 694 246), NORTH MINING LTD (ACN 000 081 434), PILBARA IRON PTY LTD (ACN 107 216 535), RIO TINTO LIMITED (ACN 004 458 404), MITSUI IRON ORE DEVELOPMENT PTY LTD (ACN 008 734 361), NIPPON STEEL AUSTRALIA PTY LTD (ACN 001 445 049) and SUMITOMO METAL AUSTRALIA PTY LTD (ACN 001 444 604)** **ROBE RIVER MINING CO PTY LTD (ACN 008 694 246), NORTH MINING LTD (ACN 000 081 434), PILBARA IRON PTY LTD (ACN 107 216 535), RIO TINTO LIMITED (ACN 004 458 404), MITSUI IRON ORE DEVELOPMENT PTY LTD (ACN 008 734 361), NIPPON STEEL AUSTRALIA PTY LTD (ACN 001 445 049) and SUMITOMO METAL AUSTRALIA PTY LTD (ACN 001 444 604) v AUSTRALIAN COMPETITION TRIBUNAL** **THE PILBARA INFRASTRUCTURE PTY LTD (ACN 103 096 340) and FORTESCUE METALS GROUP LIMITED (ACN 002 594 872) v AUSTRALIAN COMPETITION TRIBUNAL, ROBE RIVER MINING CO PTY LTD (ACN 008 694 246), NORTH MINING LTD (ACN 000 081 434), PILBARA IRON PTY LTD (ACN 107 216 535), RIO TINTO LIMITED (ACN 004 458 404), MITSUI IRON ORE DEVELOPMENT PTY LTD (ACN 008 734 361), NIPPON STEEL AUSTRALIA PTY LTD (ACN 001 445 049) and SUMITOMO METAL AUSTRALIA PTY LTD (ACN 001 444 604)**

File number(s):	VID 616 of 2010 VID 686 of 2010 VID 687 of 2010
Judges:	**KEANE CJ, MANSFIELD AND MIDDLETON JJ**
Date of judgment:	4 May 2011
Catchwords:	**TRADE PRACTICES** – Access to Services – Trade Practices Act 1974 (Cth) – Part IIIA – s 44H(4) – Part IIIA to be read having regard to the background to the introduction of Part IIIA into the Trade Practices Act 1974 (Cth). **AUSTRALIAN COMPETITION TRIBUNAL** – appeal from decision – role of Tribunal – Tribunal comprises judge and two experts – function to resolve difficult and complex matters of judgment – Court's role to ensure decision accords with the law – Court's role not to reconsider merits of the case **WORDS AND PHRASES** – "uneconomical for anyone" **ROLE OF EXPERT EVIDENCE** – meaning of legislation cannot change according to the evidence of an economic expert
Legislation:	*Administrative Decisions (Judicial Review) Act 1977* (Cth) *Judiciary Act 1903* (Cth) *Competition and Consumer Act 2010* (Cth) *Competition Policy Reform Act 1995* (Cth) *Trade Practices Act 1974* (Cth) *Trade Practices Amendment (National Access Regime) Act 2006* (Cth)
Cases cited:	*Alcan NT Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 *BHP Billiton Iron Ore Pty Ltd & Ors v National Competition Council & Anor* (2008) 236 CLR 145 *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v ACCC* (2003) 215 CLR 374 *Carr v Western Australia* (2007) 232 CLR 138 *Minister for Immigration and Citizenship v SZJSS* [2010] 85 ALJR 306 *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 *Swift v SAS Trustee Corporation* [2010] NSWCA 182

Sydney Airport Corporation Ltd v Australian Competition Tribunal and Others (2006) 155 FCR 124

Date of hearing:	21, 22, 23, 24 and 25 February 2011
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	142
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IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION

VID 616 of 2010

ON APPEAL FROM THE AUSTRALIAN COMPETITION TRIBUNAL

BETWEEN:

THE PILBARA INFRASTRUCTURE PTY LTD (ACN 103 096 340)
First Applicant

FORTESCUE METALS GROUP LIMITED (ACN 002 594 872)
Second Applicant

AND:

AUSTRALIAN COMPETITION TRIBUNAL
First Respondent

HAMERSLEY IRON PTY LTD (ACN 004 558 276)
Second Respondent

HAMERSLEY IRON-YANDI PTY LTD (ACN 009 181 793)
Third Respondent

ROBE RIVER MINING CO PTY LTD (ACN 008 694 246)
Fourth Respondent

NORTH MINING LTD (ACN 000 081 434)
Fifth Respondent

PILBARA IRON PTY LTD (ACN 107 216 535)
Sixth Respondent

RIO TINTO LIMITED (ACN 004 458 404)
Seventh Respondent

MITSUI IRON ORE DEVELOPMENT PTY LTD (ACN 008 734 361)
Eighth Respondent

NIPPON STEEL AUSTRALIA PTY LTD (ACN 001 445 049)
Ninth Respondent

SUMITOMO METAL AUSTRALIA PTY LTD (ACN 001 444 604)
Tenth Respondent

JUDGES: **KEANE CJ, MANSFIELD AND MIDDLETON JJ**

DATE OF ORDER: **4 MAY 2011**

WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The parties confer and thereafter by 4.00 pm on 11 May 2011 file minutes of orders (including as to costs), and in the event of disagreement, file and serve written submissions as to the contentions of the parties.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION VID 686 of 2010

ON APPEAL FROM THE AUSTRALIAN COMPETITION TRIBUNAL

BETWEEN:	ROBE RIVER MINING CO PTY LTD (ACN 008 694 246) First Applicant
	NORTH MINING LTD (ACN 000 081 434) Second Applicant
	PILBARA IRON PTY LTD (ACN 107 216 535) Third Applicant
	RIO TINTO LIMITED (ACN 004 458 404) Fourth Applicant
	MITSUI IRON ORE DEVELOPMENT PTY LTD (ACN 008 734 361) Fifth Applicant
	NIPPON STEEL AUSTRALIA PTY LTD (ACN 001 445 049) Sixth Applicant
	SUMITOMO METAL AUSTRALIA PTY LTD (ACN 001 444 604) Seventh Applicant
AND:	THE AUSTRALIAN COMPETITION TRIBUNAL Respondent
JUDGES:	KEANE CJ, MANSFIELD AND MIDDLETON JJ
DATE OF ORDER:	4 MAY 2011
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

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IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION VID 687 of 2010

ON APPEAL FROM THE AUSTRALIAN COMPETITION TRIBUNAL

BETWEEN:	THE PILBARA INFRASTRUCTURE PTY LTD (ACN 103 096 340) First Applicant
	FORTESCUE METALS GROUP LIMITED (ACN 002 594 872) Second Applicant
AND:	AUSTRALIAN COMPETITION TRIBUNAL First Respondent
	ROBE RIVER MINING CO PTY LTD (ACN 008 694 246) Second Respondent
	NORTH MINING LTD (ACN 000 081 434) Third Respondent
	PILBARA IRON PTY LTD (ACN 107 216 535) Fourth Respondent
	RIO TINTO LIMITED (ACN 004 458 404) Fifth Respondent
	MITSUI IRON ORE DEVELOPMENT PTY LTD (ACN 008 734 361) Sixth Respondent
	NIPPON STEEL AUSTRALIA PTY LTD (ACN 001 445 049) Seventh Respondent
	SUMITOMO METAL AUSTRALIA PTY LTD (ACN 001 444 604) Eighth Respondent
JUDGES:	KEANE CJ, MANSFIELD AND MIDDLETON JJ
DATE OF ORDER:	4 MAY 2011
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. The parties confer and thereafter by 4.00 pm on 11 May 2011 file minutes of orders (including as to costs), and in the event of disagreement, file and serve written submissions as to the contentions of the parties.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION VID 616 of 2010

ON APPEAL FROM THE AUSTRALIAN COMPETITION TRIBUNAL

BETWEEN: THE PILBARA INFRASTRUCTURE PTY LTD
(ACN 103 096 340)
First Applicant

FORTESCUE METALS GROUP LIMITED
(ACN 002 594 872)
Second Applicant

AND: AUSTRALIAN COMPETITION TRIBUNAL
First Respondent

HAMERSLEY IRON PTY LTD (ACN 004 558 276)
Second Respondent

HAMERSLEY IRON-YANDI PTY LTD (ACN 009 181 793)
Third Respondent

ROBE RIVER MINING CO PTY LTD (ACN 008 694 246)
Fourth Respondent

NORTH MINING LTD (ACN 000 081 434)
Fifth Respondent

PILBARA IRON PTY LTD (ACN 107 216 535)
Sixth Respondent

RIO TINTO LIMITED (ACN 004 458 404)
Seventh Respondent

MITSUI IRON ORE DEVELOPMENT PTY LTD
(ACN 008 734 361)
Eighth Respondent

NIPPON STEEL AUSTRALIA PTY LTD (ACN 001 445 049)
Ninth Respondent

SUMITOMO METAL AUSTRALIA PTY LTD
(ACN 001 444 604)
Tenth Respondent

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION VID 686 of 2010

ON APPEAL FROM THE AUSTRALIAN COMPETITION TRIBUNAL

BETWEEN: ROBE RIVER MINING CO PTY LTD (ACN 008 694 246)
First Applicant

NORTH MINING LTD (ACN 000 081 434)
Second Applicant

PILBARA IRON PTY LTD (ACN 107 216 535)
Third Applicant

RIO TINTO LIMITED (ACN 004 458 404)
Fourth Applicant

MITSUI IRON ORE DEVELOPMENT PTY LTD
(ACN 008 734 361)
Fifth Applicant

NIPPON STEEL AUSTRALIA PTY LTD (ACN 001 445 049)
Sixth Applicant

SUMITOMO METAL AUSTRALIA PTY LTD
(ACN 001 444 604)
Seventh Applicant

AND: THE AUSTRALIAN COMPETITION TRIBUNAL
Respondent

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION VID 687 of 2010

ON APPEAL FROM THE AUSTRALIAN COMPETITION TRIBUNAL

BETWEEN: THE PILBARA INFRASTRUCTURE PTY LTD
(ACN 103 096 340)
First Applicant

FORTESCUE METALS GROUP LIMITED (ACN 002 594 872)
Second Applicant

AND:	**AUSTRALIAN COMPETITION TRIBUNAL** **First Respondent**
	ROBE RIVER MINING CO PTY LTD (ACN 008 694 246) **Second Respondent**
	NORTH MINING LTD (ACN 000 081 434) **Third Respondent**
	PILBARA IRON PTY LTD (ACN 107 216 535) **Fourth Respondent**
	RIO TINTO LIMITED (ACN 004 458 404) **Fifth Respondent**
	MITSUI IRON ORE DEVELOPMENT PTY LTD (ACN 008 734 361) **Sixth Respondent**
	NIPPON STEEL AUSTRALIA PTY LTD (ACN 001 445 049) **Seventh Respondent**
	SUMITOMO METAL AUSTRALIA PTY LTD (ACN 001 444 604) **Eighth Respondent**
JUDGES:	**KEANE CJ, MANSFIELD AND MIDDLETON JJ**
DATE:	**4 MAY 2011**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

1 In 1995, the *Trade Practices Act 1974* (Cth), which is now known as the *Competition and Consumer Act 2010* (Cth) (the Act), was amended by the *Competition Policy Reform Act 1995* (Cth). This amendment introduced Pt IIIA of the Act to establish a two stage process whereby third parties may obtain access to private services provided by facilities, including mining infrastructure facilities, owned by others. In the first stage of the process, a third party may apply to the National Competition Council (the NCC) to recommend that a particular service provided by a facility be declared under Part IIIA. If the NCC recommends that a declaration be made, the designated Minister must either declare or not declare the service. In the event that a service is declared, an enforceable right to negotiate the terms of

access to the service vests, not only in the original applicant, but in any interested person. The second stage of the process may include the arbitration of terms of access by the Australian Competition and Consumer Commission (ACCC) if the parties are unable to reach agreement by negotiation.

2 The Pilbara Infrastructure Pty Ltd (TPI), a wholly owned subsidiary of Fortescue Metals Group Ltd (to which we will refer collectively as Fortescue) sought to invoke Pt IIIA of the Act to obtain access to four railway lines in the Pilbara region of Western Australia and all associated infrastructure necessary to allow trains and rolling stock to provide rail transport services of its own. Two of these lines (the Goldsworthy and Mt Newman services) are owned and operated by BHP Billiton Iron Ore Pty Ltd and BHP Billiton Minerals Pty Ltd (collectively referred to as BHP). The other two (the Hamersley and Robe services) are owned and operated by Rio Tinto Ltd and its subsidiaries or associates (to which we will refer collectively as Rio Tinto, noting that the Tribunal referred to them as RTIO).

3 These railway lines are heavy haulage lines used for the transport of iron ore from mines operated by BHP and Rio Tinto in the Pilbara to ports on the Western Australian coast. The rail hauling operations by BHP and Rio Tinto are integrated with the mining of iron ore from their respective mines and the transport of the ore from those ports to customers overseas. The details of the lines are as follows:

- The Goldsworthy line is located in the north-east of the Pilbara. It extends from near Yarrie in the east to BHP's port at Finucane Island at Port Hedland, a distance of some 210 km.
- The Mt Newman line runs from the town of Newman to BHP's port at Nelson Point at Port Hedland, a distance of around 400 km. The Mt Newman line intersects with the Goldsworthy line at Goldsworthy junction, 14 km south of Nelson Point.
- The Hamersley line runs from Rio Tinto's port at Dampier south to Rosella junction, a distance of some 235 km. From the junction the line has three branches. There is a spur heading west to mines at Brockman No 2, a distance of around 40 km. There is a second spur heading south toward Paraburdoo, around 135 km away. The third spur heads south-east to Yandicoogina (a distance of 193 km) with a further spur to the Hope Downs and West Angelas mines.

- The Robe line runs from Rio Tinto's port at Cape Lambert to the Mesa J mine near Pannawonica, a distance of 182 km. It interconnects with the Hamersley line near Emu junction, approximately 60 km south of Cape Lambert.

4 Between June 2004 and January 2008, Fortescue applied to the NCC for recommendations that the railway lines be declared so that Fortescue might run its own rail haulage operations to carry ore from its mines and from the mines of junior miners to ports.

5 The Treasurer of the Commonwealth of Australia, as the designated Minister, declared the Goldsworthy, Hamersley and Robe lines for a 20 year period. The Treasurer failed to make a declaration within the required period under s 44H(9) in relation to the Mt Newman line and was therefore taken to have decided not to declare that service.

6 Rio Tinto applied pursuant to s 44K of the Act to the Australian Competition Tribunal (the Tribunal) for review of the Hamersley and Robe declarations. BHP applied for review of the Goldsworthy declaration. Fortescue, for its part, applied for review of the failure to make a declaration in relation to the Mt Newman line and its consequences. The review by the Tribunal involved a re-consideration of those decisions. For the purpose of that review, the Tribunal had the same powers as the Treasurer.

7 On 30 June 2010 the Tribunal, in *Fortescue Metals Group Limited* [2010] ACompT 2 (Reasons), made determinations setting aside the decision of the Treasurer to declare the Hamersley line and varying the decision in relation to the Robe line so that it expired in 10, rather than 20, years. The Tribunal also affirmed the decisions of the Minister not to declare the Mt Newman line and to declare the Goldsworthy line for 20 years.

8 Only the determinations in relation to the Hamersley line and the Robe line are in issue in the appeals before this Court. It is convenient to state here, in the briefest summary, the conclusions which are critical to the decisions of the Tribunal in issue in this Court. The Tribunal concluded that:

1. access to the Hamersley and Robe lines would promote a material increase in competition in the markets for rail haulage services and the export of iron ore so as to satisfy s 44H(4)(a) of the Act;

2. it would be uneconomical for anyone to build another line to provide the service, in the sense that the existing lines can meet market demand at total cost less than would be required to construct another line. On this basis s 44H(4)(b) of the Act was satisfied in relation to each line;

3. in relation to the Hamersley line, the balance of costs and benefits assessed by the Tribunal as resulting from access to the Hamersley line was such that access to it would not be in the public interest. Accordingly, s 44H(4)(f) of the Act was not satisfied in relation to that line;

4. in relation to the Robe line, the balance of costs and benefits assessed by the Tribunal was such that, until 2018, access would not be contrary to the public interest. Accordingly, to that extent but no further, s 44H(4)(f) was satisfied in relation to that line.

THE PROCEEDINGS IN THIS COURT

9 There are three appeals before this Court. In VID 616 of 2010, Fortescue challenges the decision of the Tribunal to set aside the Treasurer's decision in relation to the Hamersley line. Fortescue, having the benefit of favourable findings by the Tribunal in relation to criteria (a) and (b) in s 44H(4), attacks the Tribunal's approach to the assessment of the public interest in s 44H(4)(f) of the Act. Fortescue argues that the Tribunal erred in law in its construction and application of s 44H(4)(f) of the Act principally because the Tribunal failed to appreciate the implications of the two-stage process prescribed by Pt IIIA of the Act and, in particular, that the Tribunal should not take into account evidence of costs of access which could be addressed by the ACCC, if necessary, at the second stage of the process. Further, the findings by the Tribunal are said to contain reviewable errors, including a breach of natural justice in connection with the making of findings about the timing of the likely construction of the Dixon line, a railway line which Fortescue may construct to take iron ore from its large iron ore deposits on the Solomon area to Anketell near Dixon Island on the coast. Finally, even though Fortescue succeeded before the Tribunal in relation to s 44H(4)(a) of the Act, Fortescue contends that the Tribunal erred in its construction and application of s 44H(4)(a) of the Act by reason of its finding that the market for mining tenements was effectively competitive.

