

# AUSTRALIAN COMPETITION TRIBUNAL

## Applications by Robe River Mining Co Pty Ltd and Hamersley Iron Pty Ltd

### [2013] ACompT 2

Citation: Applications by Robe River Mining Co Pty Ltd and Hamersley Iron Pty Ltd [2013] ACompT 2

Review from: Treasurer of the Commonwealth of Australia

Parties: **Robe River Mining Co Pty Ltd, North Mining Ltd, Pilbara Iron Pty Ltd, Rio Tinto Ltd, Mitsui Iron Ore Development Pty Ltd, Nippon Steel Australia Pty Ltd & Sumitomo Metal Australia Pty Ltd**

**Hamersley Iron Pty Ltd, Hamersley Iron-Yandi Pty Ltd, Robe River Mining Co Pty Ltd, North Mining Ltd, Pilbara Iron Pty Ltd, Rio Tinto Ltd, Mitsui Iron Ore Development Pty Ltd, Nippon Steel Australia Pty Ltd & Sumitomo Metal Australia Pty Ltd**

File numbers: ACT 3 of 2008  
ACT 4 of 2008

Tribunal: **MANSFIELD J (PRESIDENT)**  
**MR R SHOGREN (MEMBER)**  
**MR R STEINWALL (MEMBER)**

Date of judgment: 8 February 2013

Catchwords: **ACCESS TO SERVICES** – review of Minister’s decisions to declare two services under s 44H of *Trade Practices Act 1974* (Cth) – where Minister had failed to consider proper test in applying criterion (b) in s 44H(4) – private profitability test – whether there was material which could satisfy the Tribunal about criterion (b) properly considered

**ACCESS TO SERVICES** – review of Minister’s decisions to declare two services under s 44H of *Trade Practices Act 1974* (Cth) – review being conducted after significant passage of time – extent of power of presiding member under s 44K(6) – whether in circumstances presiding member could request National Competition Council to secure experts reports through parties to review and provide them to Tribunal on issue not previously properly addressed – factors relevant to discretion of

presiding member to exercise that power

**ACCESS TO SERVICES** – review of Minister’s decisions to declare two services under s 44H of *Trade Practices Act 1974* (Cth) – whether Tribunal has power to permit parties to adduce further evidence on review other than by presiding member exercising power under s 44K(6) – whether, if such power exists, it should be exercised in present circumstances where that would lead to a form of rehearing – discretionary factors considered

Legislation:

*Competition and Consumer Act 2010* (Cth)  
*Trade Practices Act 1974* (Cth) ss 29A, 44B, 44F, 44H, 44HA, 44K  
*Trade Practices Amendment (Australian Consumer Law Act (No 2) 2010* (Cth)  
*Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth)

Cases cited:

*The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 290 ALR 750 followed  
*Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 discussed  
*The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 discussed  
*Craig v South Australia* (1995) 184 CLR 168 cited  
*Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 cited  
*Collector of Customs (NSW) v Brian Lawler Automotive Pty Ltd* (1979) 2 ALD 1 cited  
*Secretary, Department of Social Security v Alvaro* (1994) 50 FCR 213 cited

Date of hearing:

20 December 2012

Place:

Adelaide (via video link to Melbourne)

Category:

Catchwords

Number of paragraphs:

125

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**IN AUSTRALIAN COMPETITION TRIBUNAL**

**ACT 3 of 2008**

**RE: APPLICATION FOR REVIEW OF THE DECISION BY THE COMMONWEALTH TREASURER OF 27 OCTOBER 2008 UNDER SECTION 44H(1) OF THE TRADE PRACTICES ACT 1974 (CTH) IN RELATION TO THE APPLICATION FOR DECLARATION OF A SERVICE PROVIDED BY THE ROBE RAILWAY**

**BY: ROBE RIVER MINING CO PTY LTD  
NORTH MINING LTD  
PILBARA IRON PTY LTD  
RIO TINTO LTD  
MITSUI IRON ORE DEVELOPMENT PTY LTD  
NIPPON STEEL AUSTRALIA PTY LTD and  
SUMITOMO METAL AUSTRALIA PTY LTD  
Applicants**

**TRIBUNAL: MANSFIELD J (PRESIDENT)  
MR R SHOGREN  
MR R STEINWALL**

**DATE OF ORDER: 8 FEBRUARY 2013**

**WHERE MADE: ADELAIDE (VIA VIDEO LINK TO MELBOURNE)**

**THE TRIBUNAL DETERMINES THAT:**

1. The declaration of Service of the Treasurer as designated Minister made under s 44H of the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)) in respect of the specified section of the Robe Railway and more fully described in the said declaration, commencing on 19 November 2008 and expiring on 19 November 2028, is set aside.

**IN AUSTRALIAN COMPETITION TRIBUNAL**

**ACT 4 of 2008**

**RE: APPLICATION FOR REVIEW OF THE DECISION BY THE COMMONWEALTH TREASURER OF 27 OCTOBER 2008 UNDER SECTION 44H(1) OF THE TRADE PRACTICES ACT 1974 (CTH) IN RELATION TO THE APPLICATION FOR DECLARATION OF A SERVICE PROVIDED BY THE HAMERSLEY RAIL NETWORK**

**BY: HAMERSLEY IRON PTY LTD  
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**ACT 3 of 2008**

**RE: APPLICATION FOR REVIEW OF THE DECISION BY THE COMMONWEALTH TREASURER OF 27 OCTOBER 2008 UNDER SECTION 44H(1) OF THE TRADE PRACTICES ACT 1974 (CTH) IN RELATION TO THE APPLICATION FOR DECLARATION OF A SERVICE PROVIDED BY THE ROBE RAILWAY**

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**DATE: 8 FEBRUARY 2013**

**PLACE: ADELAIDE (VIA VIDEO LINK TO MELBOURNE)**

## REASONS FOR DECISION

### THE TRIBUNAL

### INTRODUCTION

1           These two applications are before the Tribunal again as a result of the decision of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 290 ALR 750 (*Pilbara HCA*).

2           The proceedings concern applications under Part IIIA of the *Trade Practices Act 1974* (Cth) (*TPA*) (now called the *Competition and Consumer Act 2010* (Cth): see *Trade Practices Amendment (Australian Consumer Law Act (No 2) 2010* (Cth) Schedule 5, item 2) for declaration of two services, namely the Robe River railway service (Robe line) and the Hamersley railway service (Hamersley line). These railways are described in the previous decision of the Tribunal in these matters: *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 (*Fortescue Tribunal*) at [6]-[7].

3           Part IIIA of the *TPA* deals with the processes by which access to what, in the United States, are known as essential facilities is provided to third parties. Part IIIA was amended in some respects by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth). The amendments do not apply to these applications. In that circumstance, the Tribunal will refer to the *Competition and Consumer Act 2010* (Cth) as the *TPA* and to the provisions as relevantly in force at the material time. Part IIIA provides for a two stage process for any person or body seeking access to a service, which is defined to include the use of an infrastructure facility such as a railway line: *TPA* s 44B. The first stage of this process concerns the determination of whether the service is essential and thus should be declared, while the second provides for arbitrated access where the parties are unable to agree to terms and conditions for access.

4           The first stage, which is the subject of these applications, concerns whether a service should be declared. If a service is declared, any third party interested in gaining access to the service has a right to negotiate access to the service. Such a right is enforceable in the sense that, should negotiations fail, the access dispute may be resolved in arbitration by the Australian Competition and Consumer Commission (ACCC).

5           The process for declaration of a service, in summary, is as follows. Any person, including a “designated Minister” may make an application to the National Competition Council (NCC) established under s 29A of the *TPA*, asking that it recommend that a particular service be declared: *TPA* s 44F(1). Having received such a request, the NCC must recommend to the designated Minister that the service be declared or that the service not be declared: *TPA* s 44F(2).