10 In VID 687 of 2010 Fortescue challenges the decision of the Tribunal to vary the expiration period of the declaration in relation to the Robe line from 20 years to 10 years. Essentially, Fortescue argues that it was unreasonable for the Tribunal to come to that view, having regard to its findings in relation to criterion (f).

11 In each of Fortescue's appeals it seeks declaratory relief and orders in the nature of certiorari and mandamus against the Tribunal pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 39B of the *Judiciary Act 1903* (Cth) and s 163A of the Act.

12 In Fortescue's appeals, Rio Tinto seeks to maintain the decision of the Tribunal in relation to the Hamersley line by the contention that the question which the Tribunal should have addressed under s 44H(4)(b) was whether it was economically feasible for anyone to have developed another railway line to provide the service. Rio Tinto contends that if the Tribunal had addressed this question, then having regard to the Tribunal's findings of fact, s 44H(4)(b) was not satisfied and Fortescue's application for access fails at that threshold.

13 In VID 686 of 2010, Rio Tinto appeals to challenge the decision of the Tribunal not to set aside the Treasurer's declaration in relation to the Robe line in its entirety. Rio Tinto's principal contention is in relation to the proper construction of s 44H(4)(b) of the Act.

14 Before the Tribunal, the parties raised many arguments in relation to the costs of providing access including the costs of extending the facilities and possible inefficiencies in the facilities' operation if access were granted relative to the benefits of saving the cost of duplicating the Hamersley and Robe lines. These arguments involved complex issues of fact and opinion which the Tribunal resolved on the evidence before it.

15 The Tribunal is constituted by a judge of the Federal Court and two experts. Accordingly, it is well fitted to decide the issues of fact and opinion to be resolved by it. As this Court said in *Sydney Airport Corporation Ltd v Australian Competition Tribunal and Others* (2006) 155 FCR 124 (*Sydney Airport (No 2)*) at [35]:

> ... the context and history of Pt IIIA lead easily to the conclusion that difficult and complex questions of an economic, commercial and social character will be involved at both stages of the process. For example, in the first stage, such considerations as what is of national significance, whether it is economic to develop another facility

> and whether access would be contrary to the public interest could, no doubt, in any given case, be difficult and complex, and involve matters of judgment.

16 It is not this Court's function to resolve the difficult and complex matters of judgment raised by the evidence and resolved by the Tribunal. This Court's role in reviewing the decision of the Tribunal is to ensure that the decision of the Tribunal accords with the law. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [114] it was said that it is no part of the supervisory jurisdiction of this Court to

> ... enter upon a consideration of the factual merits of the individual decision. The grounds of judicial review ought not be used as a basis for a complete re-evaluation of the findings of fact, a reconsideration of the merits of the case or a re-litigation of the arguments that have been ventilated, and that failed, before the person designated as the repository of the decision-making power.

17 In *Minister for Immigration and Citizenship v SZJSS* [2010] 85 ALJR 306, HCA 48 at [23]-[30], the High Court, quoting *Swift v SAS Trustee Corporation* [2010] NSWCA 182 at [45], warned that a court exercising judicial review should guard against the "slide into impermissible merit review". Many of the arguments agitated before this Court did not respect the limitations on this Court's role and invited a re-evaluation of evidence on which findings of fact were made by the Tribunal. Notwithstanding attempts to shoehorn arguments about the merits of the Tribunal's conclusions into categories of reviewable error such as "no evidence" or "illogicality" or "unreasonableness", the parties sought to press the merits of arguments determined by the Tribunal. Nevertheless, a number of legal issues did emerge. It is convenient to summarise them now.

18 First, Rio Tinto raises the key legal argument that s 44H(4)(b) of the Act, in requiring "that it would be uneconomical for anyone to develop another facility to provide the service", erects a test of private economic feasibility (or as it was described by the Tribunal, "private profitability"). It is argued that the Tribunal erred in law in preferring a test of productive efficiency from the point of view of society as a whole. We will refer to this issue as the criterion (b) issue. Rio Tinto raises this issue by way of a notice of contention as a basis for maintaining the decision of the Tribunal in relation to the Hamersley line; it is also raised by Rio Tinto's appeal in relation to the Robe line.

19 Secondly, in relation to the Hamersley determination, Fortescue identifies as a key legal issue, the nature and scope of the test in s 44H(4)(f) of the Act. We will refer to this

issue as the criterion (f) issue. Fortescue argues that the Tribunal erred in law in taking into consideration under criterion (f) costs of access which would be expected to be addressed by the ACCC under s 44V and s 44X at the second stage of the Pt IIIA process.

20 Thirdly, Fortescue raises an issue as to the procedural fairness of the Tribunal's determination. This issue arises as a result of the terms of Rio Tinto's communications with the Tribunal after the conclusion of the hearing before it.

21 Fortescue also raises an argument in relation to the interpretation of criterion (a). That argument could only be of academic interest unless Fortescue were to succeed in relation to criterion (b) and (f), and fail on the other bases on which it succeeded in relation to criterion (a). It is convenient to deal with this argument in the discussion of the arguments concerning criterion (f).

22 In relation to the other arguments which Fortescue seeks to elevate to challenge the legality of the Tribunal's decision, it must be understood that Fortescue cannot succeed on any of its arguments if Rio Tinto's contention as to the proper construction of criterion (b) is accepted. That is because the Tribunal concluded that if criterion (b) is applied, in the way Rio Tinto argues it should be, then Fortescue cannot satisfy criterion (b) and no declaration may lawfully be made in respect of either the Hamersley line or the Robe line. That outcome would not be altered if Fortescue were to succeed on any of its other arguments. Even the procedural fairness argument, if accepted, would not avail Fortescue because that argument does not call into question the Tribunal's findings of fact in relation to criterion (b).

23 Fortescue's other arguments depend largely on the resolution of the questions of law we have identified. Fortescue argues that the Tribunal took into account irrelevant considerations in taking into account costs which were either an unavoidable incident of the second stage of the Part IIIA process or could be ameliorated by the determination of the ACCC. That argument could succeed only if Fortescue's interpretation of the terms of Part IIIA of the Act is correct. A similar point may be made in relation to much of Fortescue's argument that considerations relevant to the Tribunal's decision were not taken into account. And to argue, as does Fortescue, that relevant considerations were not taken into account because of flaws in the evidence upon which the Tribunal relied to quantify the delays resulting from access is really to argue about the sufficiency of the evidence. Fortescue

contends that there was no evidence to justify the decision to limit access to the Robe line to 2018 on the basis that the capacity of that line was likely to be fully or extensively utilised beyond 2018, but to advance that contention is merely to call into question the Tribunal's judgment of the state of affairs likely to obtain years hence, a judgment on which reasonable minds can be expected to differ, and in relation to which this court may not second guess the Tribunal.

24 The Tribunal has filed a submitting appearance. BHP was made a party to each of the appeals subject to, inter alia, the power of the Court to direct the nature and extent of their participation in the proceeding. BHP made submissions to this Court which were supportive of Rio Tinto's position.

25 The NCC sought and was granted leave to appear as an intervener in the proceedings in VID 616 and VID 686 upon the condition that it bear its own costs of the intervention and that no party seek a costs order against it. The NCC made submissions which supported Fortescue on the criterion (b) issue and gave Fortescue limited support on the criterion (f) issue.

26 We propose to set out the terms of the material provisions of Pt IIIA of the Act before summarising so much of the Tribunal's conclusions as is necessary to make intelligible the challenges to its conclusions on the key legal issues. We will then set out the reasons for the Tribunal's decision upon each of these issues and proceed directly to discuss whether the Tribunal's decision on that issue can stand. In the interests of coherence, we will deal with each of the legal issues identified above in turn.

PART IIIA OF THE ACT

27 Section 2 of the Act was introduced in the 1995 amendments. It provides:

> The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

28 Section 44AA, the objects provision of Pt IIIA, was added to the Act by the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth) on 1 October 2006 in response to a recommendation from the Productivity Commission. The text of s 44AA is as follows:

> **44AA Objects of Part**
> The objects of this Part are to:
> (a) 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; and
> (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

29 As we have mentioned, Pt IIIA of the Act contemplates a two stage process. The first stage of the process is to have the service provided by means of a facility such as a railway line "declared" under s 44H. If the service is declared, a right is created in favour of any access seeker, not just the applicant for declaration, to negotiate with the service provider for access to the declared service. This right is enforceable under the second stage of the process whereby the ACCC may arbitrate any unresolved dispute as to the terms of access to the declared service.

30 Section 44B of the Act provides the following definition of "service":

> ***service*** means a service provided by means of a facility and includes:
> (a) the use of an infrastructure facility such as a road or railway line;
> (b) handling or transporting things such as goods or people;
> (c) a communications service or similar service;
> but does not include:
> (d) the supply of goods; or
> (e) the use of intellectual property; or
> (f) the use of a production process;
> except to the extent that it is an integral but subsidiary part of the service.

31 The word "facility" is not separately defined in the Act but, implicit in the definition of "service", it is clear that a facility includes a road or railway line.

32 The service for which Fortescue seeks a declaration is the use of the railway track and associated infrastructure. This is often referred to as "below rail" service. Access to "above rail" service is not sought. Accordingly, if the service is obtained, a third party (e.g. Fortescue) would be able to run its own trains on the line to transport iron ore, but would not be able to require the owner of the line to transport the third party's iron ore.

33 The decision of the High Court in *BHP Billiton Iron Ore Pty Ltd v National Competition Council & Anor* (2008) 236 CLR 145 upheld the conclusions of Middleton J ([2006] FCA 1764) and of the Full Court of the Federal Court ([2007]) FCAFC 157) that, notwithstanding the vertically integrated nature of the business of the incumbent owners, the use of the lines by the incumbents could not be classified as a "production process" so as to exclude them from the definition of "service" for the purposes of Pt IIIA of the Act.

34 The first stage of the access regime is initiated by an application to the NCC under s 44F of the Act requesting that a particular service be declared. The NCC must recommend to the designated Minister that the service be declared or not be declared. The NCC must observe the limitations stated in s 44G of the Act. It provides:

> **44G Limits on the Council recommending declaration of a service**
>
> (1) The Council cannot recommend declaration of a service that is the subject of an access undertaking in operation under Division 6.
>
> (1A) While a decision of the Commission is in force under subsection 44PA(3) approving a tender process, for the construction and operation of a facility, as a competitive tender process, the Council cannot recommend declaration of any service provided by means of the facility that was specified under paragraph 44PA(2)(a).
>
> (2) The Council cannot recommend that a service be declared unless it is satisfied of all of the following 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;
>
> (f) that access (or increased access) to the service would not be contrary to the public interest.
>
> ...
>
> (6) The Council cannot recommend declaration of a service provided by means of a pipeline (within the meaning of a National Gas Law) if:
>
> (a) a 15-year no-coverage determination is in force under the National Gas Law in respect of the pipeline; or
>
> (b) a price regulation exemption is in force under the National Gas Law

in respect of the pipeline.

35 The Minister may not declare the service unless satisfied of the criteria in s 44H(4) and, in particular, having considered whether it would be economical for anyone to develop another facility that could provide part of the service. Section 44H provides relevantly:

44H Designated Minister may declare a service

(1) On receiving a declaration recommendation, the designated Minister must either declare the service or decide not to declare it.

Note: The designated Minister must publish his or her decision: see section 44HA.

(1A) The designated Minister must have regard to the objects of this Part in making his or her decision.

(2) 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.

(3) The designated Minister cannot declare a service that is the subject of an access undertaking in operation under Division 6.

...

(4) The designated Minister cannot declare a service unless he or she is satisfied of all of the following 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;

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

...

(5) 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 subsection (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.

(6) If there is in force a decision of the Commonwealth Minister under section 44N that a regime established by a State or Territory for access to the service is an effective access regime, the designated Minister must follow that decision, unless the designated Minister believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement.

Note: The period for which a decision is in force is determined under subsection 44N(3) and paragraph 44P(a).

(6A) In deciding whether a regime is an effective access regime, the designated Minister must disregard Chapter 5 of a National Gas Law.

(6B) The designated Minister cannot declare a service provided by means of a pipeline (within the meaning of a National Gas Law) if:

(a) a 15-year no-coverage determination is in force under the National Gas Law in respect of the pipeline; or

(b) a price regulation exemption is in force under the National Gas Law in respect of the pipeline.

(8) If the designated Minister declares the service, the declaration must specify the expiry date of the declaration.

(9) If the designated Minister does not publish under section 44HA his or her decision on the declaration recommendation within 60 days after receiving the declaration recommendation, the designated Minister is taken, at the end of that 60 day period, to have decided not to declare the service and to have published that decision not to declare the service.

[Emphasis added].

36 It can be seen that s 44H(4) of the Act sets out a number of criteria which must be satisfied before a service may be declared. All parties accept that, even if the criteria in s 44H(4) are satisfied, there remains a discretion, vested in the Minister, not to declare a service reposed in the Minister. That discretion is reflected in s 44H(2) of the Act: *Sydney Airport (No 2)* at [79] and [94].

37 If the service is declared, the service provider may apply under s 44K(1) to the Tribunal for a review of the declaration. If the service is not declared, the applicant for the declaration recommendation may apply to the Tribunal for a review of the decision. In reviewing the decision the Tribunal must reconsider each application afresh: s 44K(4) and (5). That is to say the Tribunal stands in the shoes of the Minister.

38 If the service is declared but the access seeker and the service provider cannot agree on one or more of the terms of access then, at the second stage of the process under Pt IIIA, disputes about the terms of access may be arbitrated by the ACCC pursuant to ss 44V and 44W of the Act.

39 In relation to the functions of the ACCC, s 44V provides:

44V Determination by Commission

(1) Unless it terminates the arbitration under section 44Y or 44ZZCB, the Commission:
(a) must make a written final determination; and
(b) may make a written interim determination;
on access by the third party to the service.

Note 1: There are time limits that apply to the Commission's final determination: see section 44XA.
Note 2: The Commission may defer arbitration of the access dispute if it is also considering an access undertaking: see section 44ZZCB.

(2) A determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute. By way of example, the determination may:
(a) require the provider to provide access to the service by the third party;
(b) require the third party to accept, and pay for, access to the service;
(c) specify the terms and conditions of the third party's access to the service;
(d) require the provider to extend the facility;
(da) require the provider to permit interconnection to the facility by the third party;
(e) specify the extent to which the determination overrides an earlier determination relating to access to the service by the third party.

(3) A determination does not have to require the provider to provide access to the service by the third party.

(4) Before making a determination, the Commission must give a draft determination to the parties.

(5) When the Commission makes a determination, it must give the parties to the arbitration its reasons for making the determination.

(6) A determination is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003.*

40 Section 44W provides that the ACCC must observe limits on the grant of access:

44W Restrictions on access determinations

(1) The Commission must not make a determination that 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, measured at the time when the dispute was notified;

(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.

(2) Paragraphs (1)(a) and (b) do not apply in relation to the requirements and rights of the third party and the provider when the Commission is making a determination in arbitration of an access dispute relating to an earlier determination of an access dispute between the third party and the provider.

(3) A determination is of no effect if it is made in contravention of subsection (1).

(4) If the Commission makes a determination that has the effect of depriving a person (the ***second person***) of a pre-notification right to require the provider to supply the service to the second person, the determination must also require the third party:

(a) to pay to the second person such amount (if any) as the Commission considers is fair compensation for the deprivation; and

(b) to reimburse the provider and the Commonwealth for any compensation that the provider or the Commonwealth agrees, or is required by a court order, to pay to the second party as compensation for the deprivation.

Note: Without infringing paragraph (1)(b), a determination may deprive a second person of the right to be supplied with an amount of service equal to the difference between the total amount of service the person was entitled to under a pre notification right and the amount that the person actually needs to meet his or her actual requirements.

(5) In this section:

existing user means a person (including the provider) who was using the service at the time when the dispute was notified.

pre-notification right means a right under a contract, or under a determination, that was in force at the time when the dispute was notified.

protected contractual right means a right under a contract that was in force at the beginning of 30 March 1995.

41 The ACCC must take into account the considerations specified in s 44X of the Act:

44X Matters that the Commission must take into account

Final determinations

(1) The Commission must take the following matters into account in making a final 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.

(2) The Commission may take into account any other matters that it thinks are relevant.

Interim determinations

(3) The Commission may take the following matters into account in making an interim determination:
- (a) a matter referred to in subsection (1);
- (b) any other matter it considers relevant.

(4) In making an interim determination, the Commission does not have a duty to consider whether to take into account a matter referred to in subsection (1).

THE TRIBUNAL'S DECISION

42 It was in relation to criteria (f) that Fortescue's case failed before the Tribunal in respect of the Hamersley service. As we have already noted, Fortescue succeeded before the Tribunal in relation to criteria (a) and (b).

43 The Tribunal made some general observations before proceeding to its conclusions in relation to criterion (f). Those general observations relate to the balancing of the benefits and costs to society as a whole involved in a declaration of the services under Pt IIIA of the Act.

They reflect the Tribunal's conclusion that the benefits of access are unlikely to be great whereas the costs are likely to be substantial. These conclusions are hardly surprising given the high level of international demand for iron ore from the Pilbara and the vast profits to be made from participating in meeting that demand. The Tribunal's general comments are at [1301] – [1305]:

> [1301] It is particularly important that, if the services are not declared, alternative rail facilities are likely to be available for many access seekers. The situation in the Pilbara is unusual in that, notwithstanding the presence of facilities with natural monopoly characteristics, alternative facilities can be – and are highly likely to be – built if a declaration is refused. Other benefits which might ordinarily flow from access to a natural monopoly facility do not necessarily arise here. In particular, although we have concluded that criterion (a) is satisfied in respect of all of the services except the Mt Newman service, we doubt that access will result in large gains for competition.
>
> [1302] Sifting through all of the benefits and costs which have been raised by the parties, in the end there are only a few which have a major bearing on the public interest.
>
> [1303] On the benefits side of the ledger, there are two key potential benefits. First, access to some lines might potentially "unlock" some stranded deposits, and even for those who are not stranded, access may provide a significantly cheaper form of transport and allow greater volumes of iron ore to be transported. Second, there may be capital savings from accommodating third party demand on an incumbent's existing line rather than on a new railway.
>
> [1304] On the other hand, there are two key likely costs. First, there is the likelihood that access will discourage the development of alternative lines. Given that access to alternative lines may well be less constrained, and provide far more certainty of use for third parties than access to the existing lines, this is an important cost. The second critical cost is that for some services access will most likely lead to delays in the incumbent making changes on its lines, whether by way of expansions, adopting new operating practices or introducing new technology. These delays (and the resultant costs) are a likely consequence of having a shared facility. The delays (and costs) would probably arise in any event if third parties were to share an alternative facility. Hence, the third parties may be indifferent to the effect. But it is of great significance for BHPB and RTIO.
>
> [1305] We have said that criterion (f) and the discretion do not require a precise quantifiable cost/benefit analysis. Nonetheless, in what follows we have attempted to compare the benefits and costs of access, where possible giving them some order of magnitude value.

44 Specifically in respect of the Hamersley service, the Tribunal concluded (at [1319] – [1331]):

> [1319] Of all of the lines, demand for the Hamersley line – from both RTIO and potential access seekers – is likely to be the most intense. This means that the benefits and costs of access are likely to be of greater magnitude than for other lines. Although we have concluded that the benefits may be worth billions, there is the very

real possibility – indeed probability – that these benefits could be dwarfed by the costs.

[1320] To understand how we come to this conclusion, it is necessary to have regard to the way in which demand will arise for the Hamersley line. On the one hand, RTIO requires the line to carry the vast majority of its iron ore. Most of the mines which RTIO plans to bring online going forward will require use of the Hamersley line. On the other hand, we have identified 167 mtpa of potential third party demand. To put this figure in context, this will be more than half of RTIO's output as at 2014. Of the potential third party demand we have identified, a large proportion is from tenements located near the Solomon area (many of whom could access the Dixon line if it were built), with a comparatively small group of tenements to the south and east who would perhaps be unable to access the Dixon line.

[1321] Viewed in this context, there are two principal benefits from access. One is providing a rail service for tenements who would be "stranded" or severely inconvenienced without access and unable to access the Dixon line. As to the risk of tenements being stranded or severely inconvenienced, see Chapter 13.4.

[1322] If it difficult to know the extent of the benefit [sic]. When we assessed potential third party demand for the Hamersley line, we considered that most would come from large projects in or near the Solomon area. But it must be remembered that we identified potential demand by applying some fairly strict rules which did not take into account other deposits (eg non JORC-certified deposits) which might also benefit from access. Other projects might emerge in the vicinity of the Hamersley line. This makes it impossible to quantify the benefits of access for those tenements, other than to suggest that the benefits will be substantial. It is also important to note that a number of those tenements, even if they cannot access the Dixon line, might be able to access other rail services (eg the Kennedy line or the Marillana spur to the Chichester line).

[1323] The other principal benefit is the capital savings associated with avoiding duplication of the Hamersley line. There are potentially large capital savings if the Hamersley service is not duplicated. We have assessed the maximum amount that could be saved to be around $2.4-2.75 bn, although we did not, and could not, purport to calculate accurately the actual savings. The actual savings might be significantly lower, but, even then, the savings will be substantial. It is important to understand who will benefit from these capital savings. The largest capital savings arise from avoiding duplication of the line south and east of Rosella. The capital savings from Rosella north – which, for a large proportion of identified potential third party demand, is the only section which they will use – are less clear-cut. The cost of expanding this section to cater for third party demand may not be that much less than building the Dixon line.

[1324] There is no denying that savings of this order (ie savings incurred by avoiding the construction of an alternative facility) have a significant bearing on the public interest. But to focus on construction costs is to take too blinkered a view. It is just as important – and perhaps more important – to consider whether access to the Hamersley line will encourage the optimal development of rail infrastructure in the Pilbara. The Hamersley line services parts of the Pilbara where significant mining activity already takes place and where activity will likely grow. A vital question is whether access will encourage rail infrastructure which best services these regions. There are three possibilities presented before us. The first is that there is access to the Hamersley line and the Dixon line is not built. The second possibility is that there is access to the Hamersley line and the construction of the Dixon line is delayed (but

it is eventually built). The third possibility is that there is no access to the Hamersley line and (as is most likely) the Dixon line will be built.

[1325] Let us consider the implications if the first possibility were to eventuate. This would involve potentially cramming a very large amount of traffic (from both RTIO and third parties) on to one rail network. We have potential third party demand to be 167 mtpa; in the long run this likely understates potential demand. Apart from anything, this will increase the potential for complexity in rail operation and for disputes.

[1326] From the perspective of third parties using the line, the constraints associated with fitting in with RTIO's requirements may be very significant, if not prohibitive. Many of the juniors who might benefit from access have relatively large projects contemplating target production rates of 10 mtpa or more. In FMG's case, its project contemplates 100 mtpa of demand for the Hamersley line. These projects will be particularly affected by constrained operations. The reality is that the proposed Dixon Island line would likely offer a much more attractive arrangement for many potential access seekers. In this regard, we note that if FMG were to build the Dixon Island line, it would be able to use it as part of an integrated network with the Chichester line (and any other lines it is contemplating building). Obviously, the Hamersley line could not be used in that same way.

[1327] From the perspective of RTIO, the consequences of third party access would likely be grave. The Hamersley line is regularly expanded to enable RTIO to take advantage of growing iron ore demand. The expansions are significant, and take years to plan and implement. If access is granted it would be necessary for expansion to cater not only for RTIO's future needs but also those of the third parties. The resultant delays caused by the need to consult with third parties on any expansion proposed (RTIO's or the third parties) will produce significant loss to RTIO. Likewise, the costs associated with delaying or preventing the introduction of innovations on the line (eg through changed operating practices or new technology) could be significant.

[1328] On Mr Taylor's analysis and his assumption of a three month average delay to an expansion – which we think is a very conservative assumption – lost export revenue would be in the order of $10 bn. While Mr Taylor's calculation was for the combined RTIO rail network, most of this loss would be attributable to the Hamersley line. Mr Taylor did not take the next step, as Dr Fitzgerald did in BHPB's case, of deriving the likely impact of this loss on Australian economic welfare. If he had done so, we have little doubt that the cost would be extremely large, if Dr Fitzgerald's findings are anything to go by.

[1329] Turning to the second possibility (access to the Hamersley line will delay but not prevent the construction of the Dixon line), we do not think that much could be said to commend this result. The notion of third parties paying for expansions to the Hamersley line and then "ramping up" production while building the Dixon line is, we think, uncommercial. Whatever capital savings there are from access would be greatly reduced. And for the period the Dixon line is under construction, the costs that will be incurred by both third parties and RTIO will be large indeed.

[1330] If we consider the final possibility (no access to the Hamersley service), then we think the consequences are as follows:

- A relatively small proportion of access seekers who could not otherwise access the Dixon line or some other line would be prejudiced.
- For a relatively large proportion of access seekers who could access the

Dixon line, the Dixon service will offer a much more commercially practical rail solution, although they will incur the additional costs of constructing the Dixon service either directly or indirectly (through access charges to the Dixon service).

- RTIO will avoid the potentially enormous costs associated with delays to implementing expansions and innovations on the Hamersley line.

[1331] In none of the above scenarios would we be satisfied that access (even if one ignored delays to expansion) would not be contrary to the public interest. Indeed, when expansion delays are taken into account (and given the enormous potential demand for the Hamersley line, delays are likely to be most prominent), we think access would be contrary to the public interest. We would, in any event, for the reasons outlined, exercise our discretion not to declare the Hamersley service.

45 In relation to the Robe service, the Tribunal concluded (Reasons at [1332] – [1337]):

[1332] Here there are parallels with the Goldsworthy service. One parallel is the need to consider two separate sections of the line.

[1333] Access to the south-west section has significant benefits and relatively minor costs. There are large savings from avoiding duplication of this part of the line, since it appears that any expansions required to meet the demand for this section is limited. Correspondingly, issues such as constraints to third party operations, delays to changes in technology or operating practices, or delays to expansions, are not particularly troubling.

[1334] Access to the northern section of the line (ie north of Western Creek) gives rise to greater complexities. The starting point is that much of the iron ore which RTIO plans to bring online will be directed to Cape Lambert. Equally, however, it appears that RTIO's current expansion plans would not fully utilise capacity of the northern section until at least 2018.

[1335] We note also that the northern section may have some bearing on the proposed joint venture between BHPB and RTIO. It is far from clear whether this joint venture will proceed. At the present time, it is too speculative a prospect to be given significant weight in assessing the public interest.

[1336] If we were declaring the Hamersley service, there might have been large potential third party demand for the northern section. But we are not declaring the Hamersley service, and the third party demand for the northern section is relatively limited. It appears that for at least some time, that demand can be comfortably accommodated with relatively minor, if any, expansions.

[1337] Access to the Robe service will result in large capital savings and, because there is significant capacity, problems associated with constrained third party operations and delays to changes to operating practices or technology are not as pronounced as on other lines. Importantly, Mr Ranson has suggested that in the absence of a joint venture with BHPB, RTIO does not have any intention of fully utilising the capacity of the northern section of the Robe line before 2018. We are concerned about the likelihood of extensive use by RTIO of the line after that time. Even taking into account potential expansion delays, we think that access would not be contrary to the public interest if the period for declaration is limited to 2018. However we are not satisfied that, for any period beyond 2018, access would not be contrary to the public interest.

SECTION 44H(4)(b)

46 We now turn to the criterion (b) issue. As foreshadowed, we will refer first to the Tribunal's reasons in relation to this issue before summarising and discussing the arguments agitated in this Court.

The Tribunal's reasons

47 The Tribunal set out the competing arguments in relation to the construction of criterion (b) at [815]-[817] of its reasons:

> [815] A significant issue is the meaning of "uneconomical for anyone" to develop another (similar) facility. The competing views are that "uneconomical" means that: (1) it would not be profitable for anyone to develop the facility (the "privately profitable" test); (2) the total net costs (including social costs) exceed the total net benefits (including social benefits) of developing another facility (the "net social benefit" test); or (3) a single facility can meet market demand at less total cost than two or more facilities (a "natural monopoly test").
>
> [816] To understand the debate, it is necessary to appreciate the different results that might be reached depending on whether or not a privately profitable test is adopted. It was accepted by all the economic experts that the existence of a natural monopoly does not necessarily preclude the profitable development of a second facility. For example, suppose that an incumbent and potential access seeker occupy infra-marginal positions in a related market; ie, their marginal cost is below the prevailing market price. In that circumstance, it may be profitable for a second facility to be built, notwithstanding that it would be more efficient to share an existing facility.
>
> [817] The question is whether Part IIIA is intended to apply in circumstances where it is profitable – albeit less profitable, and potentially less efficient from society's perspective – for a second line to be built. The incumbents say Part IIIA is not intended to apply in those circumstances, because it is concerned with removing "bottlenecks" and criterion (b) should be seen as a bottleneck test. In contrast, FMG and the NCC argue that while bottleneck considerations may be relevant to criterion (a), criterion (b) is concerned with efficiency.

48 The Tribunal then explained at [818]-[835] its reasons for rejecting what it referred to as the "privately profitable" test (which Rio Tinto referred to in this Court as the test of "economic feasibility"). The passage is lengthy but it is worth setting out in full because it provides a comprehensive statement of the competing considerations drawn from the text of the Act, its context and the evidence of the economists. The Tribunal said:

> [818] In resolving this debate, the place to begin is with the objects of Part IIIA. There are a number of features of the objects clause which should be noted. First, it refers to "effective competition" rather than competition per se. This is to be contrasted with s 2 of the *Trade Practices Act*, which relevantly provides that the

object of the Act generally is to enhance the welfare of Australians through the promotion of competition. A very useful shorthand description of effective competition is proffered by Professor Hausman. He said: "By 'effectively competitive' economists mean that no individual firm (or group of firms) is exercising significant market power nor is the price above the competitive price." A privately profitable test does not sit easily with the object of achieving effective competition. If viewed as a "bottleneck" test, as the incumbents would have it, then it simply tests whether a person could compete in a related market without access. It does not ask whether that person could compete effectively. 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.

[819] Another feature of s 44AA is that it is concerned with two distinct but related concepts – efficiency and effective competition. The references to efficiencies in "operating", "using" and "investment" in infrastructure connote concepts of productive, allocative and dynamic efficiencies. On any view, the scope of criterion (b) must take into account both effective competition and the efficiencies contemplated by s 44AA(1).

[820] One issue raised by the privately profitable test is whether it ignores efficiency considerations, in particular, the allocative efficiency associated with the use of a natural monopoly facility. The proponents of the privately profitable test contend that if it is privately profitable to develop an alternative facility, there is a strong incentive for the access seeker and facility owner to voluntarily implement a socially efficient sharing arrangement. Professor Willig, for example, explains why it is that the credible threat of a new facility will result in "strong individual incentives" for the incumbent facility owner to enter into an efficient facility-sharing agreement. In substance, his approach suggests that once an incumbent realises that refusing to share a facility will not prevent an access seeker from competing in a related market, the incumbent would rationally share the facility if it is efficient to do so. If the incumbent cannot prevent a competitor entering a related market, the incumbent may as well profit from that entry, if possible. Indeed, Professor Willig argues, if the incumbent still refuses to share the facility in the face of a credible threat, then this strongly suggests that there must be inefficiencies and costs associated with sharing that outweigh any efficiencies. His point is that where it is privately profitable, an entrant will come into the market because it will be competitive (ie there is no market failure) and there is no need for regulation. If an alternative facility is not privately profitable, then regulation *might* be warranted.

[821] A variation of this argument is that even if the market does not always achieve an efficient outcome when there is a credible threat of a new facility, it still gets it right most of the time and does a better job than regulation. For example, Professor Ordover draws a distinction between a technical natural monopoly test and evidence of market behaviour indicating an "independent [ie third party] commitment to enter/construct/duplicate" the facility. If there is such a commitment, Professor Ordover argues that the technical assessment whether it is or is not economic (or "uneconomical") to build another facility is "trumped" by the revealed behaviour of market participants.

[822] Similarly, Professor Kalt, who deals with the US essential facilities doctrine, notes that under the second criterion expounded in the *MCI* case (the "impractical to duplicate" criterion), a would-be entrant could not succeed if it were privately profitable to duplicate the facility. In other words, says Professor Kalt, criterion 2 of

MCI uses the market to perform the social cost test on the efficiency of new facilities. Professor Kalt acknowledges that market forces do not always produce satisfactory outcomes. But he says that "it is a false standard to place such market forces up against some vision of a court/regulatory process that is costless and without error of its own". He points out that the operative assumption of the US approach is that firms are rational profit-making concerns and this underlies the stringent US policy toward mandating access. His view is that, from a policy perspective, the US approach has the distinct advantage of using competing parties' respective self-interests to compel them to assess accurately the costs and benefits of their alternatives and for each to act on those alternatives in accord with their own individual self-interest.

[823] In essence, the economists supporting the privately profitable test assert that where an alternative facility can credibly be built, private negotiations will necessarily result in efficient outcomes or, at least, will achieve efficient outcomes more readily than regulation. There are several problems with this assertion. First, it assumes that firms always, or usually, behave in an economically rational manner but from empirical observation we know they do not – especially when it comes to dealing with potential competitors. Second, there are often reasons for an incumbent owner who is behaving rationally to deny access to a potential competitor even when sharing would be socially optimal. Forcing the competitor to use a less profitable alternative facility may harm that competitor. The incumbent may seek to exploit the fact that it will take some time to build the alternative facility. It may be that it is only profitable to build an alternative facility with limited capacity (which is lower than the spare capacity on the existing facility which would otherwise be available). The incumbent may be mindful of not giving a fledgling competitor a "leg-up" to facilitate its growth into a larger player. Third, given the potential for market failure, it is far from clear that market forces achieve a better result than regulation as a general rule. In any event, it is doubtful that the Tribunal is entitled to assume that the decision-makers regulating Part IIIA will make errors.