6           Upon receiving a recommendation from the NCC that the designated Minister declare the service, he or she must either declare the service or decide not to declare the service: *TPA* s 44H(1). Before deciding to declare the service in question the Minister must be satisfied of the six matters set out in *TPA* s 44H(4). The Minister must publish his or her decision and the reasons for that decision: *TPA* s 44HA(1). If the Minister does not publish the decision on the declaration recommendation of the NCC within 60 days, the Minister is deemed not to have declared the service: s 44H(9).

7           Section 44H(4) of the *TPA* provided:

**44H Designated Minister may declare a service**

...

- (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.

8           Particularly relevantly for these proceedings, the Minister’s decision can be reviewed by the Tribunal: *TPA* ss 44K(1) and (2). Section 44K of the *TPA*, as at the time of these applications, provided:



#### **44K Review of a Declaration**

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

#### **HISTORY OF THE PROCEEDINGS**

9           The origin of these proceedings lies in two applications to the NCC of 16 November 2007 and 18 January 2008 by The Pilbara Infrastructure Pty Ltd (TPI), a subsidiary of Fortescue Metals Group Ltd, an iron ore producer (together "Fortescue").

10           By the first application Fortescue applied to the NCC, pursuant to s 44F of the *TPA*, asking the NCC to recommend to the Commonwealth Treasurer, being the relevant designated Minister, that the Hamersley line be declared. This was followed on 18 January 2008 by a request that the NCC recommend the declaration of the Robe line. Both the Hamersley line and the Robe line are operated by Rio Tinto Iron Ore (RTIO), a division of Rio Tinto Ltd.

11           On 27 October 2008 the Commonwealth Treasurer (the Hon Wayne Swan MP) declared both services for a period of 20 years.

12           Following the Minister's declarations, applications were made to the Tribunal by the current applicants, who are subsidiaries of Rio Tinto Ltd (together 'Rio Tinto') in respect of

the declarations of the services on the Hamersley line and the Robe line on 13 November 2008.

13 Those applications, along with two similar applications, were heard by the Tribunal over 42 days, commencing on 28 September 2009 and concluding on 26 February 2010. The Tribunal made its determination in those matters and published its reasons for so doing on 30 June 2010: *Fortescue Tribunal*. In *Fortescue Tribunal*, the Tribunal set aside the Minister's decision to declare the Hamersley line, and decided that the Hamersley service should not be declared. The Tribunal varied the Minister's decision to declare the Robe line by reducing the period it should operate to 10 years.

14 The Tribunal's decision in *Fortescue Tribunal* was then the subject of review by the Full Court of the Federal Court of Australia in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 (*Pilbara FCA*).

15 By special leave granted on 28 October 2011, that decision was appealed to the High Court of Australia. The High Court determined that appeal in *Pilbara HCA*, quashing the Tribunal's decision in *Fortescue Tribunal* and remitting the matters to the Tribunal for determination according to law.

### **The Treasurer's decision**

16 As noted above, on 27 October 2008 the Minister declared both the Hamersley line and the Robe line.

17 Relevantly for these applications as they currently stand, the Minister adopted the approach taken by the NCC to determining the requirement, set out in s 44H(4)(b) of the *TPA*, that the service not be declared unless "it would be uneconomical for anyone to develop another facility to provide the service". The NCC and then the Minister assessed satisfaction of this criterion by using the "social cost benefit" test, also known as the "net social benefit" test. That approach was one that had found acceptance in earlier decisions of the Tribunal.

18 The social cost benefit approach required assessment of the costs and benefits to the community as a whole, as opposed to the costs and benefits to private interests. In using this approach it was useful to assess whether the facility was a natural monopoly. The Minister determined that there were no alternative facilities already in existence that could provide a substitutable service for the Hamersley line. The Minister agreed with the NCC's conclusion

that the Hamersley line and the Robe line exhibited features that suggested they were natural monopolies.

19           The Minister considered that there were other facilities that could potentially provide alternatives to the Robe line, being the Hamersley, Chichester and proposed Kennedy lines. He concluded, however, that because those lines did not provide equivalent access to locations available via the Robe line, there were no alternative facilities that could provide a substitutable service.

20           The Minister reached the conclusion that the Hamersley line and the Robe line were, in their then current configuration, close to capacity to meet expected demand over the medium to long term, but that access seekers could negotiate and fund any required expansions.

21           The Minister found, on the basis of estimated construction costs for augmentation and duplication, on the natural monopoly character of the Hamersley line and the Robe line and on his conclusion that expansion is likely to be less costly than construction of new facilities for many demand levels, that expansion is likely to be more economical than duplication.

22           For these reasons the Minister was satisfied that it would be uneconomical for anyone to develop another facility to provide either the Hamersley line or the Robe line. In making each of these declarations, the Minister said “in making my decision I have drawn on the evidence relied on by the NCC and the findings of the NCC”.

### **The Tribunal’s first decision**

23           Rio Tinto applied for review by the Tribunal of the declarations made in respect of the Hamersley line and the Robe line. As noted above, the Tribunal, in reviewing the Minister’s decision, affirmed the declaration of the Robe line, although it altered the duration of the declaration, and set aside the declaration of the Hamersley line.

24           The Tribunal heard together Rio Tinto’s two applications for review together with applications from BHP Billiton Ltd and Fortescue concerning the Goldsworthy line and the Mt Newman line in the same area. The hearing took 42 sitting days and the parties filed 130 affidavits from 73 witnesses: *Fortescue Tribunal* at 268 [26]. The review proceeded as a fresh hearing, with new evidence, rather than an assessment of the Minister’s decision, based on the material that he considered.

25           The nature of the review undertaken by the Tribunal was not contentious at that point  
in time.

26           The Tribunal concluded that the correct test for determining whether a service  
satisfied criterion (b) in s 44H(4) was whether the facility that provided that service was a  
natural monopoly. In the reasoning process the Tribunal rejected both the private profitability  
conception of “uneconomical” as well as the social cost test used by the Treasurer. The  
Tribunal also considered criterion (f) in s 44H(4) and whether, in addition to the six criteria in  
s 44H(4), there remained a residual discretion to be exercised by the Minister and on review  
by the Tribunal in determining whether to declare a particular service.

27           As noted, in the result the Tribunal set aside the decision to declare the Hamerlsey  
line and reduced the period of the declaration of the Robe line to 10 years.

### **The Full Federal Court**

28           Fortescue in separate proceedings in the Federal Court challenged the orders of the  
Tribunal giving effect to its reasons concerning the Hamersley line and the Robe line. In  
response Rio Tinto by notice of contention raised the question whether the Tribunal had  
properly construed and applied the criterion in s 44H(4)(b). Rio Tinto also in a separate  
proceeding challenged the Tribunal’s decision to maintain the declaration of the Robe line,  
also asserting error in the construction and application of 44H(4)(b).

29           Those three proceedings were heard together.

30           Again, no issue was raised at that point in time about the correctness of the process by  
which the Tribunal undertook its review of the Minister’s decisions.

31           As to criterion (b) in s 44H(4), after setting out the Tribunal’s assessment of the  
competing tests, as well as considering a large amount of extraneous material, particularly the  
Hilmer Report (National Competition Policy Review, *National Competition Policy*, (1993)),  
the Full Court returned to the text and structure of the *TPA*. The Full Court said at 92 [76] of  
*Pilbara FCA*:

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.

32           The Full Court viewed the “perspective” of s 44H(4)(b) as that of participants in the marketplace, rather than society as a whole. This meant that “economically feasible” should not be treated as “economically efficient”: *Pilbara FCA* at 93 [79]. The text of Part IIIA of the *TPA* was, in the Full Court’s view, inconsistent with lowering “the bar to access erected by criterion (b)” by treating 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”: *Pilbara FCA* at 93 [79].

33           The Full Court concluded its assessment of s 44H(4)(b) by saying in *Pilbara FCA* at 98 [99]-[100]:

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.

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.

34           The Full Court also considered the proper application of criterion (f), set out in s 44H(4)(f) of the *TPA*.

35           The Full Court held that the Tribunal had not erred in assessing criterion (f). Fortescue had argued that the Tribunal had 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, on Fortescue’s submissions, are required to be addressed only in relation to criterion (a) and criterion (b) in s 44H(4). Fortescue further 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.