[824] There is another reason why a privately profitable test may not lead to the efficient use and operation of a facility. Suppose that an existing facility is a natural monopoly, ie it can satisfy society's total demand at a lower cost than two or more facilities. Suppose also that it is privately profitable to build an alternative facility which can only satisfy some, but not all, potential demand. On a privately profitable test, a declaration could not be made, even though many potential users would not be able to use the second facility, but could use (and use more efficiently) the incumbent's facility. It is difficult to see how such an outcome is consistent with the efficient use and operation of infrastructure – and for that matter, the achievement of effective competition – contemplated by s 44AA.

[825] Another factor which tells against a privately profitable test is the emphasis on natural monopolies in the background materials to Part IIIA: see Chapter 9, where this material is discussed in detail. For present purposes, it is sufficient to note that the two consistent themes which emerge from this material are that: (1) facilities requiring access exhibit natural monopoly characteristics; and (2) the notion of being "uneconomical" has been linked to the definition of natural monopoly. In Chapter 11 of the Hilmer Report, which concerns access to "essential facilities", there is repeated reference to a facility being uneconomical to duplicate because it exhibits natural monopoly characteristics. Indeed, the Hilmer Committee's concern was with what it described as the "essential facilities problem". They defined an essential facility as one which satisfied two key conditions. First, the facility must exhibit natural monopoly characteristics and "hence cannot be duplicated economically". Second, access to the facility is required if a business is to be able to compete effectively in a

related market. That said, the final recommendations of the Report did not refer to natural monopolies, instead recommending that a necessary condition for access was that access be essential to permit effective competition in a related market. This reproduced only the second element of the Committee's "essential facility" definition.

[826] For reasons which are unclear, but probably relate to drafting style, the legislation and Competition Principles Agreement that followed the Hilmer Report adopted a more elaborate series of criteria for declaring access than those which were originally recommended. Criterion (a) seems to correspond, albeit couched in different terms, to the "second limb" of the essential facilities definition adopted in the Hilmer Report. Criterion (b) seems to correspond to the "first limb" of that definition. It is significant that in "reintroducing" this first limb, COAG has continued to associate the first limb with natural monopolies. In September 1994, a draft legislative package was released by COAG for public comment. One of the documents in the package was the explanatory memorandum that described an essential facility as one which "exhibits a high degree of natural monopoly characteristics; ie, a competitor could not duplicate it economically". In the second reading speeches for the Competition Policy Reform Bill in the House of Representatives (Commonwealth, *Debates*, House of Representatives (1995) Vol HR202, p 2799) and in the Senate (Commonwealth, *Debates,* Senate (1995) Vol S170, p 2438), it was said that the notion underlying the proposed Part IIIA regime is that access to certain facilities with natural monopoly characteristics is needed to encourage competition in related markets.

[827] While the background material makes repeated reference to infrastructure that displays natural monopoly characteristics, there is no reference to a privately profitable test in terms or in similar language. Nonetheless, the incumbents argue that the Hilmer Committee was principally concerned with bottlenecks, rather than natural monopolies. In this regard, they place particular emphasis on the passage from the Hilmer Report which recommended that a necessary condition for a declaration be that access is essential to permit effective competition in a related market. The Report then observed (at p 251): "Clearly, access to the facility should be essential, rather than merely convenient."

[828] What must be borne in mind is that this comment was made in the context of access being essential for *effective* competition. It was not about whether access is essential to be able to compete per se. A "bottleneck" approach, as advocated by the incumbents, only tests the latter.

[829] Another point against the privately profitable test is that it would lead to a significant degree of overlap between criterion (a) and criterion (b). All parties accept that whether or not it is privately profitable to build an alternative facility would be a relevant consideration for criterion (a). This is not to suggest that there is complete overlap between criterion (a) and a privately profitable test under criterion (b). There may be circumstances where, for example, it is not privately profitable to build an alternative facility but, for separate reasons (eg the existence of an alternative facility which provides part of the service), criterion (a) is not satisfied. Conversely, one can conceive of circumstances in which it would be privately profitable to build an alternative facility but criterion (a) would nonetheless be satisfied, such as when the use of a less profitable alternative facility would not allow for effective competition. The point is that the existence of a bottleneck (or whether it is privately profitable to build an alternative facility) is not in itself determinative of whether access would promote effective competition and, for that matter, whether access is socially efficient. It is, therefore, unclear why criterion (b) should

separately test for a bottleneck on a stand-alone basis. An alternative approach is that criterion (b) is concerned with efficiency (ie the efficient use of existing infrastructure) and criterion (a) considers effective competition. This approach has the merit of avoiding overlap between criteria (a) and (b) and, more importantly, directly addresses the objects in s 44AA(1).

[830] Were the interpretation of criterion (b) governed solely by the forgoing considerations, the Tribunal would have no doubt in concluding that the privately profitable test should be rejected. There are, however, other considerations which muddy the waters. The first is criterion (e), which is whether access to the service is already the subject of an "effective access regime". When considering this criterion, s 44H(5) provides that the minister must have regard to the Competition Principles Agreement. Clause 6(1)(a) of that agreement refers to whether it is "economically feasible to duplicate the facility." Putting these points together, the incumbents argue that the reference to "economically feasible" indicates a privately profitable test. They then argue that criterion (b) must be interpreted consistently with clause 6(1)(a), or otherwise different results may emerge, depending on whether one is assessing an application under a State access regime or under Part IIIA.

[831] The Tribunal acknowledges that this argument has force. Perhaps the most natural meaning of the phrase "economically feasible" connotes private profitability. However, it is not too strained to read "economically feasible" as economically efficient, in the sense that something that is inefficient may be economically unfeasible when looked at from society's perspective.

[832] Another feature supporting the privately profitable test is the reference in criterion (b) to it being uneconomical "for anyone" to develop another facility. The incumbents argue that this reference does not sit well with a natural monopoly or net benefit test. Both of those tests, it was said, ask what is best for society, rendering the reference to "for anyone" otiose.

[833] There is also force in this argument. But, equally, the application of the phrase to the privately profitable test creates difficulties. It was suggested by the incumbents that "anyone" means "any particular individual who can be identified", including, for example, mining companies whose iron ore is sufficiently valuable to subsidise the cost of building the alternative rail facility. An alternative view is that "anyone" means anyone at all, asking whether any hypothetical person could build a rail line and make a profit from providing below rail services.

[834] We think that under either view, practical problems arise. On the incumbent's view, how is one to identify the relevant individual who might profitably build the line? For example, in this case, is one required to consider whether a Chinese steel mill might fund a line in order to facilitate obtaining long-term supply contracts? If the alternative view is adopted, how is one to assess the potential demand for the services and the price for below rail services that "anyone" would be willing to pay?

[835] In the end, the Tribunal does not consider that criterion (b) should be interpreted as a privately profitable test. That test is inconsistent with the enacting history and does not adequately meet the objectives of Part IIIA.

49 The Tribunal, having rejected private profitability as the test erected by the reference in s 44H(4)(b) to "uneconomical for anyone", went on to consider whether s 44H(4)(b) erects a test of natural monopoly or net social benefit. At [836] – [839], the Tribunal said:

> [836] Having rejected the privately profitable approach, it is necessary to consider whether a natural monopoly approach or net social benefit approach is to be adopted. The Tribunal has in the past favoured the net social benefit approach. The Tribunal first considered the meaning of criterion (b) in *Sydney Airport (No 1)*. There the Tribunal said that "uneconomical" did not inquire whether duplication was privately profitable. It said the criterion had to be construed in a broader social cost-benefit sense, in which the total costs and benefits of constructing another facility are to be taken into account. The Tribunal went on to explain (at [205]) that:
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> > If "uneconomical" is interpreted in a private sense then the practical effect would often be to frustrate the underlying intent of the Act. This is because economies of scope may allow an incumbent, seeking to deny access to a potential entrant, to develop another facility while raising an insuperable barrier to entry to new players (a defining feature of a bottleneck). The use of the calculus of social cost benefit, however, ameliorates this problem by ensuring the total costs and benefits of developing another facility are brought to account.
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> [837] The construction of criterion (b) was again considered in *Duke Eastern*. It was pointed out that the criterion appeared to describe a facility which exhibits natural monopoly characteristics. That led the Tribunal to say (at [64]): "[I]f 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." The Tribunal concluded (at [137]) 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."
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> [838] With respect, we consider that a natural monopoly approach is preferable to a net social benefit approach adopted in previous Tribunal decisions for several reasons. First, the background material to criterion (b) consistently links the term "uneconomic" to the notion of a facility exhibiting natural monopoly characteristics. Natural monopoly rests upon a production cost function which does not take into account social benefits or net social benefits. Second, natural monopoly characteristics are concerned with the costs of production based on the available technology. Third, a net social benefit test gives criterion (b) a role which overlaps substantially, and perhaps usurps, the role of criterion (f). Both would involve a weighing up of many of the same social costs and social benefits. Importantly, in weighing up those costs and benefits, the criteria might arrive at different results. It must be borne in mind that many social costs and benefits are necessarily difficult, and sometimes impossible, to quantify. Accordingly, it may be difficult to 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. This is to be contrasted with criterion (f), which is framed in the negative.

> [839] Moreover, criterion (f) looks at the issue in a different setting. For criterion (f) to be satisfied (although it is expressed as a negative), it is not sufficient for the net costs of access to exceed net benefits, ie even if that is the result of the inquiry, the making of a declaration may yet not be contrary to the public interest. Other factors might carry the day. We will explain why this is so when dealing with that criterion. There is, however, no such latitude given to the regulator were all social costs and benefits to be brought into account in criterion (b).

50 The Tribunal described the test for a natural monopoly in a way which regards criterion (b) differently from previous decisions of the Tribunal. Whereas previous decisions of the Tribunal have regarded social costs and benefits in the course of considering criterion (b), the Tribunal in this case took the view that these costs and benefits should be taken into account in considering criterion (f). The Tribunal said (Reasons at [840] – [855]):

> [840] The question is what costs are to be brought to account when deciding whether a facility has natural monopoly characteristics. Here several subissues arise. For one thing, we know that the costs cannot be those incurred by the "facility", for a facility incurs none. The relevant costs are those of the firm. In saying this, we recognise the concept of a firm having a number of plants, one of which may exhibit cost characteristics akin to that of a natural monopoly. This is a concept which some economists (eg Sharkey) call "plant subadditivity". Components of firms, like plants or facilities, cannot be natural monopolies as strictly defined because they are not a firm but only a component of a firm. Nonetheless, criterion (b) requires the notion of a natural monopoly to be applied to facilities.
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> [841] Whether a firm's facility has natural monopoly characteristics involves determining whether the firm's cost function in relation to that facility is subadditive at all levels of output. This is a purely technical inquiry which looks at a firm's production costs. That is, the cost function to which regard must be had is the cost of the inputs (eg labour, operating costs, capital costs, co-ordination costs) incurred in producing the relevant good or service.
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> [842] The expert economists put a different proposition. Most supported the position that "costs" are not confined to costs of inputs but should include all social costs. Dr Fitzgerald put it this way: "'Costs' should clearly, as a matter of economics, be defined comprehensively – i.e. not be confined to comparative capital and operating costs, but encompass *all* costs that differ as between the alternatives, including e.g. diseconomy costs of multi-user c.f. single-user operation" (emphasis in original). With respect to the social cost test, Professor Willig points out that if some version of the test is to be applied, it would be inconsistent with basic economic logic just to take into account construction costs and operating costs. He says it would be necessary in the comparison to include all the impractical costs "engendered by the inevitability and the need to handle as well as possible the conflicts, disputes and paralyses that accompany the mandated sharing of the single set of facilities". It would also be necessary, he says, to include the significant social costs of the disincentives to invest caused by sharing. These costs, Professor Willig rightly says, are difficult to estimate and predict.
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> [843] The Tribunal has given careful consideration to the views of the experts but is of the firm view that a natural monopoly test under criterion (b) should not take into account all social costs, for three reasons. First, almost all of the extensive literature on natural monopolies and the extensive works that consider whether

particular railways exhibit the characteristics of a natural monopoly suggest that social costs should not be taken into account. The literature shows that economists have tested for natural monopoly by only taking into account costs of production: see by way of example only David Evans and James Heckman, "A Test for Subadditivity of the Cost Function with an Application to the Bell System" (2006) 74(4) *The American Economic Review* 615, 622; Paul Joskow, "Regulation of Natural Monopolies", in A Mitchell Polinsky & Steven Shavell (eds), *Handbook of Law and Economics* (2007), 11; John Bitzan, *Railroad Cost Conditions – Implications for Policy* (10 May 2000), prepared for the Federal Railroad Administration, US Department of Transport, 41-46; Marc Ivaldi and Gerard McCullough, "Subadditivity Tests for Network Separation with an Application to US Railroads" (2008) 7(1) *Review of Network Economics* 159, 165.

[844] The second reason why a natural monopoly test should not take into account all social costs is that, by the nature of the inquiry, many of those costs would not be taken into account even if known. A natural monopoly test is a static test. It assesses the state of an industry at a given point in time by taking a set level of demand and technology. Indeed, a common criticism of the natural monopoly approach is that it fails to take into account dynamic issues such as, for example, the social benefits of facilities-based competition, where competition is enhanced by each firm having its own facility, encouraging it to innovate (and hopefully to lower its costs) to capture market share. Many of the social costs which the incumbents say will be caused by access are dynamic in nature – for example, delays to expansions or the retardation of technological development. It may be possible to annualise some of these costs, but leaving aside the difficulty involved, there remain many dynamic costs which are incapable of being quantified.

[845] The third reason is that, in this case, the social costs which the incumbents urge should be taken into account are, speaking rather loosely, the cost of the diseconomies and the inefficiencies that are said would result from access, those costs being largely in the form of lost production associated with activities in a downstream market. In the Tribunal's view, this confuses the cost of production of the service with the cost of providing access. The diseconomy and inefficiency costs, if they are incurred, are only incurred because of the incumbent's participation in a downstream market. But that is just an historical accident. In other cases, the incumbent owner may have no involvement in a dependent market. It could hardly be supposed that whether or not a facility displays natural monopoly characteristics depends upon whether or not the owner is engaged in a particular trade.

[846] It should be stressed that just because a natural monopoly test does not take into account social costs does not mean that those costs are irrelevant. The costs are clearly relevant to criterion (f) and, perhaps, as discretionary factors. It is just that they are not relevant to criterion (b).

[847] A related issue is the extent to which a natural monopoly test should take into account above rail costs. Criterion (b) is concerned with the economics of developing another facility to provide *the service*. There are some costs which are unambiguously costs of providing a below rail service (eg capital and operating costs of the track and coordination costs for scheduling and negotiating the allocation of "rail slots"). There are other costs that are not strictly below rail costs, but are costs which are consequential on whether or not a second line is built. For example, if a second line is built it is likely that newer, more efficient, trains would be used, whereas this may not be possible on an existing line. Those costs are properly characterised as above rail costs. The Tribunal considers that taking into account above rail costs in criterion (b) conflates the provision of below rail and above rail

services. These costs may, of course, be relevant to other criteria.

[848] There are three main ways to test for natural monopoly: engineering cost analysis, survivor analysis and econometric analysis. The first involves analysis of firm-level data. Survivor studies involve examining data on the growth of industries to determine those firms, assumed to be efficient, which increase market share over time and those firms, assumed inefficient, which decrease market share over time. Econometric studies involve examining cost and output data on firms in a particular industry over a period of time and applying statistical techniques to estimate the cost function for the industry.

[849] Testing for a natural monopoly is notoriously difficult. Mr Sundakov, an economist, recognised the problem with implementing the test because of the difficulty in obtaining relevant cost information. Nonetheless, he said in the course of the experts' conference that "a traditional natural monopoly test, which is a re-examination of the costs of production with and without duplication, is a test that can be universally applied." As regards the difficulties in application, he explained that: "We have a choice here of having a test [the privately profitable test] that is easy to apply but looks at the wrong thing and doesn't quite give us the right number, versus the [natural monopoly] test that we recognise is difficult to apply but tries to answer the right question". Mr Sundakov suggested that it did not seem to be right to "go with the simplicity of the answer if it doesn't quite try to answer the right question". We agree.

[850] In the present context, the question comes down to this: Can each line provide society's reasonably foreseeable demand for the below rail service at a lower total cost than if provided by two or more lines? The relevant costs are, as we have said, the costs of producing the below rail service.

[851] An important assumption of this enquiry is that an existing line can, if necessary, be expanded to meet the reasonable foreseeable demand for the service. This is consistent with the economic theory of a natural monopoly, which takes into account the ability of the facility (or, more classically, the firm) to expand the relevant output: see eg Carl Kaysen and Donald Turner, *Antitrust Policy – An Economic and Legal Analysis* (Harvard University Press, 1959); Richard Posner, *Natural Monopoly and Its Regulation* (30th Anniversary ed, Cato Institute, 1999). In the case of an incumbent's line, the additional costs to be taken into account are of operating the line on a shared basis plus the capital cost of any expansion that is necessary to meet the demand. Those costs are to be contrasted with the sum of the costs of operating the incumbent's line (plus the cost of any expansion) for its own use and the cost of constructing and operating a new line(s) to meet third party demand.

[852] It is necessary to determine a point in time at which to calculate whether it is uneconomic to develop an alternative facility. The obvious answer is that the facility must have that characteristic at the time of declaration. However, an access declaration may be made to continue for up to 20 years. It is appropriate, therefore, to consider what the future holds. The 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. Provided the future is predictable with some measure of confidence, that future should be taken into account.

[853] In deciding whether a line exhibits natural monopoly characteristics today, and whether it is likely to do so in the medium-term future, it is, we think, appropriate to begin by looking at what the position would be around 2015. We

> think this is appropriate for several reasons. First, this is the earliest an access seeker could most likely take up access having regard to the likelihood of appeals, the time consumed in negotiations and arbitrations, and the time it would take to construct the appropriate infrastructure. Second (and partly with the first reason in mind), the Tribunal has detailed capacity modelling of the lines (except for Goldsworthy) at around 2015. Third, if a line exhibits natural monopoly characteristics at that time, it is likely to do so now. Our reason for this proposition is simple enough. If in 2015 (or thereabouts) society's demand can be more efficiently accommodated on one line than on two or more, third party demand before 2015, which is likely to be significantly lower, will be more efficiently accommodated on one line due to the high upfront capital costs of constructing a new line, regardless of the level of demand.
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> [854] Given that plans for the lines beyond 2014/2015 are still at a very early stage, it is impractical to conduct a detailed assessment of the lines beyond then.
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> [855] In summary, to determine whether a facility is a natural monopoly, it is necessary, first, to determine the reasonably foreseeable potential demand for the facility (strictly the service provided 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.

51 The Tribunal then considered the evidence relating to the reasonably foreseeable potential demand for the facility. It is not necessary to set out this reasoning here. It is sufficient to note for the present that the Tribunal's findings in this regard will be considered in relation to the procedural fairness issue.

52 In applying the natural monopoly test in this case, the Tribunal reached a different view from the experts who appeared before it in holding that a natural monopoly test under criterion (b) should not take into account all social costs. These costs were seen by the Tribunal as factors to be taken into account in relation to criterion (f) as the residual discretion (Reasons [846]).

53 The Tribunal noted that for the purpose of its natural monopoly test reaching an assessment of the costs that arise in relation to the Robe line is complicated by the possibility of the Hamersley line being declared. This is dealt with in the Tribunal's reasons at [1001] to [1002]. At [1005] the Tribunal identified that the minimum capital savings to be had from sharing the Robe line are likely to be somewhere in the vicinity of $455-651 m. This was arrived at by taking the cost of duplicating the Robe line ($875m) less the cost of additional consists (ranging from $224 m to $420 m) used as proxies for expansion costs. In the upshot, the Tribunal concluded on the evidence that the Robe line (at [924]-[929]) and the Hamersley line (at [930]-[937]) are natural monopolies.

54 As to the limited declaration made by the Tribunal in relation to the Robe service, the Tribunal noted that access to the south-west section of the Robe line (which runs from Mesa J through to the junction at Western Creek) has significant benefits and relatively minor costs. The Tribunal acknowledged at [1333], that third party constraints in relation to this area would be minimal. At [1334] the Tribunal discussed the greater complexity of use of the northern section at Western Creek through to Cape Lambert. That finding is set out in the last sentence of [1334]:

> RTIO's current expansion plans would not fully utilise the capacity of the northern section until at least 2018.

55 The Tribunal gave further consideration to the application of the private profitability test. The Tribunal first revisited its reasons for rejecting the private profitability test on points of principle. The Tribunal said at [952)]–[959]:

> [952] While we have rejected the privately profitable approach to criterion (b), we think it may be of assistance for the Tribunal to express its view on (1) how a privately profitable test should be applied and (2) how it would apply on the facts here.
> ...
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> [953] Three questions arise: (1) What is meant by "profitable"?; (2) What is meant by "profitable ... to develop another facility to provide the service"?; and (3) What is meant by "anyone" in the expression "uneconomical for anyone"?
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> [954] As to (1), to an accountant profit means sales revenue minus the costs incurred in producing that revenue (eg wages, rent, raw materials, etc). To an economist profit is the minimum dollar value necessary to attract a firm to an industry or to induce the firm to remain in it. This will require credit to be given to all the opportunity costs incurred, including the cost of capital. An activity will be profitable if the return on a unit of output, less expenses (including depreciation and the opportunity cost of capital), is equal to or greater than the marginal cost of producing it. This is in line with the approach of Dr Fitzgerald, who said that an activity will be privately profitable if the entrant could cover "the full private costs of the substitute facility (ie both operational and capital costs), including a normal rate of return on capital, so as to compete in the dependent market." We prefer the approach of Dr Fitzgerald.
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> [955] As to (2), the question raised is whether the profit must be generated directly by the provision of the service on the new facility, or whether it is sufficient that a downstream activity generates a profit for which the service is an input. The incumbents favour the latter view. They argue that the private profitability test would be satisfied if there is a mining company for which building a railway would be profitable, whether or not the cost of constructing and operating the railway is subsidised by profits from a downstream activity (eg the sale of iron ore). The incumbents' position is to be contrasted with a requirement that a person could profitably develop a new railway as a stand-alone business.
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> [956] As to (3) (what is meant by "anyone"), there are two views. One, favoured

> by the incumbents, is that "anyone" means "any particular individual who can be identified", including, for example, mining companies whose iron ore is sufficiently valuable to subsidise the cost of building the alternative rail facility. In other words, criterion (b) will not be satisfied if only one person (eg FMG with its special characteristics of a mining company with a large resource) may find it profitable to construct a railway line to transport its iron ore to a port. An alternative view is that "anyone" means anyone at all, asking whether any hypothetical person could build a rail line and make a profit directly from providing below rail services. In this sense, the approach to the meaning of "anyone" is linked to whether the relevant profit-making activity must be the provision of the service, or some downstream activity for which the service is an input.
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> [957] There are conflicting arguments regarding which approach is correct. The incumbents' approach is favoured, they say, because it tests for whether a facility is truly a bottleneck. While we have previously rejected the bottleneck approach, it is clear that, *if* criterion (b) is about bottlenecks, then the incumbents' approach tests for this. The alternative approach does not – it tests the viability of establishing a stand-alone below rail business. It may be unprofitable to establish a stand-alone business, but if it were worthwhile for a miner to build a new railway in order to generate profits from downstream activities, the existing railway would not be a bottleneck.
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> [958] On the other hand, the plain words of the statute support the alternative view. The statute only refers to it being uneconomical for anyone to develop a facility *to provide the service*. In other words, the return that would render the construction of an alternative facility profitable is the return from the provision of the service produced by the use of the facility. On this approach, it is not relevant that a reasonable return can be obtained from the provision of some other service or the supply of goods for which the criterion (b) service is an input.
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> [959] In the end, the Tribunal does not accept the incumbents' approach. The alternative approach accords with the plain meaning of the words in criterion (b) and sets up an objective standard. Whether or not criterion (b) is satisfied is not to be viewed from the perspective of any particular firm. Rather, criterion (b) looks at the position of a hypothetical firm and asks whether that firm could obtain a reasonable rate of return on capital if it duplicates the facility.

56 One may pause at this point to note that the text of s 44H(4)(b) does not include a requirement that "anyone" who might economically develop another facility to provide the service should be able and willing to do so as a "stand alone business". It may be that as a matter of fact it is economical for a vertically integrated participant in the market place to develop another facility to provide the service because of the profitability of some downstream activity of that person. There is no indication in the text or context of s 44H(4)(b) that it is concerned to broaden the gateway to access based on an imagined state of affairs rather than the facts of the market place in which access is sought. As will be seen, it is not necessary to come to a final view on this aspect of the Tribunal's reasoning in order to decide these appeals.

57 Against the possibility that its interpretation of criterion (b) might be unduly favourable to Fortescue, the Tribunal proceeded to give its reasons for concluding that even if the private profitability test were adopted for criterion (b), Fortescue would fail to satisfy that test, in relation to both the Hamersley and Robe lines. The Tribunal said at [960]-[961] and [964]-[965]:

> [960] Little evidence was put forward regarding the profitability of establishing a stand-alone alternative rail haulage business. The profitability of such a business would no doubt depend on a variety of factors, most fundamentally the demand for the service, the price which could be charged and the margins to be expected. One would need also to take into account that if too high a price is charged, customers may go elsewhere or look to build their own line. In the end, there is not enough evidence for us to be satisfied that it would be unprofitable to build an alternative railway (ie as a stand-alone business) to any of the lines for which a declaration is sought.
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> [961] There is, of course, considerable evidence about the profitability of miners building railways as part of their integrated mining operations. We will summarise the conclusions that can be drawn from that evidence.
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> ...
>
> [964] In relation to the Hamersley line, RTIO argues, and we accept, that it is profitable for the Dixon line to be built. This, however, would be developing a facility which provides only *part* of the Hamersley service. Whether it is profitable to duplicate the remaining parts of the line – which extend for quite a considerable distance – is debatable. Mr Taylor has assessed the prospect of various projects in the vicinity of Yandicoogina building their own railway. However, Mr Taylor only assessed the profitability of building a railway for those projects to connect with the Chichester line. Such a railway, which would be going in the opposite direction to the Hamersley line, would provide a different service to the Hamersley service. We have assessed potential demand from that area as 32 mtpa. That might be enough to justify building the Rosella to Yandicoogina part of the railway to connect with the Dixon line (given Mr Tapp's suggestion that a 30 mtpa project would be able to attract financing for a 260 km line). Similarly, it is possible, but ultimately quite unclear, whether there would be sufficient demand for other parts of the line to be replicated to connect with the Dixon line. Ultimately, we cannot be satisfied that it is unprofitable to develop an alternative railway to provide an equivalent service to the Hamersley service.
>
> [965] As regards the Robe line, it is likely to be profitable for Aquila to build its proposed line. Given that the Aquila line follows a quite different course to the Robe line, the Aquila line would not be providing the same service as the Robe line. Nonetheless, because it appears to be profitable to build a line in the vicinity of the Robe line, we could not be satisfied that it would be unprofitable to build a new line to provide the Robe service.

SECTION 44H(4)(b)

Consideration of the arguments of the parties

58 As has been seen, the Tribunal concluded that criterion (b) would not be satisfied because the existing facility can in each case meet market demand at less total cost than two or more facilities: this test it described as a "natural monopoly test": see Reasons [815],[853]. Before the Tribunal, Rio Tinto and BHP argued that criterion (b) erects a test of private profitability, ie, criterion (b) would not be satisfied if it were privately profitable for someone to build another facility to provide the service in question. Fortescue disputed that approach and argued that criterion (b) was a social test concerned with the economic efficiency of duplication from the perspective of society as a whole.

59 In this Court, Rio Tinto and BHP maintain their contention that criterion (b) is a test of private profitability. They argue that while the word "uneconomical" considered alone might be apt equally to encompass a test of private profitability or a test of economic efficiency, the context in which the word is used and the importance of furthering the objects of Pt IIIA afford decisive indications that Parliament did not intend criterion (b) to be concerned with an evaluation of economic efficiency. The word "uneconomical" is used as part of the phrase "uneconomical for anyone". This usage directs attention to the possibility of someone in the market place, whether by reason of circumstances specific to itself or otherwise, being able to develop a similar facility. Further, the context in which s 44H(4)(b) of the Act came to be enacted is said to show that it is concerned with the facts of the market place, rather than a regulator's evaluation of efficiency.

60 It must be stated immediately that the effect of Part IIIA of the Act is a matter of law for decision by the Court. It is not a matter of fact to be resolved by a preference for one body of expert evidence over another. The meaning of the legislation cannot change according to the evidence of the economist preferred by the Tribunal. It was common ground between the parties that the evidence of economists might assist the Court with an understanding of the economic concepts used in the statute, and by alerting the Court to the absurd or unreasonable uniqueness which might flow from one or other interpretation of the statute.

61 In *Sydney Airport (No 2)* at [2], the Full Court of the Federal Court had regard to the background to the introduction of Pt IIIA into the Act by the *Competition Policy Reform Act 1995* (Cth) "as necessary context in which to read the text of the Act". This approach was orthodox in light of the decision of the High Court in *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273. In *Sydney Airport (No 2)*, the Full Court considered at [3]–[21]:

1. The Report of the National Competition Policy Review dated 1993 under the chairmanship of Professor Hilmer and with the assistance of Messrs Taperell and Rayner.

2. The outline to the draft legislation issued by the Council of Australian Governments (COAG) in 1994.

3. The draft Inter-governmental Agreement on Competition Principles which accompanied the draft legislation.

4. The Explanatory Memorandum which accompanied the *Competition Reform Policy Bill 1995* (Cth).

62 We propose now to refer to some passages from these documents. The Hilmer Report contained a number of passages on which Rio Tinto relies in support of its submission that criterion (b) is concerned with "economic feasibility". At (xxxi)-(xxxiii) of the executive overview the following appears:

> Access to Essential Facilities
>
> Introducing competition in some markets requires that competitors be assured of access to certain facilities that cannot be duplicated economically – referred to as "essential facilities". Effective competition in electricity generation and rail services, for example, will require firms to have access to the electricity transmission grid and rail tracks.
>
> While the misuse of market power provision of the Act can sometimes apply in these situations, submissions to this Inquiry confirmed the Committee's own assessment that something more is required to meet the needs of an effective competition policy.
>
> The Committee recommends that a new legal regime be established under which firms could in certain circumstances be given a right of access to specified "essential facilities" on fair and reasonable terms. That regime would operate by specific declaration applying to designated facilities under a general law, provide safeguards to the owner of the facility and to users, and have the flexibility to deal with access issues across industry sectors and facilities. Key features of the proposed regime include:

- the regime could only be applied to a facility without the owner's consent if declaration was recommended by the National Competition Council after a public inquiry;
- the access declaration would specify pricing principles for the individual facility; thereafter, actual access prices would be determined through negotiation between the parties and, if need be, through binding arbitration;
- the access declaration would specify any other terms and conditions relating to access designed to protect the legitimate interests of the owner of the facility; and
- all access agreements would be required to be placed on a public register; if additional safeguards were considered necessary to protect the competitive process they could be specified as part of the declaration process.

The National Competition Council would play a central role in advising on whether access rights should be created and, if so, on what terms and conditions. **The regime would only be applied to the limited category of cases where access to the facility was essential to permit effective competition and the declaration was in the public interest having regard to the significance of the industry to the national economy and the expected impact of effective competition in that industry on national competitiveness.** An access right under the proposed regime could not be created without the recommendation of the Council, although the designated Minister would have the discretion to decline to declare access notwithstanding the recommendation of the Council.
[Emphasis added].

63 In Chapter 11 at 240-241 under the heading "The Essential Facilities Problem", the Hilmer Report stated:

Some economic activities exhibit natural monopoly characteristics, in the sense that they cannot be duplicated economically. While it is difficult to define precisely the term **'natural monopoly', electricity transmission grids, telecommunication networks, rail tracks, major pipelines, ports and airports are often given as examples. Some facilities that exhibit these characteristics occupy strategic positions in an industry, and are thus 'essential facilities' in the sense that access to the facility is required if a business is to be able to compete effectively in upstream or downstream markets.** For example, competition in electricity generation and in the provision of rail services requires access to transmission grids and rail tracks respectively.

Where the owner of the "essential facility" is not competing in upstream or downstream markets, the owner of the facility will usually have little incentive to deny access, for maximising competition in vertically related markets maximises its own profits. Like other monopolists, however, the owner of the facility is able to use its monopoly position to charge higher prices and derive monopoly profits at the expense of consumers and economic efficiency. In these circumstances, the question of "access pricing" is substantially similar to other monopoly pricing issues, and may be subject, where appropriate, to the prices monitoring or surveillance process outlined in Chapter 12.
[Emphasis added. Footnotes omitted].

64 Later in Chapter 11 at 250, in relation to the functions of the designated Minister and the NCC the Hilmer Report sets out that:

> At the same time, the existence of a broad discretionary regime may create pressures on the Minister to declare an essential facility to advance private interests. Accordingly, the **Committee proposes that the Minister's discretion be limited by three explicit legislative criteria**, and by a requirement that the creation of such a right has been recommended by an independent and expert body – the proposed National Competition Council (NCC).
> [Emphasis added. Footnotes omitted].

65 Moreover, at 251, as to the essentiality of access, it is stated that:

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

Clearly, access to the facility should be essential, rather than merely convenient.

66 As to the circumstances in which a right of access may be created, at 266:

> 11.4 A right of access to a facility only be created if [sic]:
> (a) the owner agrees; or
> (b) the designated Commonwealth Minister is satisfied that:
> (i) access to the facility in question is essential to permit effective competition in a downstream or upstream activity;
> (ii) such a declaration is in the public interest, having regard to:
> (1) the significance of the industry to the national economy; and
> (2) the expected impact of effective competition in that industry on national competitiveness; and
> (iii) the legitimate interests of the owner of the facility will be protected by the imposition of an access fee and other terms and conditions that are fair and reasonable.
>
> Where the owner of a facility has not consented to a declaration, the Minister may only make such a declaration if recommended by the National Competition Council and only on terms and conditions recommended by that body or on such other terms and conditions as agreed by the owner of the facility.

67 The explanatory outline which accompanied the draft legislation issued by COAG in 1994 contained the following passage:

> The term 'access' means the ability of suppliers or buyers to purchase the use of essential facilities on fair and reasonable terms. **An essential facility is a transportation or other system which exhibits a high degree of natural monopoly; that is, a competitor could not duplicate it economically.** A natural monopoly becomes an essential facility when it occupies a strategic position in an industry such that access to it is required for a business to compete effectively in a market upstream or downstream from the facility. Possible examples of such facilities are electricity transmission lines, gas pipelines, water pipelines, railways, airports, telecommunication channels and sea ports. Such facilities can be owned by private or public sector organisations.
> [Emphasis added].