36 It was also submitted for Fortescue 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 of the *TPA*, such as the costs of arbitration should access negotiations fail following declaration 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.

37 The Full Court rejected all of these contentions in *Pilbara FCA* at 102 [108]:

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.

38 The Full Court did not accept the submission that criterion (f) is confined in its scope by the other criteria in s 44H(4) and the provisions which govern the second stage of the Pt IIIA process: *Pilbara FCA* at 102 [109].

39 The Full Court appeared to accept that, even if satisfied of all the matters set out in s 44H(4), there remained a discretion in the Treasurer and, thus, the Tribunal not to declare a service: *Pilbara FCA* at 103 [113].

40 In the result, Fortescue's appeals from the Tribunal were dismissed. The Tribunal decision not to declare the Hamersley line stood. Rio Tinto's application concerning the Robe line (and its contention about s 44H(4)(b) concerning the Hamerlsey line) was successful, so the Full Court set aside the Tribunal's orders with respect to the Robe line.

### **The High Court**

41 In *Pilbara HCA* the High Court allowed an appeal from *Pilbara FCA*.

42 There were four main issues considered by the High Court:

- (1) the nature of the Tribunal's task in conducting a review under s 44K of the *TPA* (an issue which emerged in the course of argument);
- (2) the proper construction of s 44H(4)(b);
- (3) the matters that may be taken into account under s 44H(4)(f); and
- (4) whether there is a residual discretion in the Minister (and the Tribunal on review), to declare or not to declare a service once the six criteria in s 44H(4) have been considered.

### *The Tribunal's role*

43 During oral argument in the High Court Fortescue sought leave to amend its notice of appeal to allege that the Tribunal's task neither required nor permitted it to conduct a wholly fresh hearing on new evidence. The Court granted that leave.

44 The plurality judgment of the Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) emphasised the importance of s 44K(4), which identified the Tribunal's task by saying that "the review by the Tribunal is a re-consideration of the matter". This requirement directs attention to the question of identification of the matter. The plurality said at 761 [37]:

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

45 That task began when the Treasurer received a declaration recommendation from the NCC. Following a declaration recommendation being made, the Treasurer only had 60 days to decide whether to declare the service. If the Treasurer did not publish his or her decision on the declaration recommendation within 60 days after receiving it, he or she was deemed to have decided not to declare the service: *TPA* s 44H(9). In deciding whether or not to declare a service the Treasurer was not given any express power to request further information, assistance or report from the NCC. This is in contrast to s 44K(6) which gives such a power to the Tribunal on review of the Treasurer's decision.

46 The plurality of the Court held at 764 [48] that:

The requirement that the tribunal review the minister's decision neither permits nor requires a quasi-curial trial between the access seeker and the facility provider as adversarial parties, on new and different material, to determine whether a service should be declared. That would not be a "review" of the minister's decision which was "a re-consideration of the matter".

47 The plurality contrasted the requirement of a re-consideration in s 44K(4) with the requirement in, for example, s 101(2) of the *TPA*. The plurality explained at 767 [60]:

The contrast is best understood as being between a "re-hearing" which requires deciding an issue afresh on whatever material is placed before the new decision maker and a "re-consideration" which requires reviewing what the original decision maker decided and doing that by reference to the material that was placed before the original decision maker...

48 The plurality, at 768 [65] affirmed that the Tribunal's task:

was to review the minister's decision by reconsidering those decisions on the material before the minister supplemented, if necessary, by any information, assistance or report given to the tribunal by the NCC in response to a request made under s 44K(6).

49 Heydon J agreed with the plurality that the Tribunal had not conducted the review required by s 44K. His Honour said at 793 [154]:

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

### ***Criterion (b)***

50 The majority of the High Court (Heydon J dissented on this issue) agreed with the Full Court of the Federal Court that criterion (b) mandated a private profitability test. The plurality (it is convenient to continue to use that term, even though strictly speaking on this topic the judgment is the majority one) at 771-772 [77] said:

The better view of criterion (b) is that it uses the word "uneconomical" to mean "unprofitable". It does not use that word in some specialist sense that would be used by an economist. Further, criterion (b) is to be read as requiring the decision maker to be satisfied that there is not anyone for whom it would be profitable to develop



another facility. It is not to be read as requiring the testing of an abstract hypothesis: *if* someone, anyone, were to develop another facility. When used in criterion (b) "anyone" should be read as a wholly general reference that requires the decision maker to be satisfied that there is no one, whether in the market or able to enter the market for supplying the relevant service, who would find it economical (in the sense of profitable) to develop another facility to provide that service.

51 The plurality approach did differ from the Full Court of the Federal Court, however, insofar as it used the word "anyone" to include the current provider of the service.

52 The plurality stated that this test "focuses only upon whether it is shown to be likely that anyone could profitably, and therefore would be likely to, develop another facility to provide the service": *Pilbara HCA* at 773 [83].

53 According to the plurality, at 776 [96], "[t]extual considerations point away from the construction adopted by the Tribunal and point towards adopting a privately profitable construction of criterion (b)". This was for two reasons. First, that criterion (b) is framed in a way that directs attention to whether 'it would be uneconomical for anyone' to develop another facility, rather than whether it would be 'economically efficient' from the perspective of society as a whole to do so. Second, the Competition Principles Agreement, which sets out the principles that the Minister must apply in making his or her decision under s 44H, directs attention to whether it is "economically feasible" to duplicate the facility. That term points away from reading criterion (b) as requiring an assessment of societal efficiency and towards an evaluation of what would be feasible or practical for an actual or potential participant in the market place.

54 The plurality noted that the extrinsic material, particularly the Hilmer Report, "show that Part IIIA is intended to operate in a way that will contribute to national economic efficiency"; at 778 [98]. Their Honours acknowledged that duplication of a natural monopoly may be a form of economic inefficiency, but came to the conclusion that the "competition principles, together with the considerations of national economic efficiency ... do not point away from adopting a privately profitable test" at 778-779 [99]-[101].

55 The plurality then explained how a private profitability test may be applied, at 779 [104]:

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

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

56 Heydon J disagreed with this finding and held that the natural monopoly test should be preferred at 794 [159].

***Criterion (f)***

57 Criterion (f) requires the Minister to be satisfied “that access (or increased access) would not be contrary to the public interest”. The plurality judgment referred to the Full Court’s reasoning in respect of criterion (f) and noted that it was premised on the basis that the Tribunal was to undertake a re-consideration on new material, independent of the Treasurer’s decision. This was not the correct approach. Re-consideration of what the Minister had decided “directed attention immediately to the bases on which the Minister was satisfied that access would not be contrary to the public interest”: *Pilbara HCA* at 781 [110].

58 The plurality of the High Court suggested that, while these considerations may be relevant, the Tribunal should act cautiously in dealing with criterion (f). Their Honours said at 781 [110]-[111]:

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

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

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

60 It thus appears that, while the Tribunal must consider criterion (f) and that the matters mentioned above will be relevant to that consideration, the Tribunal should afford due deference to the Minister's decision. Heydon J at 804 [188] also accepted that the Tribunal's role under criterion (f) was narrow.

### ***Residual discretion***

61 As noted above, the Tribunal determined that, even if it were satisfied of all the criteria set out in s 44H, there remained a discretion in the Minister and thus the Tribunal, in reviewing the Minister's decision, not to declare the service: *Fortescue Tribunal* at 468 [1305] and [1333]. The Full Court agreed with that view: *Pilbara FCA* at 67, [36].

62 The plurality in the High Court considered that no such discretion existed. Their Honours said at 782 [116] that, despite the fact that s 44H(4) was expressed negatively, "the six criteria specified in s 44H(4) should be understood as stating an exhaustive list of the considerations that may bear upon the decision to declare a service". According to the plurality, "no satisfactory criterion or criteria could be devised which would guide the exercise of some residual discretion": at 782 [116]. This was a conclusion with which Heydon J agreed: at 805 [193].

### ***Orders of the High Court***

63 In the plurality reasons at 783 [120], their Honours observed that the findings of the Tribunal concerning s 44H(4)(b) were reached on evidence and material far beyond that which should have been considered. Accordingly, as there had been no review by the Tribunal of the kind for which the TPA provided, the orders of the Full Court were set aside and a writ of certiorari was directed to the Tribunal quashing its decisions under challenge, and the matters were remitted to the Tribunal for determination according to law.

## THE SUBMISSIONS

64 Rio Tinto, following the remittal of these matters to the Tribunal by the High Court, now seeks orders from the Tribunal on the review setting aside the declarations made by the Minister of both the Hamersley line and the Robe line. This course is resisted by Fortescue. The NCC broadly supports the contentions of Rio Tinto and agrees that the ministerial declarations should be set aside.

65 The keystone of Rio Tinto's argument is that the Minister, in his consideration of the declaration recommendation from the NCC, was provided with and adopted the wrong test in assessing whether criterion (b) in s 44H(4) was satisfied. As was mentioned above, the Minister used the net social benefit test. The High Court in *Pilbara HCA* has now clearly set out the test for criterion (b) as being one of private profitability.

66 Rio Tinto submits that there was no material before the Minister capable of satisfying him of the matter set out in criterion (b) of s 44H(4), properly construed. Further, Rio Tinto submits, there is no mechanism by which the Tribunal may have access to material which now might enable a decision to be made on criterion (b), properly understood, while remaining within the bounds of the review dictated by s 44K of the *TPA*.

67 Rio Tinto highlights the High Court's description of the Tribunal's task set out in *Pilbara HCA* at 768 [65], being to review the Minister's decision by reconsidering those decisions on the material before the Minister supplemented, if necessary, by any information, assistance or report given to the Tribunal by the NCC in response to a request made under s 44K(6). Rio Tinto also points out that the Tribunal is neither permitted nor required to conduct a quasi-curial trial between the access seeker and the facility provider as adversarial parties, on new and different material, to determine whether a service should be declared.

68 This task means, in Rio Tinto's submission, it was not open to the Tribunal in its review of the Minister's decision to conduct a wholly new inquiry involving a mass of evidence which was not before the Minister when he made his decision. Nor did it admit of the decision being based on some new issue, or new material, unconnected with the recommendation.

69 Rio Tinto submits that the absence of any proper recommendation or material before the Minister capable of satisfying criterion (b) means that the Minister's decision must be set aside. Rio Tinto submits, in the alternative, that the Minister's decision was

jurisdictionally invalid and thus, there is no decision by the Minister that can be re-considered by the Tribunal.

70           The NCC supports the contention that, by applying the wrong test for criterion (b) the Minister made a jurisdictional error which invalidated his decisions to declare the two services.

71           The contention that there was no material before the Minister addressing the private profitability test is disputed by Fortescue. More particularly, Fortescue submits that there was material before the NCC and the Minister that is relevant and capable of being considered in applying the private profitability test under criterion (b) and capable of satisfying that criterion. Fortescue points to material provided to the NCC by the North West Iron Ore Alliance (NWIOA), referred to in the NCC's Final Recommendations, which concluded that "it can be seen from a purely financial aspect, an individual company building a new track and operating its own trains is not feasible". On the basis of that material, NWIOA also submitted to the NCC that its cost estimates "strongly suggest that it is not financially viable for an individual company to build a new track and operate its own trains".

72           The NCC points out that, while submissions addressing criterion (b) may have been made to it, the Minister was not provided with the submissions that the NCC received in the course of considering the declaration applications and that none of the material that was before the Minister dealt with the private profitability test.

73           Fortescue submits that, even assuming that the Minister's declarations were made on an incorrect view of the meaning of criterion (b), the Tribunal nevertheless has a power to act under s 44K of the *TPA*. Fortescue submits that there was, in fact, a declaration made by the Minister and that this was sufficient to enliven the jurisdiction of the Tribunal and that the question of jurisdictional error is not relevant to the Tribunal's task on review. Rather, in Fortescue's submission, the Tribunal is required to reconsider the declarations, exercising the same powers as the Minister. Section 44K, in particular subsection (7), does not include a power to set aside a declaration on the basis that the Minister made an error of law or jurisdictional error.

74           Fortescue further submits that any deficiency in the material before the Minister and thus the Tribunal can be remedied by the use of s 44K(6) of the *TPA* by requiring the NCC

to give certain information and assistance and to make a report for the purposes of the review.

75 In Fortescue's submission there is nothing in the High Court's reasons in *Pilbara HCA* to suggest that the power conferred by s 44K(6) should be construed or applied in a narrow fashion and that, by obtaining information and other assistance from the NCC under s 44K(6), the Tribunal will not exceed the proper scope of a reconsideration under s 44K(4) by seeking to supplement the record if it considers that the material before the Minister is not sufficient to enable it to form a state of satisfaction on one or more of the statutory criteria for making a declaration.

76 In circumstances where the Minister adopted the wrong construction of criterion (b), Fortescue submits that to adopt a narrow view of the power conferred by s 44K(6) would defeat both the right of the Fortescue parties to a decision according to law in respect of the requests under s 44F for the services to be declared, and also the rights arising under the declarations made by the Minister which are subject only to a review by the Tribunal conducted according to law.

77 In addition, or in the alternative, Fortescue submits that the rules of procedural fairness dictate that the Tribunal must permit the parties to put on material similar to the material Fortescue seeks to have brought before the Tribunal using s 44K(6). Fortescue submits that the parties affected by the declaration have a right to be heard on the application of the criteria for a declaration taking into account the correct legal test.

## CONSIDERATION

78 For the purposes of the Tribunal's present task, namely to review the two "matters" as a reconsideration of them, the nature of that task is clear by reason of *Pilbara HCA*: it is to review the two declarations of the Minister to declare the two services, namely the Hamersley line and the Robe line: *Pilbara HCA* at 761 [37].

79 It is also clear that the Tribunal's reconsideration of the two declarations by the Minister does not permit, nor require, a quasi-curial trial between Fortescue and Rio Tinto on new and different material: *Pilbara HCA* at 764 [48]. The Tribunal's task is to conduct its reconsideration by reference to the material that was before the Minister, supplemented only by what material the NCC provides in answer to any request by the Tribunal pursuant to

s 44K(6). It will, however, also be necessary to address Fortescue's request to itself adduce further information on these two reviews.

80 As to whether the Tribunal now could or should seek any further information from the NCC under s 44K(6), or indeed should permit Fortescue to itself adduce further evidence, the plurality in *Pilbara HCA* at 766-767 [58] said in a passage relied upon by Fortescue:

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

81 Clearly that passage is in the context of addressing certain arguments about the proper construction of s 44K(4). The Tribunal does not read that passage as expressing any firm view about whether, in the present circumstances, the Tribunal should or should not seek any further information from the NCC, or should or should not permit Fortescue to adduce further evidence for the purposes of the reconsideration.

82 It is also convenient at this point to address two further matters arising from the plurality reasons in *Pilbara HCA*.

83 In *Pilbara HCA* the plurality at 767 [60] said that reconsideration:

... requires reviewing what the original decision maker decided and doing that by reference to the material that was placed before the original decision maker (supplemented, in this kind of case, only by whatever material the NCC provides in answer to requests made by the Tribunal pursuant to s 44K(6)).

Both Fortescue and Rio Tinto sought to extract support for their respective contentions about the scope of operation of s 44K(6) from the use of the word “supplemented” in that passage and in 768 [65] of the plurality reasons.

84           The Tribunal does not consider that that word was intended to indicate the scope of operation of s 44K(6). Its use is in the context of comparing a “re-hearing” with a “reconsideration”, and does no more than recognise that in a review under s 44K the material considered by the Tribunal which will in the first place be that before the Minister may be added to by the proper use of s 44K(6). It is necessary to make that acknowledgement to give some role to s 44K(6). The plurality had earlier made clear at 766-767 [58] that s 44K(6) did not assist in deciding what s 44K(4), that is the term “reconsideration”, means. Once that term was explained, s 44K(6) is limited in its scope to seeking assistance from the NCC for the purposes of the review.