68 It may be noted that the understanding of "natural monopoly" reflected in this passage differs from that applied by the Tribunal in this case. This passage in the explanatory outline

is a salutary reminder that the discourse of economists may not always be precisely consistent. More importantly for present purposes, however, it is a clear statement that the "essential facility" mischief at which Pt IIIA of the Act was aimed concerned a facility which a "competitor could not duplicate economically".

69 The draft *Competition Policy Reform Bill* (at 2.30) contained a provision which anticipated s 44G of the Act. It was in the following terms:

> @A-6.(1) The Council, on an application under section @A-5, may recommend to the designated Minister that a particular service be declared.
>
> (2) The Council cannot recommend the declaration of a service that is the subject of an access undertaking in operation under section @A-18.
>
> (3) The Council cannot recommend the declaration of a service unless it is satisfied of all the following matters:
>
> (a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;
>
> **(b) that no other facility exists that can economically provide the service;**
>
> **(c) that it would be uneconomical for anyone to develop another facility to provide the service;**
>
> (d) that the facility is of national significance, having regard to:
>
> (i) the size of the facility; and
>
> (ii) the importance of the facility to constitutional trade or commerce;
>
> (e) that access to the service can be provided without undue risk to human health or safety;
>
> (f) that access to the service is not already the subject of a single, effective access regime;
>
> (g) that access (or increased access) to the service would be in the public interest.
>
> (4) 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 Council must apply the relevant principles set out in that agreement."

[Emphasis added].

70 The accompanying outline (at 1.35 of the Explanatory Material) noted in relation to the provision referred to in the preceding paragraph:

> There a number of matters on which the Council must be satisfied before it can recommend the declaration of a service. These are:
>
> - that access to the service would promote competition in a market (other than a market for the service);
> - that no other facility exists that can economically provide the service;
> - **that it would be uneconomic for anyone to develop another facility to**

provide the service;

- that the facility is of national significance having regard to its size and the importance of the facility to interstate or overseas trade and commerce;
- that access to the service can be provided without undue risk to health or safety;
- that access to the service is not already subject to a single, effective access regime; and
- that access to the service would be in the public interest.

The Council must be satisfied on each of the above before it can recommend the declaration of a service. A negative assessment on any of the above matters would mean that the service in question could not be recommended for declaration.

In determining whether access would promote competition, the Council may consider Australian and international markets. For example, access may facilitate the entry of Australian businesses into overseas markets."

[Emphasis added].

71 The inter-governmental Competition Principles Agreement, a draft of which accompanied the draft legislation, provided by cl 6(1):

> (1) Subject to sub-clause (2), the Commonwealth will put forward legislation to establish a regime for third party access to services provided by means of significant infrastructure facilities (other than facilities which are products, production processes or intellectual property) where:
>
> (a) **it would not be economically feasible to duplicate the facility;**
>
> (b) access to the service is necessary in order to permit effective competition in a downstream or upstream market;
>
> (c) the facility is of national significance having regard to the size of the facility or its importance to substantial interstate or overseas trade (or both); and
>
> (d) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist.
>
> [Emphasis added].

72 The Explanatory Memorandum which accompanied the *Competition Reform Policy Bill 1995* (Cth) stated in relation to the provisions which became ss 44G and 44H:

> [165] This regime establishes two mechanisms for the provision of third party access, namely:
>
> (a) a process for declaration of services which provides a basis for negotiation of access. This is backed up by compulsory arbitration where the parties cannot agree on an aspect of access; and
>
> (b) a procedure whereby service providers can offer undertakings which set out the terms on which a provider will grant access to third parties.
>
> ...
>
> [181] The Council cannot recommend that the service be declared if the service is

the subject of an operative access undertaking. Also, there are a number of matters *all* of which the Council must be satisfied on before it can recommend that the service be declared. These are:

(a) that access to the service would promote competition in a market (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 its size, the importance of the facility to constitutional trade and commerce, or its importance 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; and
(f) that access to the service would not be contrary to the public interest.

[182] In determining whether access would promote competition, the Council may consider Australian and international markets. For example, access may facilitate the entry of Australian businesses into overseas markets.

...

[187] The designated Minister cannot declare a service if the service is the subject of an operative access undertaking. Further, the designated Minister cannot declare a service unless satisfied of *all* the following matters:

(a) that access to the service would promote competition in a market (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 its size, the importance of the facility to constitutional trade and commerce, or its importance 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; and
(f) that access to the service would not be contrary to the public interest.

[188] Once the designated Minister is satisfied of all these matters, he or she has a discretion whether or not to declare the service. As is the case for the Council, **the Minister must consider whether it would be economical for anyone to develop another facility to provide part of the service.** [Emphasis added].

73 Clause 6(1) of the Competition Principles Agreement and the terms of the accompanying outline Explanatory Memorandum, indicate 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.

74 In *BHP Billiton Iron Ore Pty Ltd & Ors v National Competition Council & Anor* (2008) 236 CLR 145 at [42], Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ construed other provisions of Pt IIIA of the Act in a way that would advance the attainment of "the large national and economic objectives of Pt IIIA", as revealed in the legislative text enacted by the Parliament, the report that preceded its enactment, and the Minister's Second Reading Speech. Where competing constructions of the text are open, that should be preferred which "is more appropriate to advancing the overall objectives of Pt IIIA..."

75 It is the legislation which was actually passed which strikes the authoritative balance between the competing views championed by the economists of different schools. Too much should not be made of references in the extraneous materials referred to above about the phrase "essential facilities", or in the economic literature, to "bottlenecks". In *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v ACCC* (2003) 215 CLR 374 at [123], [126], [167]-[184], and [268]-[282], the High Court warned against allowing vivid phraseology derived from the jurisprudence of other countries with different statutory regimes to "take on a life of its own, independent of the statute, and distract attention from the language of the Act itself." That having been said, the extraneous materials to which we have referred do shed some light on the thinking which informs the legislation; but it is the text of s 44H(4)(b) which is decisive. The crucial phrase in s 44H(4)(b) is "not economical for anyone to develop another facility".

76 The Parliament chose to frame criterion (b), so that it directed 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 whether "it would be uneconomical for anyone" to do so. 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 at this point that we are constrained by the statutory text to part company with the Tribunal.

77 In *Sydney Airport (No 2)* at [36] the Full Court of this Court warned against unduly complicating the conceptual framework of Pt IIIA. The provisions of s 44H(4) takes, as it finds it, the market place and asks whether there is anyone who might economically develop another facility to provide the service. 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.

78 In this case the Tribunal, in the course of its consideration of Rio Tinto's argument based on the combination of s 44H(4) and cl 6(1)(a) of the Competition Principles Agreement, acknowledged at [831] that "perhaps the most natural reading of the phrase "economically feasible" connotes private profitability". The Tribunal went on to say, however, that "...it is not too strained to read "economically feasible" as economically efficient, in the sense that something that is inefficient may be economically unfeasible when looked at from society's perspective".

79 In our respectful opinion, it is indeed to strain too far to treat "economically feasible" as "economically efficient". The "perspective" of s 44H(4)(b) is not that of "society as a whole"; it is that of participants in the market place. "Economic efficiency" may involve an evaluation of efficiency "from society's perspective"; but it is quite inconsistent with the text of Pt IIIA to lower the bar to access erected by criterion (b) to regard it as dependent on a regulator's evaluation of efficiency from the perspective of society as a whole rather than the fact of economic feasibility on the part of a participant in the market place.

80 As we have noted, the adoption by the Tribunal of the natural monopoly test in relation to criterion (b) was something of a departure from the test adopted by the Tribunal in previous cases in which a "net social benefit" test was applied. Thus, in *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2 (*Re Duke Eastern)*, the Tribunal in that case said at [64]:

> [I]f 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.

81 In *Re Duke Eastern*, the Tribunal further concluded, agreeing with the submissions of the NCC, (at [137]) 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".

82 In *Re Sydney International Airport* [2000] ACompT 1 (*Sydney Airports (No 1)*), the Tribunal also applied a "net social benefit test" in its consideration of criterion (b) although, in that case, it was not necessary for the Tribunal to choose between that test and the private profitability test. There the Tribunal construed criterion (b) in a broader social cost-benefit sense, in which the total costs and benefits of constructing another facility were taken into account. In *Sydney Airports (No 1)*, the Tribunal said at [204]-[206]:

> In the circumstances of this mater, our conclusion that it would be uneconomical for anyone to develop another facility remains true whether "uneconomical" is construed in a private or social cost benefit sense, a matter of contention between the expert witnesses. As with the definition of "anyone", declaration does not turn on this issue. The Tribunal considers, however, that the uneconomical to develop test should be construed in terms of the associated costs and benefits of development for society as a whole. Such an interpretation is consistent with the underlying intent of the legislation, as expressed in the second reading speech of the Competition Policy Reform Bill 1995, which is directed to securing access to "certain essential facilities of national significance". This language and these concepts are repeated in the statue. This language does not suggest that the intention is only to consider a narrow accounting view of "uneconomic" or simply issues of profitability.
>
> The issue whether uneconomical is to be construed in a private or social cost benefit sense is closely connected to the question of whether "anyone" should include the owner of the facility providing the service to which access is sought. If "uneconomical" is interpreted in a private sense then the practical effect would often be to frustrate the underlying intent of the Act. This is because economies of scope may allow an incumbent, seeking to deny access to a potential entrant, to develop another facility while raising an insuperable barrier to entry to new players (a defining feature of a bottleneck). The use of the calculus of social cost benefit, however, ameliorates this problem by ensuring the total costs and benefits of developing another facility are brought to account. This view is given added weight by Professor Williams's [sic] evidence of the perverse impact, in terms of efficient resource allocation, of adopting the narrow view.
>
> The Tribunal is affirmatively satisfied for the purposes of s 44H(4)(b) that it would be uneconomical for anyone to develop another facility to provide the services declared by the Minister.

83 There are a number of points to be made in relation to this passage from *Sydney Airports (No 1)*. First, as to whether "anyone" in s 44H(4)(b) should include the incumbent owner of the facility to which access is sought, we prefer the view reached by the Tribunal itself in *Sydney Airports (No 1)* at [201] that "anyone" does **not** include the incumbent owner, that being "more consistent with the underlying policy of Pt IIIA and economic and commercial commonsense" [emphasis added]. On this view the problem identified by the Tribunal in *Sydney Airports (No 1)* at [205] with the private profitability test does not arise. Secondly, that the "narrow view" will not apply to resource allocation in every imaginable

case does not mean that the "narrow view" is so unreasonable that it cannot be attributed to the legislature. Reference to the contextual documents to which we have referred above shows that at least some of those responsible for propounding Pt IIIA were indeed concerned with facilities which "a competitor could not duplicate economically". Thirdly, the circumstance that the Tribunal in this case was disposed to depart from the full-blown "social benefits" test serves to dispel any inclination which this Court might otherwise have had, by reason of the importance of "consistency" referred to in s 44AA(b), to adhere to an interpretation of s 44H(4)(b) settled by the course of decisions in the Tribunal.

84 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 (Reasons [833]). That argument may commend itself to some (though not all) economists; but nothing in the language of s 44H(4) or the extraneous materials to which we have referred suggests that the legislature regarded that possibility as one which was not to be countenanced.

85 In so far as the natural monopoly test applied by the Tribunal, or the net social benefits test applied by the Tribunal in earlier cases, depends on the making of an evaluative judgment about efficiency in terms of costs and benefits, that approach is inconsistent with the intention evident from the text and context of Pt IIIA that access should not be available merely because it would be convenient to some parties, or indeed to society, according to the evaluation of a regulator.

86 The narrow test propounded by Rio Tinto has the attraction of being easier to apply than the alternative. 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 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.

87 It may be objected that this is to insist upon the dictates of an economic rationalism which allow too little scope for officials charged with the protection of the public interest to make judgments in that regard. In my respectful opinion, that objection fails to recognise the philosophy which informs the enactment of Pt IIIA, and the philosophy reflected in the provisions of s 44H, which 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.

88 The Tribunal at [835] rejected the test proposed by Rio Tinto on the basis that test "is inconsistent with the enacting history and does not adequately meet the objectives of Part IIIA". In our respectful opinion, the "enacting history" supports the adoption of the test proposed by Rio Tinto. And to the "objectives of the Act", it was not suggested that the introduction of s 44AA altered the meaning of s 44H(4)(b).

89 As to the "enacting history" of Pt IIIA, some further reference to the Hilmer Report, the later Report of the Productivity Commission before the enactment of s 44AA, and the Competition Principles Agreement, suggests that Pt IIIA was intended to minimise regulatory intervention in the market place.

90 The Hilmer Report recognised that in a well functioning market, owners of businesses may choose to deal with whom they please, and to use and dispose of their assets as seems best for them. Specifically, the Committee noted at 242:

> As a general rule, the law imposes no duty on one firm to do business with another. The efficient operation of a market economy relies on the general freedom of an owner of property and/or supplier of services to choose when and with whom to conduct business dealings and on what terms and conditions. This is an important and fundamental principle based on notions of private property and freedom to contract, and one not to be disturbed lightly.

91 The Hilmer Report was concerned that the circumstances in which Pt IIIA applied should be carefully limited, stating at 248:

> The Committee is conscious of the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another. Failure to provide appropriate protection to the owners of such facilities has the potential to undermine incentives for investment.

92 The Report of the Productivity Commission which preceded the amendment of Pt IIIA to add s 44AA reflects the concern that too ready access might chill investment in new facilities. At XIX of the Overview in its report it said:

> The potential 'chilling' effect of access regulation on investment in essential infrastructure services is the main concern. Investment may be deterred for two reasons.
>
> - Potential exposure to access regulation is likely to increase the general level of risk attaching to investment in essential facilities. The inevitable regulatory discretion involved in the implementation of such regulation, and perceptions that regulatory decisions are likely to be biased in favour of service users, are among the factors that contribute to regulatory risk. These sorts of risks attach to investment in any regulated activity. However, the scale of investment in essential infrastructure, and the fact that, once in place, the assets are 'sunk' with few alternative uses, mean that regulatory risk can be a more critical factor in the investment decision and may sometimes deter projects.

93 At p 92 of its report, the Productivity Commission also recorded the concern that a regulator might import their own values and beliefs into discretionary decisions:

> ...Also, particularly if significant administrative discretion is involved in the application of a regulation, there may be a tendency for regulators to bring their own values and predilections to the decision making process.

94 Clause 6(4)(i) of the Competition Principles Agreement also recognized the importance of the "legitimate business interests" of the owner of a facility:

> I. the owner's legitimate business interests and investment in the facility;
> II. the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;
> III. the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;
> IV. the interests of all persons holding contracts for use of the facility;
> V. firm and binding contractual obligations of the owner or other persons (or both) already using the facility;
> VI. the operational and technical requirements necessary for the safe and reliable operation of the facility;
> VII. the economically efficient operation of the facility; and
> VIII. the benefit to the public from having competitive markets.

95 As to the Tribunal's reference to the objectives of the Act, the terms of Pt IIIA strike the authoritative balance so far as the pursuit of the Parliament's objectives is concerned. It

is to the terms of Pt IIIA considered in context that this Court must look for instruction. In *Carr v Western Australia* (2007) 232 CLR 138 at [5]-[7] (*Carr*), Gleeson CJ said:

> Another general consideration relevant to statutory construction is one to which I referred in *Nicholls v The Queen* [(2005) 219 CLR 196 at 207[8]]. It was also discussed, in relation to a similar legislative scheme, in *Kelly v The Queen* [(2004) 218 CLR 216 at 225-232 [22]-[40]]. It concerns the matter of purposive construction. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object. As to federal legislation, that approach is required by s 15AA of the *Acts Interpretation Act 1901* (Cth) (the *Acts Interpretation Act*). It is also required by corresponding State legislation, including, so far as presently relevant, s 18 of the *Interpretation Act 1984* (WA). That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.
>
> To take an example removed from the present case, it may be said that the underlying purpose of an *Income Tax Assessment Act* is to raise revenue for government. No one would seriously suggest that s 15AA of the *Acts Interpretation Act* has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.
>
> As explained in *Kelly and Nicholls*, the general purpose of legislation of the kind here in issue is reasonably clear; but it reflects a political compromise. The competing interests and forces at work in achieving that compromise are well known. The question then is not: what was the purpose or object underlying the legislation? The question is: how far does the legislation go in pursuit of that purpose or object?

96 The observations of Gleeson CJ in *Carr* were referred to with evident approval in *Alcan NT Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [51].

97 In seeking to discern the intent of the Parliament, it is important to note that s 44H(4)(e) and s 44H(5) of the Act 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 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 of the Act, should stand on a different basis in relation to criterion (b) from that on which Pt IIIA of the Act stands.

98 It is also significant in this regard that s 44X(1)(g) requires that the ACCC 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 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.

99 In summary on this point, we are unable to discern in Pt IIIA of the Act an intention that a person who is, as the Tribunal found here, able economically to develop its own facility to provide the service should be able to cross the criterion (b) threshold to access to a competitor's facility merely by showing that it would accord with a regulator's evaluation of productive efficiency. It may be accepted that one of the objects of Pt IIIA is the promotion of productive efficiency, but Pt IIIA strikes the authoritative balance between the promotion of competition and economic efficiency and the "legitimate interests" of incumbent owners of facilities.