85           The second matter concerns the use by the plurality of the expression “in this kind of case” in the passage quoted above from *Pilbara HCA* at 767 [60]. The Tribunal does not consider that the plurality was doing other than referring to a reconsideration under s 44K(4) which, by reason of the power granted in s 44K(6), will not necessarily be confined to the material before the Minister. In another statutory setting a reconsideration by an administrative reviewer may well be confined to the material before the primary decision maker. The Tribunal does not accept that the use of those words was intended to provide a mandate for an expansive operation of s 44K(6).

86           The starting point for the review is the identification of the material before the Minister for the purposes of the Minister deciding to declare the services comprising the Hamersley line and the Robe line.

87           The presiding member of the Tribunal under s 44K(6) made the uncontentioned requirement of the NCC to identify the material that was before the Minister. The NCC duly prepared a description of the material presented to the Minister (the Minister’s Material) for the parties.

88           The Minister’s Material, so far as it is relevant to the present reviews (as agreed between the parties and the NCC), includes the NCC Final Recommendation – Hamersley Railway, with appendix dated 29 August 2008, and the NCC Final Recommendation – Robe Railway, with appendix, each dated 29 August 2008.



89           The Minister's Material also included the NCC Draft Recommendations in relation to each of the Hamersley line and Robe line, a short summary of each of the Draft and Final Recommendations, and a covering letter from the NCC to the Treasurer in relation to the Final Recommendations.

90           The Minister's Material also included various briefing notes prepared by the Treasury to assist the Treasurer in considering the NCC Recommendations (including the Treasurer's Statement of Reasons) and in relation to meetings between the Treasurer and Fortescue and Rio Tinto.

91           The parties are agreed that only the NCC Final Recommendations from the Minister's Material are of assistance in the Tribunal conducting the present reviews.

92           In addition, the Tribunal also has the Minister's Declaration in respect of the Hamersley line and Statement of Reasons for that decision, and the Minister's Declaration in respect of the Robe line and Statement of Reasons for that decision, each dated 27 October 2008.

93           As a result of the indication from Fortescue to the Tribunal at a preliminary hearing of these reviews, Fortescue was asked to identify what information and assistance it would invite the Tribunal to require from the NCC under s 44K(6) of the TPA on each review.

94           Fortescue proposed that the Tribunal pursuant to s 44K(6) should require the NCC, in respect of each of the Hamersley line and the Robe line, to:

... request The Pilbara Infrastructure Pty Ltd (the applicant for the declaration) and the applicants for review to provide it with expert reports addressing the criterion in s 44H(4)(b) of the TPA with respect to ...

each specified railway by a date to be specified, and to provide copies of any such reports to the Tribunal, "together with any commentary by the [NCC] that it considers appropriate" by a later date to be specified.

95           In addition or in the alternative, Fortescue also indicated in its written submissions that, if the Tribunal made no requirement of the NCC under s 44K(6) as Fortescue proposed, the requirements of procedural fairness should and would be met by:

... allowing the parties to provide to the Tribunal the same material as is proposed to be the subject of orders under s 44K(6) – namely, expert reports addressing criterion (b) ... - and to conduct a hearing confined to that material.

96           It may be observed that each of those proposals, contemplates both Fortescue and Rio Tinto being entitled to adduce further expert evidence directed to criterion (b) and then some form of hearing about the effect of that evidence.

97           The Tribunal took the view that the first step in conducting the current reviews after identifying the Minister's decisions and his reasons for them, and after identifying the Minister's Material, was to decide whether it should make any requirement of the NCC to provide further information or assistance to the Tribunal, either as proposed by Fortescue or in some other terms.

98           The presiding member of the Tribunal has not made a requirement of the NCC under s 44K(6), other than that referred to in [87] above to identify and provide the Minister's Material. The presiding member's reasons for that decision are the Annexure to these reasons. Consequently, subject to the alternative contention of Fortescue referred to above that it and Rio Tinto should be permitted to adduce further expert evidence within a specified time directed to addressing criterion (b) and a view to a further hearing limited to that material, the Tribunal's reviews will be confined to reconsidering the Minister's Decisions in the light of the Minister's Material.

99           The Tribunal does not propose to allow Fortescue (and Rio Tinto) to adduce further expert evidence directed to criterion (b) in s 44H(4). In essence, the reasons for the Tribunal's decision are the same as those of the presiding member in respect of the possible use of s 44K(6) (beyond obtaining the Minister's Material). The Tribunal will not repeat them. The Tribunal does not consider that it has power to do so. The consequence – as Fortescue's submission and proposed orders acknowledge – would be that both Fortescue and Rio Tinto would have the opportunity to adduce further expert evidence. Despite the submissions of senior counsel for Fortescue, the Tribunal does not consider that that would be a simple and short process. That evidence may have to be tested in a further hearing. The Tribunal would have to make a decision based on that new evidence. Consequently, that step would cause the Tribunal to undertake a form of review which the High Court in *Pilbara HCA* at 764 [48] said is not authorised. It would be more in the nature of a rehearing. Even if the Tribunal has the power to accede to Fortescue's request, the Tribunal in exercise of its discretion would decline to do so for the same reasons as those expressed by the presiding member.

100           The nature of the review to be conducted by the Tribunal under s 44K indicates the content of any obligation of procedural fairness. The Tribunal does not accept that the principles of procedural fairness can change the nature of the review as prescribed by the High Court to one which, on one of the six specified criteria, would in substance amount to a rehearing on fresh evidence of that issue. Clearly, the power under s 44K(6) extends so far as is necessary to facilitate a proper re-consideration of the Minister’s decision. But the Tribunal does not accept that, under the shield (or sword) of procedural fairness the reviews can be converted to one involving the Tribunal making decisions of its own after a fresh inquiry and hearing on fresh evidence.. The reviews, moreover, would be on evidence provided by Fortescue and Rio Tinto through the NCC, but without the NCC having secured and assessed such material as it considered appropriate and without any recommendation from the NCC in the light of all that material.

101           Indeed, it is doubtful that the Tribunal on such a review as the present has any power to receive further information and assistance from the NCC or otherwise for another reason. There is much to be said for the view that s 44K(6) is exhaustive of that power, and it rests with the presiding member. That view would fit comfortably with the conclusion of the High Court about the nature of the review under s 44K(4).

102           As the Tribunal has said, the Tribunal – even if it had the power to do so – would not accede to the request by Fortescue to adduce further evidence, given the difficulties it would present in adhering to a review by reconsideration and to reaching a sound and proper conclusion on the specified criteria. The presiding member’s reasons explain in more detail why that is so.

103           The Tribunal therefore approaches the two reviews on the basis of the Minister’s Materials, his Decisions and Reasons for Decisions, and the submissions of the parties.

104           Rio Tinto submits that, because the Minister applied the wrong test in deciding whether criterion (b) is satisfied, his Decisions amount to jurisdictional error (see *Craig v South Australia* (1995) 184 CLR 163 at 169; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-615, 619 and 647). Consequently, it says, because the Minister asked himself the wrong question in relation to criterion (b), by addressing the social cost benefit test rather than the private profitability test, the Minister’s Decisions were each “jurisdictionally invalid” and “there is no decision by the Minister with

respect to criterion (b) that can be re-considered by the Tribunal”. Rio Tinto also says that, because the NCC made the same error, there was no recommendation before the Minister.

105 It is not in dispute that both the NCC Final Recommendations and the Minister’s Decisions proceeded upon the basis of the social cost benefit test, rather than the private profitability test for the purposes of criterion (b). As the High Court in *Pilbara HCA* has explained, that was clearly erroneous.

106 The NCC in its written submissions at [10] took the same position about the status of the Minister’s Decisions, but in oral submissions it did not take the extra step of saying that there was therefore nothing to review.

107 However, the Tribunal does not accept the consequence that there are no NCC Final Recommendations and no Minister’s Decisions to be reconsidered. Of course, jurisdictional error by an administrative decision maker is subject to judicial review. But that is not the point. Indeed, if the appropriate response from the Tribunal on review were so obvious and straightforward, Rio Tinto might have made the same submission to the High Court. The reasons of the plurality and of Heydon J in *Pilbara HCA* do not advert to such a submission.

108 In the Tribunal’s view, it is both empowered and obliged to review the Minister’s Decisions once a review application has been made under s 44K(1). The Tribunal’s review does not involve the exercise of judicial power, but is an administrative review. The nature of the review is described by s 44K(4), as explained in *Pilbara HCA*. The Tribunal then has the same powers as the Minister, and may affirm, vary or set aside a declaration or (where there has been no declaration) make a declaration of the service in question: s 44K(5), (7) and (8). Those powers are intended to be exercised whatever the asserted flaw or flaws in the Minister’s Reasons for Decision made on the NCC Final Recommendations: see *Collector of Customs (NSW) v Brian Lawler Automotive Pty Ltd* (1979) 2 ALD 1 per Bowen CJ at 5 and per Smithers J at 27; *Secretary, Department of Social Security v Alvaro* (1994) 50 FCR 213 at 219-220 and generally the discussion in Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4 ed, 2009) at 721-723 [10.70]. If the submission of Rio Tinto were correct, it may follow that any decision by the Minister (or by the Tribunal) based upon an erroneous understanding of what criterion (b) requires would be no decision at all; clearly the legislation does not contemplate that. Any decision of the Minister under s 44H, until changed by the Tribunal if it is reviewed, is intended to be effective unless there is a Court order to a different effect.

109 Fortescue contends that, on the Minister's Material, there is sufficient foundation for the Tribunal in any event to be satisfied that it would be uneconomical for anyone to develop another facility to provide the services in issue. That is, it contends on the Minister's Material, the Tribunal on its reconsideration on each review should be satisfied that criterion (b), properly understood, is made out.

110 It refers to the Final Recommendations of the NCC, and in particular [5.35] of both of those Final Recommendations.

111 The section of the Final Recommendations dealing with criterion (b) is Chapter 5. It has subheadings: "Legal requirements"; "Application and submissions", "Alternative tests for assessing criterion (b)"; and "The Council's assessment".

112 The discussion under "Legal requirements", "Application and submissions", "Alternative tests for assessing criterion (b)", and "The Council's assessment" make it plain that the NCC, in accordance with earlier decisions of the Tribunal, was applying a net social benefit test: see eg at [5.44] and [5.47]; its conclusion is at [5.48].

113 Paragraph [5.35] is in the discussion under "Application and submissions" referring to other parties who submitted to the NCC that criterion (b) is met. They included NWIOA, in its submissions to the NCC of 30 April 2008 and 21 July 2008. At [5.35], the NCC notes those submissions but not in terms which, even on Fortescue's submissions, go much further than noting the submissions about the significant cost of replicating a railway, and to the relative costs of transporting iron ore on an existing railway, a new railway or by road. Fortescue referred particularly to the last sentence of that paragraph which reads:

The NWIOA doubted whether constructing a new railway would be feasible on the basis of cost, and pointed to other constraints such as lack of available land, and social and environmental issues such as dust, noise, habitat impacts and water management. It considered that modes of transport, other than rail, are only likely to be feasible over relatively short distances and for low volumes.

114 It may be that, pursuant to s 44K(6), the presiding member may have sought from the NCC the submissions of NWIOA referred to. Presumably in anticipation of that, Fortescue and Rio Tinto have included in the material before the Tribunal those two submissions. They have also included an affidavit of Angus Taylor of 26 March 2009 provided to the Tribunal for its earlier hearing, exhibiting a redacted copy of his report of March 2009 entitled "Economic Evaluation of Third Party Iron Ore Projects".

115 Fortescue referred to NWIOA's first submission, containing the conclusion:

... [i]t can be seen from a purely financial aspect, an individual company building a new track and operating its own trains is not feasible.

and its later submission, containing the observation, based on modelling (the details of which are not in the submission), that cost estimates:

... strongly suggest that it is not financially viable for an individual company to build a new track and operate its own trains.

That material may address, or be capable of addressing, the private profitability test. Fortescue did not contend that on that material the Tribunal could properly be satisfied in terms of criterion (b). In its written submissions in reply it said that such material could be supplemented by information or material provided to the Tribunal by the NCC under a request made under s 44K(6). As appears from the Annexure to these reasons, the presiding member has declined to make such a request.

116 In *Pilbara HCA* at 780 [106] the plurality in discussing the private profitability test said that the question whether it is profitable or economically feasible to develop an alternative service is "a question that bankers and investors must ask and answer in relation to any investment in infrastructure". Consequently, Fortescue – in acknowledging that the Tribunal on the rehearing of these reviews would need evidence from appropriate experts – says that the plurality thereby implicitly invited the Tribunal to procure such evidence by use of s 44K(6). That is not necessarily the case. The NCC may have assembled or been provided with such material. It may have assessed such material, although its Final Recommendations may not have referred in detail to its assessment as it took a different view about what criterion (b) required. The Fortescue submission does however, at least implicitly, acknowledge that neither [5.35] of the Final Recommendations or the content of the submissions underlying it are sufficient in themselves to support the Tribunal now being satisfied about criterion (b).

117 There are other sections of the NCC Final Recommendations to which reference was made in submissions.

118 The NCC Final Recommendation regarding the Hamersley line at [5.93]-[5.100] notes that the Hamersley line may not accommodate the likely demand for the Hamersley line as it was then configured. The NCC then discusses whether it would be less costly to develop a

new, additional, facility or to expand the existing facility in order to meet this demand. This discussion includes analysis of the costs of constructing a railway in the Pilbara. The NCC concluded that it would cost approximately \$1.7-\$2.7 billion to construct a duplicate facility. The NCC relies on its view that the railway is likely to be a natural monopoly in concluding that expansion of the existing facility is likely to be less costly than construction of a new facility for a wide range of demands. The NCC said at [5.98] that “it is likely that expansion will almost always be cheaper than duplicating a facility”.

119           In the same document at [4.59] the NCC notes the “high export returns to iron ore”. Fortescue submitted that at [4.59], [4.86], [4.49]-[4.54] and [5.65]-[5.86] of that document, addressing criterion (c) in s 44H(4), namely the current and forecast demand for rail services, the NCC did consider the current and projected demand for the Hamersley line. It is clearly correct that [5.65]-[5.86] consider the likely demand for the Hamersley line in considerable detail, while acknowledging that it was unable to reach a specific conclusion as to demand. Its consideration is of demand or likely demand for the Hamersley line, rather than for a hypothetical alternative service. It may be possible to infer such demand from the level of demand for the Hamersley line considered by the NCC. Similar references appear in the NCC Robe River Final Recommendation at [4.84] and [5.49]-[5.53].

120           The Tribunal was not taken to any material before the Minister that discussed the required rate of return. Fortescue in its oral submissions said “the NCC did not look at the costs of capital, the costs of equity, the costs of debt and so forth, the rates of return which would be necessary”. To that may be added the absence of any detailed analysis of the market for the supply of such services (that is, the market in which “anyone” might provide the services). He went on to submit that such information could be readily obtained by the Tribunal, through the NCC. While the Tribunal accepts Fortescue’s submission that there is some material in the Final Recommendations that briefly addresses whether it would be privately profitable for anyone to construct another facility or facilities to provide the services that the Hamersley line and Robe line provide, that material is manifestly insufficient to enable the Tribunal to be satisfied, one way or the other, on that question. It is only a cursory descriptive reference to one submission. There is in other parts of the Final Recommendations some detailed discussion of the level of existing and anticipated demand for the transport of iron ore, and the capacity of the existing services including the Hamersley line and the Robe line to meet that demand.

121 Several of the topics relevant to the proper application of criterion (b), namely the private profitability test, are not discussed and there is certainly no detailed discussion of them based upon information (if any) provided to and considered by the NCC.