100 In our opinion, the intention of the legislature was that, if it is economically feasible for someone in the market place to develop an alternative to the facility in dispute, then criterion (b) will not be satisfied. In such a case, there is no problem in the market place that participants in the market place cannot be expected to solve. This might occasion some wastage of society's resources in some cases, but to say that, is to say no more than that the intention of the Parliament to promote economic efficiency did not trump the competing considerations at play in the compromise embodied in s 44H(4)(b) of the Act.

SECTION 44H(4)(f) AND THE DISCRETION

The Tribunal's reasons

101 The Tribunal explained its approach in relation to criterion (f), and the residual discretion to refuse to declare a service even if the criteria in s 44H(4) are satisfied. The Tribunal expressed its disagreement with the approach taken by the Tribunal (differently constituted) on earlier occasions. The Tribunal said at [1160]-[1167]:

> *Criterion (F) & DISCRETION*
> *Overview*
> [1160] Criterion (f) requires the Tribunal to be satisfied that "access (or increased access) is not contrary to the public interest". The criterion is expressed in the negative, ie it is not necessary for the Tribunal to positively be satisfied that access is in the public interest.
>
> [1161] The TPA provides no definition of the expression "public interest". Dr Fitzgerald says that what must be considered is the welfare, particularly the economic welfare, of the Australian community as a whole. This is in line with the views of the NCC. Professor Fels put it that the Tribunal should consider whether the costs of access do not outweigh the benefits, though it must be borne in mind that, apart from the fact that the assessment may at best be robust, the object is to achieve not a state of perfection but a better outcome. We are in broad agreement with these views, but with one important qualification. On close analysis it may be that access will be manifestly unjust to a section of the community while, at the same time, benefiting the community as a whole. In that circumstance access may nevertheless be contrary to the public interest.
>
> [1162] In the past the Tribunal has emphasised that criterion (f) should not be used to call into question the results obtained by the application of the earlier criteria. Rather, criterion (f) is concerned with other considerations, not caught by earlier criteria, which bear upon the public interest: see eg *Virgin Blue* at [587]-[588]. While the results of earlier criteria cannot be questioned, they are not to be ignored. The satisfaction of criteria (a) and (b) indicates that benefits will occur from access. Those benefits, and other benefits not considered under earlier criteria, as well as the costs of access, must be taken into account under criterion (f).
>
> [1163] The Tribunal also has a discretion whether or not to declare a service. In the past the Tribunal has said that, in light of the detailed considerations required to be undertaken to determine whether the statutory criteria have been satisfied, the discretion is extremely limited. This is not consistent with *Sydney Airport (No 2)*. There the Full Court observed the discretion "may be affected by a wide range of considerations of a commercial, economic or other character not squarely raised by, nor falling within, the necessary preconditions in s 44H(4)": 155 FCR at 137. That is to say, the discretion is a very broad one.
>
> [1164] The relationship between criterion (f) and the discretion is important. Criterion (f) requires the Tribunal to consider whether "access" is contrary to the public interest. The NCC points out that if the Full Court's decision in *Sydney Airport (No 2)* applies to this criterion (and it suggests that, for consistency of approach, it must apply), the only issue to be considered is the impact on public welfare of the mere fact that a third party has access to the service on reasonable

terms and conditions. The NCC says (and no party disagrees) that it is necessary for there to be a more detailed inquiry to appreciate the effect on public welfare of both a declaration and access under Part IIIA, but that inquiry is only relevant to the Tribunal's discretion.

[1165] It is, we think, impossible to disagree with the NCC. The result, however, is problematic. Mere access to the service may, in theory, have some consequences, albeit their measurement is impossible. In the real world many consequences will only arise if access is actually taken up. And the nature and extent of those consequences will depend upon the extent to which access is taken up. Moreover, whether, and the extent to which, access is taken up will be a reflection of the terms upon which access is obtained.

[1166] The *Sydney Airport (No 2)* approach does not permit a detailed consideration of the likely terms of access that might be imposed under Part IIIA. It does allow for the assumption that access will be on reasonable terms. So, we will apply the *Sydney Airport (No 2)* approach to criterion (f) by making some broad assumptions about the nature of access "on reasonable terms and conditions". Issues of substitutability may also be taken into account. We will also take into account the effect of access being taken up: see Chapter 17.4.3. Issues which arise because of the specific operation of Part IIIA will be considered under the discretion.

[1167] Our approach could have this consequence. There may be a finding that access *simpliciter* is in the public interest (or, more correctly, that access is not contrary to the public interest), but taking into account the effects of both a declaration and access under Part IIIA, a different conclusion might be reached. The limitations of the *Sydney Airport (No 2)* approach highlight the importance of the discretion to withhold making a declaration if, in the Tribunal's opinion, a declaration is not in the community's best interests. Indeed, this is consistent with the Full Federal Court's view about the wide scope of the discretion.

102 The Tribunal, having expressed its preference for a broad view of the considerations encompassed by criterion (f), went on to explain the matters which it proposed to take into account. The Tribunal said at [1168]-[1172]:

[1168] The factors which the Tribunal proposes to take into account will not be confined to strict cost-benefit issues. The Tribunal will also have regard to broader issues concerning social welfare and equity, and the interests of consumers. Where possible the Tribunal will distinguish between criterion (f) issues and discretionary factors, although the distinction is not always easy to draw.

[1169] While many factors for and against a declaration and access will be discussed, their impact will, in most cases, be difficult, if not impossible, to quantify. A good example is dynamic efficiency considerations which involve speculation about the future path of technology in the iron ore industry or rail industry. In part the difficulty of quantification arises because many of the alleged costs and benefits of access are esoteric or qualitative in nature. Another reason is that many of the alleged costs and benefits depend upon the occurrence of future events which are necessarily uncertain. Hence, the cost-benefit analysis that the Tribunal performs will not be purely quantitative, and will have significant qualitative aspects.

[1170] In weighing up the costs and benefits, and in the exercise of its discretion, the

> Tribunal will keep in mind that Pt IIIA was intended by the Hilmer Committee to protect "the legitimate interests of the owner of the facility": Hilmer Report at 252. Thus, Part IIIA specifically protects the incumbent's reasonably anticipated requirements for the facility (s 44W(1)(a)) and requires the ACCC during an access arbitration to take into account the legitimate business interests of the provider (s 44X(1)(a)). Clause 4(i)(ii) of the Competition Principles Agreement also requires the ACCC to take into account the costs to the owner of providing access other than costs associated with losses arising from increased competition in upstream or downstream markets. But when giving consideration to the owner's interests, it is necessary to distinguish between its legitimate interests and other, potentially anti-competitive, interests.
>
> [1171] This brings us to a point already mentioned in these reasons, namely, what issues may properly be taken into account at the declaration stage of the two-stage process. FMG and the NCC suggest that many of the alleged costs raised by the incumbents should only be considered at stage two, the negotiation (and if necessary) arbitration of an access dispute. There are two premises underlying this suggestion. The first is that Part IIIA makes provision for the protection of the incumbent's legitimate business interests so it cannot be assumed that those interests will be prejudiced as a result of access. The second premise is that whether there is a factual basis for many of the incumbents' concerns will only become apparent at stage two. This is for the reason that the impact of access on the incumbent's operations will depend on the nature and extent of the access sought. Thus, according to the NCC, it is necessary to distinguish between those costs caused by access *per se* and those caused by the type of access sought at stage two. The NCC does not, however, make clear what costs, if any, are relevant to criterion (f) under this approach.
>
> [1172] We think that the approach suggested by FMG and the NCC gives too limited a role to the decision-maker at the declaration stage. It is true that, when it comes to the kind of access which might be sought in the event of a declaration, nothing is certain. But criterion (f) requires the Tribunal to consider the consequences of *access* (even if only in the narrow sense described in *Sydney Airport (No 2)*). This necessarily involves some speculation. In any event, there will be some consequences which, while not certain, are likely to occur. It is inappropriate to simply ignore those consequences. The better view, we think, is that the Tribunal should consider consequences that are likely to arise as a result of access, giving them a weight that pays regard to their degree of likelihood.

103 The last paragraph of the passage just excerpted was the focus of contention between the parties in this Court. The Tribunal went on to give some further explanation of its understanding of the scope of criterion (f). The Tribunal said at [1173]-[1174]:

> [1173] As regards the proposition that Part IIIA provides some protection for the legitimate interests of the incumbent, the Tribunal makes two observations. First, there may be costs which will be borne by an access seeker in order to protect the incumbent's legitimate interests. That the incumbent does not bear those costs does not make them irrelevant to the declaration decision. We are, after all, concerned with costs from society's perspective. The second observation is that Part IIIA does not provide the incumbent with certainty that its legitimate business interests will be protected: see generally Chapter 10. We think this is relevant both to the public interest criterion and to discretion.
>
> [1174] The final introductory comment we wish to make is that, as regards

> criterion (f) and the discretion, the Tribunal considers that its role at the declaration stage is to be concerned with the "big picture". At stage two the minutiae of terms of access will be dealt with. When considering the public interest and exercising its discretion at the declaration stage, the Tribunal is, to a significant extent, concerned with broad issues of policy that are unlikely to be dealt with at stage two.

SECTION 44H(4)(f) AND THE DISCRETION

Consideration of the arguments of the parties

104 The 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). In the Tribunal's costs and benefits analysis, the costs of access which the Tribunal took into account at [1204]–[1246] included:

- That the mere presence of a third party on a line will lead to a loss of throughput.
- That compatibility and safety issues arise as rail infrastructure for a heavy haulage railway involves highly sophisticated and intricate technology.
- That a number of discrete maintenance issues arise.
- That scheduling concerns arise as Rio Tinto and BHP function on a "run when ready" basis and are constantly in operation.
- That third party train failures on the incumbents' lines have the potential to cause serious disruptions to operations.
- That a third party operating on an incumbents' line will be subject to operational constraints likely to be required to run its trains with minimal notice in conditions that are not ideal and that they will be required to operate trains which are compatible with the incumbent's trains.
- That inefficiencies associated with delayed or sub-optimal new operating practices and technology arise.
- That access may lead to delayed or sub-optimal expansions due to competitive motives.
- That arbitration costs may arise if there is a need for incumbents to consult with third party users over expansion plans.

105 In evaluating the balance of costs and benefits, the Tribunal noted the need to keep in mind that Pt IIIA was intended by the Hilmer Committee to protect "the legitimate interests of the owner of the facility" (Reasons [1170]). The Tribunal considered that in respect of criterion (f) and the residual discretion, its concern at the declaration stage with the "big picture" noting that at the second stage the detail of terms of access would be dealt with. The Tribunal noted that to a significant extent, it is concerned with broad issues of policy that might not be dealt with at the second stage of the Pt IIIA process (Reasons [1174]).

106 Mr Beach QC, who appeared with Mr Marks and Mr Borsky of Counsel on behalf of Fortescue, attacked these aspects of the Tribunal's reasoning. Mr Beach argued that the Tribunal erred in approaching criterion (f) on the basis that the considerations which inform the "public interest" in s 44H(4)(f) encompass matters of economic efficiency and competition policy; these considerations are required to be addressed only in relation to criterion (a) and criterion (b) in s 44H(4). Mr Beach argued that the Tribunal failed to appreciate that criterion (f) does not invite a consideration of whether the benefits of a material increase in competition for the purposes of criterion (a) may be outweighed by the costs incurred in order to achieve those benefits, nor does criterion (f) invite a reconsideration of the costs germane to criterion (b) in order to determine whether those costs are worth incurring as a matter of the public interest if criterion (b) is satisfied.

107 Mr Beach also submitted that the Tribunal's error in its approach to the application of criterion (f) was compounded by the Tribunal's taking into account, for the purposes of criterion (f), costs which are inherent in the processes contemplated by Pt IIIA, such as the costs of arbitration at Stage 2 and predictions as to costs which, if they are ultimately incurred, inevitably fall to be taken into account in the processes of negotiation and arbitration by the ACCC in relation to the terms on which access should be granted, if at all, to particular third parties.

108 In our respectful opinion, Mr Beach's arguments should be rejected. 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.

109 Mr Beach's argument that criterion (f) is confined in its scope by the other criteria in s 44H(4) and by the provisions which govern the second stage of the Pt IIIA process, does not sit comfortably with the text of s 44H (which is unqualified by reference to the provisions relating to the second stage of the Part IIIA process) or with the observations of the Full Court of this Court in *Sydney Airport (No 2)* at [39]:

> The construction and interpretation of s 44H, and in particular s 44H(4), should not be approached on the basis that it is necessary to find a place for all possible competing arguments about the merits in any given decision about the making of a declaration within the list of necessary preconditions of satisfaction in s 44H(4). After the considerations in s 44H(2) and (4) are dealt with, the decision to be made whether or not to declare a service may be affected by a wide range of considerations of a commercial, economic or other character not squarely raised by, nor falling within, the necessary preconditions in s 44H(4). Of course, any such considerations must not be irrelevant in the sense discussed in *Minister for Aboriginal Affairs v Peko-Wallsend Pty Ltd* (1986) 162 CLR 24 at 39-42, in particular having regard to the purposes, text and structure of the Act.

110 Next, Fortescue argued that it was wrong of the Tribunal to speculate as to whether the ACCC might not observe the requirements of s 44X(1)(a) and (b) of the Act that it take into account "the legitimate business interests of the provider" and "the public interest" in making its determination at the second stage of the Pt IIIA process. Fortescue also argues that s 44V(3) enables the ACCC to determine the costs and inefficiencies resulting from delays flowing from access; that being so, it is unnecessary and premature for the Minister or Tribunal to concern itself about such matters at the first stage of the Pt IIIA process.

111 But to say these things is not to demonstrate that the matters addressed by the Tribunal were outside its purview under s 44H(4)(f). It cannot be the case, for example, that a declaration of access must be made by the Tribunal where only a modest improvement in competition in a minor downstream or upstream market is likely to ensue from access at great cost in the way of disruption to an incumbent's operations in an important market simply because the ACCC can be expected to exercise its power under s 44V(3) to preclude access in order to give effect to s 44X(1)(a). To accept Fortescue's argument would radically reduce the power and responsibility of the Minister and the Tribunal to reject applications which appear to them plainly to be contrary to the public interest.

112 It may be accepted that, in applying criterion (f), the Tribunal should proceed on the footing that "access" in criterion (f) is access on such reasonable terms and conditions as may be determined in the second stage of the Pt IIIA process. But nothing in the Tribunal's reasons suggested that it did not proceed in this way: indeed, it expressly said that it did: [1066].

113 It may also be accepted that the costs of negotiation of the terms of access at the second stage of the Pt IIIA process, including the costs liable to be incurred in any arbitration by the ACCC, are costs which are a necessary part of the Pt IIIA process. But to say that is not to demonstrate that the likelihood that such costs will be incurred at the second stage of the process is irrelevant to the question whether an incumbent owner should be exposed to those costs by the making of a declaration. It is difficult to see why the avoidance of the expense of what is likely to be a futility is not a good reason for exercising the discretion against making a declaration. Similarly, it is not irrelevant to the decision to open the way to the second stage of the Pt IIIA process that no sufficient case for access is shown to warrant putting an incumbent owner to the futile expense of the second stage of the process.

114 It may well be that, as Mr Beach says, the resolution of issues as to the costs and benefits of access can be more precisely informed at the second stage of the Pt IIIA process. Section 44V(3) authorises the ACCC to make a determination to refuse access where that is considered by the ACCC to be the proper course. These considerations do not, however, afford a sound basis for concluding that the terms of s 44H are not, or ought not to be, applied according to their terms but are instead to be read down in a way which is unstated in the legislation. It is also an unattractive aspect of this argument that, if accepted, it would diminish the responsibility of the Minister to make a decision as to whether access would be in the public interest in a broad national perspective.

115 Nothing in the language of Pt IIIA of the Act is apt to convey the intention that the decision making required of the Minister and the Tribunal in stage one should be somehow constrained or limited by the consideration that if a declaration is made, it may fall to the ACCC to consider the same or similar issues in stage two.

116 The Minister and the ACCC may be obliged to consider the same evidence in relation to similar issues; but the perspective of each decision-maker will be different. Under

criterion (f), the Minister may take into account the possibility that a material improvement in competition in a dependent market does not outweigh, in terms of the public interest, the likelihood of a countervailing cost to the Australian interest of the making of a declaration in terms of, for example, the national economy, security, or the environment.

117 For these reasons, we respectfully concur with the Tribunal that the correct approach to the application of criterion (f) is that stated in para [1172] of the Tribunal's reasons set out above. On that interpretation of s 44H(4)(f) it was open to the Tribunal to reach the conclusion that criterion (f) was not satisfied in relation to the Hamersley service and was satisfied only until 2018 in relation to the Robe service.

118 That having been said, it is necessary now to address Fortescue's arguments in relation to criterion (a) insofar as they may bear upon the Tribunal's conclusion in relation to criterion (f). As we indicated at [21] above, it is convenient to deal with criterion (f) in conjunction with criterion (a).