122 Consequently, on the basis of the Minister's Material, the Tribunal is not satisfied, applying the private profitability test, that it would be uneconomical for anyone to develop another facility to develop the service or services. As noted, whilst Fortescue's submission is that there is sufficient reference in [5.35] of the Final Recommendations to open the topic, and if the submissions upon which [5.35] is based are examined to show some little secondary evidentiary basis which goes to the topic, it did not contend that either the Final Recommendations together with the two submissions were sufficient for the Tribunal to be satisfied about criterion (b). The Minister's Reasons for Decision do not provide any further basis for the Tribunal being able to be satisfied about criterion (b).

123 In these matters, the Minister considered the wrong test in applying criterion (b). The material before the Minister addressed the wrong test for criterion (b). The Tribunal is clearly entitled to consider, and has considered, the Minister's Material to endeavour to ascertain whether it would be uneconomical for anyone to develop another facility to provide the service. There is virtually no material in the Minister's Material which could satisfy the Tribunal of that criterion. Clearly that is because the NCC and the Minister considered that criterion (b) required the application of a net social benefit test. Nor was there substantive material before the NCC which was the basis for its observations in [5.35] of each of its Final Recommendations in the submissions on which its observations were based.

124 As the presiding member has declined to seek further information and assistance from the NCC under s 44K(6), and the Tribunal has not acceded to Fortescue's request to adduce further evidence on these reviews, it follows that the Tribunal does not have before it sufficient material to satisfy it that it would be uneconomical for anyone to develop an alternative facility to provide either the service provided by the Robe line or the service provided by the Hamersley line. In those circumstances, the Tribunal must set aside the declarations of the Minister, made on 27 October 2008.



125 The Tribunal so orders.

I certify that the preceding one hundred and twenty-five (125) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justice Mansfield, Mr R Shogren and Mr R Steinwall.

Associate:

Dated: 8 February 2013

**ANNEXURE: REASONS OF PRESIDING MEMBER RELATING TO SECTION 44K(6)**

126 Section 44K of the TPA provides for the review by the Tribunal of a declaration of a service by the Minister under s 44H. The Tribunal is presently reviewing two declarations of the Minister in the circumstances set out in the Tribunal's reasons, to which these reasons are an Annexure. It is doing so in accordance with the decision of the High Court in *Pilbara HCA* and in the light of the reasons of the plurality in *Pilbara HCA*.

127 Section 44K(6) is set out in the Tribunal's reasons at [8]. It empowers the presiding member of the Tribunal, rather than the Tribunal itself, to require the NCC to give information and other assistance and to make reports, as specified by the member for the purposes of a review under s 44K of the TPA.

128 On each of the two review applications, Fortescue has submitted that, as the presiding member, I should require the NCC to provide the Tribunal with expert reports addressing the criterion in s 44H(4)(b) of the TPA with respect to each of the Hamersley line and the Robe River line by a specified date, and then for the NCC to provide copies of those reports to the Tribunal, with such commentary of the NCC as it considers appropriate: see the Tribunal's reasons at [94] above.

129 I decline to make that request of the NCC in the particular circumstances. I do not consider the Tribunal is empowered in the circumstances to make the request proposed by Fortescue, or a similar request, under s 44K(6). In addition, even if there were power to

make such a request, the power is a discretionary one and in my discretion I would not exercise it in the terms requested or in similar terms.

130           These are my reasons for that decision.

131           Firstly, I do not consider that the process suggested would, in substance, give rise to reviews by reconsideration of the Minister's decisions. The process contemplates the Tribunal, through the NCC, giving Fortescue the opportunity to adduce expert evidence on the criterion in (b) of s 44H(4) in circumstances where that criterion was not previously considered by the NCC, or by the Minister, in accordance with the proper construction of s 44H(4)(b).

132           The expert or experts engaged by Fortescue would have to identify the factual assumptions and economic assumptions upon which their opinions were based. Although the NCC, under the proposal, would be given an opportunity to comment on those expert reports, the underlying factual assumptions or some of them may themselves require testing. They may be contentious. Then, as Fortescue acknowledges, it would be unfair to Rio Tinto to deprive it of the opportunity to dispute the assumptions made by the experts whose reports are provided by Fortescue, and to adduce different expert reports. Then the Tribunal, as anticipated by Fortescue, may have to have a hearing at which contentious factual or economic assumptions are resolved, and conflicting expert views addressed. It is not difficult to perceive that the process therefore would become a rehearing largely on different material from that before the Minister on whether criterion (b) – imposing the private profitability test – is satisfied.

133           In my view, the process proposed will cause the Tribunal to embark upon a form of review which the High Court has indicated is not authorised: see *Pilbara HCA* at 764 [48]. I do not accept the contention of senior counsel for Fortescue that the process would be straightforward and relatively simple.

134           By way of illustration, at a general level, the experts providing an opinion on criterion (b), as properly understood, would need to indicate their assumptions about matters such as:

- (1) the expected capital and operating costs for the development and operation of an alternative facility or alternative facilities servicing one or more mining projects;
- (2) projections as to the future price of iron ore;

- (3) current and forecast demand that could utilise a new facility providing the service; and
- (4) the required rate of return for an entity which might undertake that development.

135 That is by no means an exhaustive list.

136 Secondly, it is common ground, as acknowledged by the NCC in its submissions, that the NCC in its Draft and Final Recommendations did not address criterion (b) by applying the private profitability test. That is a technical issue (cf *Pilbara HCA* at 763 [44]) upon which the NCC's views would be likely to be of significance to the Minister, and on review of significance to the Tribunal. The Minister (and so on review the Tribunal) was expected to make a decision on the NCC Recommendation: see s 44H(9), and *Pilbara HCA* at 763 [47] per the plurality and at 787-788 [136] per Heydon J. The NCC would have provided its Final Recommendations after a careful and lengthy investigative process. The course proposed by Fortescue would mean that the Tribunal would not have the benefit of the NCC Final Recommendation so far as it concerned criterion (b), properly understood. It allowed for NCC comment on the expert reports but the NCC would not have addressed that issue in its normal manner, by a process of notification and the invitation of submissions, assessment and investigation where appropriate of those submissions (including where it considered desirable consulting its own experts), the publication of its Draft Recommendations, submissions and their consideration leading to its Final Recommendations.

137 Although in a practical sense, on the issue of criterion (b), Fortescue and Rio Tinto will act as a proponent and as a contradictor, it is possible if not likely that much material relevant to whether criterion (b) is satisfied would rest with other interested entities such as junior miners and tenement holders, and perhaps those with wider business interests. The Tribunal would not have the benefit of a properly informed recommendation from the NCC and would not itself have all the information which might reasonably be expected to be available to form a view on a matter of such general community significance as one of the six specified criteria for the declaring of the two railway services.

138 The proposal by Fortescue would clearly be a more limited process, confined to experts reports and further submissions from Fortescue and Rio Tinto with commentary from the NCC. From the Tribunal's perspective, the proposed process might not produce a reliable foundation for a conclusion on criterion (b). I do not think s 44K(6) is intended to permit or facilitate a process which, on one of the criterion in s 44H(4), effectively sidesteps the

information gathering and advice and recommendations of the NCC as the body primarily charged with the responsibility of providing its Final Recommendations.

139 In the third place, the proposed request does not direct the proposed experts to address the criterion in s 44H(4)(b) at a particular time. That is obviously an important issue. It was an issue adverted to, but not fully addressed, in the submissions. On standard principles, an administrative review would be conducted on current information: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 624.

140 In the normal course, following the NCC recommendation to the Minister under s 44F(2), the Minister will decide whether to declare a service within 60 days of receiving the recommendation. As the plurality in *Pilbara HCA* said at 763 [46] and [47], the Minister was expected to make a decision on the recommendation of the NCC without seeking further information from the NCC and possibly without being entitled to do so (and also see *Pilbara HCA* at 768 [63]), and would do so quickly.

141 The right of review of the Minister's decision must be exercised within 21 days of the decision (or deemed decision) under s 44H: see s 44K(3), and again in the normal course the Tribunal would make its decision on the review within four months: s 44ZZOA. Consequently, the elapse of time between the Minister's decision and the decision by the Tribunal on any review will be relatively short and the relevant circumstances will be unlikely to have changed significantly. It is consistent with that expectation that the Tribunal's reconsideration will be of the character explained by the High Court. It is also consistent with that timetable that the use of s 44K(6) generally would not lead to the Tribunal making a decision, unassisted by detailed investigation and analysis by the NCC following its normal procedures. In the present circumstances, on the other hand, Fortescue's proposal would lead to the Tribunal substituting its decision for that of the Minister on consideration of criterion (b) directed to a point of time some years after the Minister's decision, and without the input from the NCC which the legislation provides for.

142 The Tribunal does not know if, or how, the relevant economic circumstances have changed: prices, demand, transport costs, markets, and the like. Nor indeed does it know whether there have been any changes in the physical circumstances: whether another railway has been built, and if so by whom, additional ore body locations, and the like. Neither party has chosen to proffer any evidence on such topics.

143 That is not to assert that either party should attempt to do so, but to point out that a view on criterion (b) now formed by the Tribunal would be vulnerable to factual error without such material. And, by way of contrast, the other criteria in s 44H(4) are not the subject of reconsideration by the Tribunal and neither Fortescue nor Rio Tinto has submitted that they should be. Consequently, the process proposed by Fortescue would probably result in the Tribunal's views on criterion (b) as at 2013 being addressed, with the Minister's views on criteria (a) and (c) – (f) being adhered to. That concern is particularly significant by the nature of criterion (f). The Tribunal would not be well equipped to make a decision on criterion (f) as at the present time, at the least without the benefit of the Minister's reasons for determining where the public interest presently lay: see *Pilbara HCA* at 781 [112]. And it is by no means obvious that the present assessment of the public interest would be the same as at 2008. Relevant circumstances may well have changed. It would not be appropriate for the Tribunal to form a view on the issue of the public interest as at the present time in substitution for that of the Minister as at 2008, or to do so on the basis of what was in the NCC Final Recommendations given in 2008. Indeed, the plurality in *Pilbara HCA* at 781 [112] stressed the particular qualification of the Minister to form a view on criterion (f).

144 It is neither necessary nor appropriate to explore in these reasons the range of circumstances in which the power in s 44K(6) might be exercised. In *Pilbara HCA*, Heydon J at 793 [153] suggested that the power might be exercised to complete “the record”. However, in the present circumstances, I do not think the power can properly be exercised to seek from the NCC the assistance proposed by Fortescue. To do so would be to convert the review into a form of adversarial trial on essentially new and different material and in a manner not contemplated within the prescribed form of review: cf *Pilbara HCA* at 764 [48] per the plurality. It would not be exercising the power in s 44K(6) for the purpose of reconsidering the Minister's decisions, but for the purpose of inquiring afresh into whether the private profitability best prescribed by criterion (b) has been satisfied.

145 Fortescue argued that as a matter of procedural fairness it is entitled to adduce evidence and make submissions directed to satisfying the Tribunal about criterion (b), either through the gateway of s 44K(6) or independently of it. That is said to exist because it has not had an opportunity to address the correct test under criterion (b). I do not accept that, on these reviews, s 44K(6) should (or must) be used to provide that opportunity to Fortescue. It had the opportunity fully to address criterion (b) in its presentations to the NCC. The review under s 44K(4) is a confined one, and on that review Fortescue must be given the right to be

heard (as it has). The nature of the review does not entitle it to adduce such evidence on criterion (b) as it now wishes, and to make submissions on that evidence. To accede to that proposition would be to fail to give effect to the decision in *Pilbara HCA* as to the nature of the review as defined by s 44K(4). Once the nature of the review is identified, the content of Fortescue's (and Rio Tinto's) rights on the review become clear. In my view, they do not extend to Fortescue being entitled to advance evidence of the character it identified, because that would lead to a review of an entirely different character.

146 Even if I were satisfied that, in the present circumstances, the Tribunal could exercise the power under s 44K(6) to make a requirement of the NCC in the terms proposed by Fortescue, I would not exercise the discretion available under s 44K(6) to make the proposed requirement. The reasons for that view are, in substance, the same as those discussed above. To do so would extend the reviews to a potentially lengthy quasi-curial adversarial inquiry. The material then available would be confined to that adduced by either Fortescue or Rio Tinto, with only the benefit of any NCC commentary on that material. Neither the NCC nor the Tribunal would have had the benefit of other interested entities providing (or being asked to provide) material relevant to the issue and the Tribunal would not have the fully considered views of the NCC on the issue, as would be the case if its Final Recommendations had properly addressed the issue. The decision about criterion (b) would be made as at the present time, without there being any assessment of whether the material relevant to criteria (a) and (c) – (f) has changed over the period between 2008 and 2013, in particular concerning criterion (f). And, in addition, as to criterion (f), the Tribunal would not have the benefit of the contemporary views of the Minister about the public interest in the circumstances now obtaining.

147 I have also considered whether the Tribunal could exercise the power under s 44K(6) to make some differently expressed request of the NCC for information which might put the Tribunal in a position to fairly decide whether criterion (b) was satisfied. I do not consider that such a request could be made without, in effect, resulting in a quasi-curial adversarial hearing between Fortescue and Rio Tinto for the reasons given. And, as a consequence, such a request would not be permitted by s 44K(6) in the circumstances. Even if it were, it in any event is not a request which in my discretion I would make in the present circumstances for the same reasons.

148           There is one possible general form of request which might now be made to the NCC, namely to itself resume its consideration of the initiating applications for a declaration recommendation made by TPI in respect of the Hamersley line in 2007 and by TPI in respect of the Robe line in 2008, limited to reconsidering its recommendation concerning whether criterion (b), properly understood, has been satisfied. I would not make such a request of the NCC. I am not satisfied that it would be possible or, as a matter of discretion, proper to do so.

149           The process imposed on the NCC would be a long one. It would need to identify the point of time at which the assessment should be made. If that point of time is in the period 2007-2008 (that is, proximate to the application), it is not clear how the assessment could usefully be made at a practical level, having regard to whatever changes in the relevant industry or industries have occurred since then. If it is to be made as at the present time it would not in substance be the same task as the NCC previously undertook; it would be based on present circumstances. That may require extensive investigation and would further frustrate the scheme of a prompt ministerial decision and a prompt Tribunal review. In either event, there is also some possible degree of interaction between criterion (b) and at least criterion (f), so that the NCC's reconsideration might be unfairly and artificially confined by a request limited to criterion (b).

150           It is clear that the NCC did not in fact address the private profitability test, even though it is arguable that Rio Tinto adverted to it in its submissions to the NCC; that brief reference in the circumstances does not provide a mandate for the NCC undertaking a full and fresh inquiry on a critical criterion.

151           I do not have to decide whether such a wide request could properly be responded to by the NCC, having regard to the important primary role of the NCC leading up to its Final Recommendation being given to the Minister, although it is clearly questionable whether the scope of s 44K(6) would re-enliven the NCC's power to produce an amended Final Recommendation after renewing its process of notification, consultation and decision-making because I am of the view that s 44K(6) could not support such a wide request. It is clearly questionable whether the NCC itself has such a power, following its providing its Final Recommendation to the Minister. In any event, even if such a request could properly be made under s 44K(6), in the present circumstances I would not exercise my discretion by

making such a request for the same reasons as I have decided not to make a request to the NCC under s 44K(6) in the terms proposed by Fortescue.

152 Accordingly, as indicated at the commencement of these reasons, I decline to make a request to the NCC under s 44K(6) as proposed by Fortescue.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the reasons of Justice Mansfield as the presiding member and being Annexure to the Reasons for Decision herein of the Honourable Justice Mansfield, Mr R Shogren and Mr R Steinwall.

Associate:



Dated: 8 February 2013