119 In relation to criterion (a), Fortescue contended, before the Tribunal, that there were three dependent markets in which access to Rio Tinto's services would materially increase competition: the global iron ore market; the iron ore tenements market; and the rail haulage market. The Tribunal held that the global iron ore and the iron ore tenements market were already effectively competitive and that criterion (a) had no application in markets that are already effectively competitive. In relation to the rail haulage market, however, the Tribunal found that access to the Hamersley and the Robe services would promote a material increase in competition.

120 In this Court Fortescue argued that the Tribunal erred in its construction and application of criterion (a), in finding that intervention was not called for if the dependent market was effectively competitive and, further, in finding that the market for iron ore tenements was effectively competitive. Fortescue raises the criterion (a) argument because the Tribunal's conclusions on criterion (a) had a bearing upon its consideration of the costs and benefits of access under criterion (f). The likelihood of the construction of the Dixon line lessened the significance of the stranding of other tenements and the consequences in terms of competition in the tenements market for the purposes of criterion (a). Further, the

Tribunal's finding that an alternative link would exist for the Hamersley line, namely the Dixon line, was said to be tainted by what Fortescue says was a denial of procedural fairness.

121 We will deal with the procedural fairness question below. But as to the relevance of the tenements market, it is not for this Court to second guess the Tribunal's conclusion in relation to the imminent reality of access to a beneficial effect on competition in the tenements market. That is precisely the sort of evaluation with which the legislative has charged the Minister and the Tribunal.

PROCEDURAL FAIRNESS

The Tribunal's reasons

122 Fortescue argues that the Tribunal denied it procedural fairness in concluding that it was likely that Fortescue would construct the Dixon line by 2013/14. The Dixon line would enable the carriage of ore from the Solomon area to Anketell Point on the coast. Fortescue argues that the Tribunal's conclusion, in this regard, in relation to criterion (f) was based on evidence unfairly provided to the Tribunal by Rio Tinto in the following circumstances.

123 At the conclusion of argument before the Tribunal, the Tribunal informed the parties of its intention to seek material updating the position of junior miners in the Pilbara who might be affected by the declaration sought by Fortescue. In May 2010, the Tribunal sought this information from the Council; and the Council responded, copying the other parties into its response to the Tribunal. Rio Tinto, unbidden by the Tribunal, made its own response, which included material published by Fortescue in March 2010. This material tended to support the Tribunal's findings as to the likelihood of the construction of the Dixon line in the future.

124 It should be noted here that Rio Tinto emphasises that the Tribunal did not make a finding as to the likely date of the construction by Fortescue of the Dixon Line. It will be seen that there is little substance in this point.

125 The Tribunal reverted to a discussion of the request it made of the NCC and said at [450]-[457]:

> [450] FMG appears to have selected Anketell Point as its preferred option. In June

2009, it entered into a co-operation agreement with Aquila Resources Ltd to investigate the joint development of a port at Anketell Point. Planning is relatively well progressed. Aquila has indicated that the port has an initial design capacity of 40mtpa, with provision to allow for the progressive expansion of facilities for other users up to 350mtpa. A conceptual plan has been submitted to the Western Australian Government, with a definite feasibility study due shortly. In March 2010 FMG indicated that it intends, as part of the third stage of its expansion plans, to ship 100mtpa of iron ore from Anketell Point in about 2013/2014.

[451] To transport iron ore to Anketell Point will require a railway. FMG's stated preference is to access RTIO lines for that purpose. If it cannot obtain that access, it may build its own line from the Solomon area to Anketell Point. In a March 2010 investor presentation, FMG noted that if it does not obtain access to the RTIO lines, it will build a 220km railway. Mr Miller's report identified a preliminary route for the line running from the Solomon Group area to the port. He has estimated the cost of the construction of that line (the Dixon line), based on the actual cost of the Chichester line, to be $950m for infrastructure plus $350m for rolling stock.

[452] If FMG were to combine the proposed Kennedy and Dixon railways and port facilities at Anketell Point, iron ore from all of FMG's operations could be delivered to either the existing Anderson Point port facility or to the planned port facilities at Anketell Point.

[453] To the extent it has foreshadowed developments beyond 95mtpa, Mr Tapp said that the development of the Solomon area is only at an early stage of conceptual study. In respect of the proposed Kennedy railway, Mr Tapp said there is no prospect of construction commencing within the next two years and it is by no means certain that construction will ever go ahead. If it does, Mr Tapp says, it will be at least 5 years before it is completed.

[454] In the Tribunal's view, if FMG does not obtain access to the Hamersley line it is highly likely to construct both the Dixon line and the Kennedy line. The Dixon line will be constructed once the Solomon output increases beyond 60mtpa and FMG's port facilities at Port Hedland reach capacity. The Kennedy line will be constructed first to handle the initial Solomon output.

[455] There are several reasons for us reaching this conclusion. First, FMG's recent public announcements all suggest that the lines will be built if there is no access to the Hamersley line. In fairness to Mr Tapp, these announcements supersede his evidence.

[456] Second, the Solomon deposits are a very large, valuable resource. FMG's latest investment announcements suggest that the area can produce 160mtpa, which is more than enough to justify building both lines.

[457] Third, all the evidence suggests that FMG's long-term expansion is likely to be closely tied to use of the port at Anketell Point, given capacity constraints at Port Hedland.

126 The Tribunal also said at [856]-[871]:

[856] Reasonably foreseeable demand consists of the incumbent's expected demand plus reasonably foreseeable third party demand. The material produced by the parties did not provide sufficient information about the activities of mining companies to assess demand. Accordingly, pursuant to s 44K(6), the Tribunal

requested the NCC to prepare a report updating the information. For the report, the NCC was asked to consider only information made publicly available by or on behalf of the junior miner (and for public companies, only information published through the ASX).

[857] The specific issues the NCC was asked to address on a project-by-project basis were the following:

(1) The nature and extent of the resource for each project, specifying, in the case of a mineral resource, whether the JORC classification is inferred, indicated or measured, and in the case of an iron ore reserve, whether the JORC classification is probable or proved;
(2) The chemical characteristics of the resource or reserve (eg its Fe content);
(3) Any target production rate which is proposed or being investigated for the project;
(4) Any transport arrangements that are proposed or being investigated for the project; and
(5) Any use of port facilities that is proposed or being considered for the project.

[858] Following the receipt of the report, the Tribunal invited the parties to comment on any errors or omissions. Comments were received from RTIO and BHPB.

[859] Based on the information that was initially provided to the Tribunal, the information more recently provided by the NCC, and RTIO's and BHPB's comments, the Tribunal has been able to assess the demand for each service. In that regard the Tribunal has applied a number of broad rules to "filter out" tenements which it regards as not being treated as an appropriate source of demand.

[860] First, in the absence of a concluded joint venture between BHPB and RTIO, the Tribunal has assumed that neither RTIO nor BHPB will demand use of the other's lines. This is consistent with a key theme in both their cases – that each operates its Pilbara iron ore business in a way which requires exclusive use and control of its rail lines.

[861] Second, contrary to submissions by FMG, the Tribunal has excluded tenements at an earlier stage of development.

[862] Third, only tenements which have JORC certified mineral resources and/or ore reserves are included. A mineral resource under the JORC can only be certified if there are "reasonable prospects for eventual economic extraction." Mr Harmsworth said that when an iron ore project is developed, there is usually a "reconnaissance" stage whereby some limited initial drilling is conducted. If it is thought that further exploration is warranted, it is most appropriate for further drilling to be undertaken to establish an (inferred) mineral resource. The Tribunal considers that the results of exploration activity prior to reaching JORC standard are too speculative to be relied upon.

[863] The Tribunal appreciates that further JORC certified deposits will emerge. But the Tribunal must at least arrive at a "broad indicative estimate" of third party demand. No reliable estimates can be made of potential demand from mineral deposits which have not been proven to JORC standard. The result is that the Tribunal's estimates for third party demand are likely, if anything, to understate potential future demand.

[864] Fourth, several tenements were excluded because of their proximity to port. The tenement include those where the deposit lies closer to the port than to the rail line (or in the case of Mt Newman, the loading point) and where the deposit lies so close to the port that rail access is highly unlikely to be uneconomic.

[865] Fifth, several tenements were excluded on the basis that they have entered into long-term "mine gate" sales or similar arrangements.

[866] Sixth, where a junior has committed itself to alternative means of transport (eg as where there is an agreement to use the Chichester line, or where the junior is planning to construct a slurry pipeline) its tenements have been excluded.

[867] Seventh, junior miners with no access to port facilities were included. This was for the reason that new port facilities are likely to be developed to cater for third party demand. There are plans to expand and develop facilities at Utah Point and South-West Creek. There are also plans to develop Anketell Point, with estimates of the commencement of that port's operations varying from 2013 to 2015.

[868] Eighth, the Tribunal has not, as suggested by BHPB, disregarded tenements with a low quality resource. Given the growth in demand predicted in years to come, we think it would be unsafe to proceed on any basis other than to assume that so called "low quality" resources could be developed.

[869] Ninth, only juniors who have commenced production or who have announced they will commence production have been included. For the latter group the Tribunal has assumed that the project will be operational around 2014/2015. The evidence shows that once a decision is made to move to production the start-up time can be relatively short. Mr Richards said that even projects which are at the stage of being conceptual targets could be operational within 12 months. Mr Tapp said that it would take approximately 18 months to develop Mindy Mindy to the point of being fully operational.

[870] To assess the volume of the demand the Tribunal has relied upon the production figures in the NCC's report and the incumbents' comments on that report. If a junior miner is considering a range of target production levels the Tribunal has used the highest figure.

[871] A difficult issue with which the Tribunal had grappled is how to deal with demand for a particular line which is contingent on another service being declared. This issue arises in two ways: (1) third party ore hauled on the Mt Newman line may use the western part of the Goldsworthy line to get to port; (2) ore coming off the Hamersley line may use the Robe line north of Emu junction to get to port. We do not think that potential demand coming off other lines can be ignored. For this reason, we have considered the position both with and without other lines being declared.

Consideration of the arguments of the parties

127 Several of the statements made by the Tribunal in paragraphs [450]–[457] of its reasons reflect information which was contained in Fortescue's March 2010 investor presentation. Some of this information was before the Tribunal already. In this regard:

1. The statement by the Tribunal in [446] that "FMG has announced plans that contemplate increasing its production rate in three stages, from 55 mtpa to 95 mtpa, then to 155 mtpa, and then to 255 mtpa or more" appears to have been taken from the March 2010 presentation;

2. The statement by the Tribunal in [448] that "60 mtpa will be hauled from the Solomon area. Combined with 95 mtpa from the Christmas Creek and Cloud Break area, a total of 155 mtpa will be hauled down the Chichester line to be shipped from Anderson Point" might also have been taken from that material. There was, however, other material before the Tribunal on which this statement could have been based;

3. The statement by the Tribunal in [450], "[i]n March 2010 FMG indicated that it intends, as part of the third stage of its expansion plans to ship 100 mtpa of iron ore from Anketell Point in about 2013/14" obviously came from references in the March 2010 presentation to "target timeline 2013/14" and "can be delivered in 2013/2014";

4. The statement by the Tribunal in [451], "FMG's stated preference is to access RTIO lines for that purpose. If it cannot obtain that access, it may build its own line from the Solomon area to Anketell Point" reflects information in the March 2010 presentation, but the possibility that FMG will build its own line from the Solomon area to Anketell Point had been canvassed in other evidence including the cross-examination of Mr Tapp of Fortescue;

5. In relation to [454] of the Tribunal's reasons where it is said that the "Dixon line will be constructed once the Solomon output increases beyond 60 mtpa" the basis for that inference was available in an FMG announcement tendered during the hearing as well as in the March 2010 presentation.

6. The statement by the Tribunal in [455] that "...FMG's recent public announcements all suggest that the lines [including the Dixon line] will be built if there is no access to the Hamersley line. In fairness to Mr Tapp, these announcements supersede his evidence". This statement and the Tribunal's reference to "FMG's latest investment announcements" (in [456]) were obviously based on the March 2010 presentation;

7. The statement by the Tribunal in [456], referring to the Solomon deposits, "FMG's latest investment announcements suggest that the area can produce 160 mtpa, which is

more than enough to justify building both lines" was taken from the March 2010 presentation;

8. The statement by the Tribunal in [462], "[u]ltimately, FMG says that "its medium term management target" for the Pilbara region is 355 mtpa" was taken from the March 2010 presentation which contained the statement: ("FMG Pilbara region medium term management target – 355 mtpa").

128 It may also be noted that the Tribunal stated (at [891]):

> FMG has recently announced that its Solomon hub strategy will take place in two stages. It is anticipated that 60 mtpa will initially be transported east to the Chichester line and ultimately to an expanded FMG port (with a capacity of 155 mtpa) at Anderson Point. The second stage involves an additional 100 mtpa being transported to Anketell Point. The target timeline for the second stage is 2013/14.

This statement is based on information contained in the March 2010 presentation.

129 On behalf of Rio Tinto it was submitted that Fortescue had not been denied natural justice because the March 2010 material to which the Tribunal referred was not "adverse" to Fortescue so that no occasion arose for Fortescue to be afforded an opportunity to answer this material. It was also said that the material emanated from Fortescue and that Fortescue had not sought to make any public withdrawal or qualification of this material. We are not disposed to accept these arguments.

130 There is an air of unreality in the argument that the March 2010 material was not calculated to be "adverse" to Fortescue. It was apt to support a finding that the Dixon line would be built by Fortescue in the short term because of the demand for the carriage of ore from the Solomon area to a new post at Anketell Point. Nor are we persuaded that Fortescue was, as Rio Tinto argued, the author of its own misfortune by refraining from demanding of the Tribunal an opportunity to be heard in relation to this new material.

131 Fortescue was entitled to assume that, unless it was advised otherwise by the Tribunal, the Tribunal would not use the material provided to it by the NCC and Rio Tinto for any purpose other than that which was indicated, namely to update the level of demand by junior miners in the Pilbara. It was perfectly clear to all concerned that Fortescue was not considered to be a junior miner. The Courts should be slow to encourage litigants to persist

in attempts to "have the last word" after the conclusion of argument and the case has been taken under consideration.

132 It should be clearly understood that it is undesirable that a party engage in unsolicited correspondence with a Court or Tribunal after argument has concluded and the decision has been reserved: there must be an end to argument. The course taken by Rio Tinto in this case is not rendered acceptable because its communications with the Tribunal were copied to Fortescue's solicitors, who were entitled to regard the argument as concluded. Fortescue and its solicitors should not be criticised for failing to insist upon the Tribunal reconvening in order to enable them to complain about the new material. They were entitled to proceed on the basis that if the Tribunal was minded to use the information provided by Rio Tinto for purposes adverse to Fortescue, they would have been alerted to that possibility by the Tribunal.

133 We are unable to conclude that the Tribunal did not rely upon the information irregularly provided by Rio Tinto to make a finding which it would not have made on the material properly before it.

134 It may be said that the excerpts from the reasons of the Tribunal which we have set out show that the Tribunal's findings adverse to Fortescue in relation to criterion (f) did not include a finding that the Dixon line would be completed by the year 2013-2014. That there is a likelihood that Fortescue will construct the Dixon line at some time was supported by evidence before the Tribunal other than the material in Fortescue's March 2010 presentation. But it is not correct to say that there is no finding by the Tribunal in relation to which the timing of the construction of the Dixon line in 2013-2014 is germane. In this regard, the finding at [891] of the Tribunal's reasons suggests the possibility that the Tribunal's thinking informed in a material way the finding in paragraph [454] of its reasons.

135 We are not able to conclude that the March 2010 material, and the absence of any explanation from Fortescue in relation to it, did not make a difference to the Tribunal's conclusions adverse to Fortescue in respect of criterion (f): cf *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 at [4], [131], [211].

136 That having been said, there is no suggestion that the March 2010 material affected, in any way, the Tribunal's conclusion that if the test of economic feasibility were applied in criterion (b), Fortescue's applications in relation to the Hamersley service and the Robe service would not pass that test. Because Fortescue's applications for access were bound to fail for that reason, Fortescue was not prejudiced by the late reception of the March 2010 presentation and the Tribunal's decision must be upheld.

CONCLUSION

137 So far as the Hamersley application is concerned, even if the conclusions of the Tribunal in relation to criterion (f) adverse to Fortescue were erroneous or were affected by a want of procedural fairness, Fortescue's application for access cannot be sustained unless it passes through the criterion (b) threshold. And so far as the Robe application is concerned, even with the benefit of the Tribunal's conclusion on criterion (f), Fortescue's application cannot succeed unless it too passes criterion (b). On the correct interpretation of criterion (b), based on the findings of fact by the Tribunal which are unchallenged, both Fortescue's applications must fail at that threshold.

138 Fortescue's complaints in relation to procedural fairness do not bear at all upon the Tribunal's findings of fact in relation to criterion (b).

PROPOSED ORDERS

139 Accordingly, we would dismiss Fortescue's appeals.

140 We would allow Rio Tinto's appeal. The decision of the Tribunal in relation to the Robe line should be set aside with consequential orders.

141 In normal circumstances, Fortescue should pay Rio Tinto's costs of each of the three appeals.

142 We would ask the parties to confer and thereafter by 4.00 pm on 11 May 2011 file minutes of orders (including as to costs), and in the event of disagreement, file and serve written submissions as to the contentions of the parties.

I certify that the preceding one hundred and forty-two (142) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Keane CJ, Mansfield and Middleton.

Associate:

Dated: 4 May 2011