IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M155 of 2011

BETWEEN

THE PILBARA INFRASTRUCTURE PTY LTD

FORTESCUE METALS GROUP LIMITED

Appellants

and

AUSTRALIAN COMPETITION TRIBUNAL

HAMERSLEY IRON PTY LTD

HAMERSLEY IRON-YANDI PTY LTD

ROBE RIVER MINING CO PTY LTD

NORTH MINING LTD

PILBARA IRON PTY LTD

RIO TINTO LIMITED

MITSUI IRON ORE DEVELOPMENT PTY LTD

NIPPON STEEL AUSTRALIA PTY LTD

SUMITOMO METAL AUSTRALIA PTY LTD

BHP BILLITON IRON ORE PTY LTD

BHP BILLITON MINERALS PTY LTD

Respondents

10 APPELLANTS' SUBMISSIONS IN REPLY

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1 In reply to the respondents' submissions on criteria (b) and (f) and the discretion, the appellants (**Fortescue**) rely upon and repeat their submissions in reply filed in proceedings M156 and M157 of 2011 on 22 December 2011.

Procedural fairness issue

2 The Court may not need to resolve the notice of contention by the second to tenth respondents (**Rio Tinto**) challenging the decision that Fortescue was denied procedural fairness on the criterion (f) and discretion issues.

3 If Fortescue succeeds in these appeals on all issues (criteria (b) and (f) and discretion), the procedural fairness issue falls away.[1] That is because it was only within the inappropriately expanded criterion (f) and discretion inquiry that the Tribunal was found to have denied procedural fairness to Fortescue.

4 The issue could only arise if Fortescue succeeded in this Court solely on criterion (b). There would then be a remitter to the Tribunal, for criterion (f) and discretion to be examined in a procedurally fair manner.

5 In any event, there is nothing in Rio Tinto's contention. The Full Court carefully explained how the denial of procedural fairness occurred and why it could not conclude that the material irregularly provided by Rio Tinto did not make a difference to the Tribunal's findings adverse to Fortescue. Rio Tinto merely seeks to restate the facts in a way which glosses over the key factual findings of the Full Court. No error is identified. Should it matter, the facts will now be accurately stated and the consequences of the denial of procedural fairness set out.

The facts showing the breach of procedural fairness

6 On 19 November 2009, at the conclusion of the main body of evidence received by the Tribunal (during a hearing which by that stage was in its 29th day), there was an exchange between the President of the Tribunal and Senior Counsel for Fortescue, concerning a specific body of additional expert modelling evidence which the Tribunal proposed to receive early in 2010, after closing submissions were to have been made in writing and orally during December 2009. Fortescue did not object, but received an assurance from the Tribunal that the Tribunal would not receive further evidence updating generally the factual matrix upon which the Tribunal would base its decision, after Fortescue had delivered its closing submissions.[2] Closing submissions were delivered on this basis during December 2009 and the supplementary evidence from the modellers was received during February 2010.

7 On 17 May 2010, well after the hearing of the supplementary modelling evidence, the Tribunal requested assistance from the National Competition Council (**NCC**) pursuant to s 44K(6) of the Act. The Tribunal noted that the parties during the hearing had "*placed considerable reliance on mining prospects that were under exploration or development in the Pilbara by the so-called junior miners*" and the Tribunal requested "*the NCC to assist the Tribunal by preparing a report which updates the information presently before the Tribunal regarding the junior miners mentioned in* [specified affidavits]. *For the avoidance of doubt, the Tribunal does not require information regarding any junior miner not mentioned in those affidavits*"[3] (emphases added).

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[1] As Rio Tinto appears to acknowledge in its submissions filed 15 December 2011 (**Rio Tinto submissions**) at [70], [71].
[2] T2490-2491 (in Tab B309 of the application book before the Full Court (**FCAB**)).
[3] FCAB B248.

8 Fortescue's projects had been included in an exhibit to one of the affidavits specified by the Tribunal. This, however, did not bring Fortescue's projects within the scope of the request by the Tribunal (any more than it could have brought the projects of BHP Billiton, also included in the relevant exhibit, within the scope of the request).

9 The Tribunal sought updating information only in respect of "*junior miners*". Contrary to the assertion by Rio Tinto,[4] the expression "*junior miners*" could on no view have reasonably been read as including Fortescue (or BHP Billiton). The expression referred to miners with operations smaller than those of the parties (being the major iron ore miners in Australia).[5]

10 On the same day which it made its request of the NCC, the Tribunal wrote to the parties' solicitors noting that the Tribunal had requested the NCC to provide the report within 10 days. The Tribunal said that it assumed the report would be uncontroversial but that the parties would have 48 hours from receipt of the report within which to advise if they detected any errors in the report or could provide more up-to-date information.[6]

11 The NCC provided its report on the junior miners to the Tribunal on 3 June 2010.[7] In accordance with the request by the Tribunal, the NCC included in its report information only about junior miners.

12 In short, as observed by the Full Court, "*it was perfectly clear to all concerned that Fortescue was not considered to be a junior miner*".[8]

13 The Tribunal on 4 June 2010 wrote to the parties' solicitors inviting any comments from the parties by 8 June 2010 if a party detected any errors in the NCC report or had available to it more complete up-to-date information.[9] On 8 June 2010, solicitors for BHP Billiton provided the Tribunal with comments on the NCC report. In conformity with the ambit of the Tribunal's request, the comments from BHP Billiton were confined only to information about the "*junior miners*".

14 Also on 8 June 2010, solicitors for Rio Tinto wrote to the Tribunal, purportedly in response to the same invitation by the Tribunal (by its 4 June 2010 letter).[10] Rio Tinto provided the Tribunal with extensive information concerning Fortescue. This was not a correction of any error in the report or the mere provision of more up-to-date information than that provided by the NCC. It was an unsolicited[11] supplement to the evidence before the Tribunal on a critical and controversial issue between the parties, after the delivery of final submissions.

15 The operations (both current and proposed) of each of the parties had by this stage already been the subject of extensive documentary and oral evidence from the parties themselves, cross-examination and, following the conclusion of hearings, detailed closing submissions.

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[4] Rio Tinto submissions at [75].
[5] So much is evident, for example, from the Tribunal's Reasons which addressed the Pilbara operations of each of BHP Billiton, Rio Tinto and Fortescue before turning to address the "*Junior Miners*" in a separate section: see Chapters 3, 4, 6 and 7 of the Tribunal Reasons.
[6] FCAB B249.
[7] FCAB B251.
[8] FC[131].
[9] FCAB B252.
[10] FCAB B253.
[11] FC[132], cf. Rio Tinto submissions at [79].

16 In those circumstances, the Full Court was correct to conclude that "*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*".[12] There is no substance in the contention that Fortescue was the "*author of its own misfortune*" because it "*chose not to raise any issue in relation to the Tribunal's receipt of the material*".[13] Fortescue and its solicitors were not to 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.[14]

17 Notwithstanding the assurance from the Tribunal and the careful specificity of the terms of the Tribunal's request to the NCC, the Tribunal ultimately received and relied heavily upon this further information on an unrelated but critical aspect of its reasoning. The Tribunal relied upon this untested and unexplained information to "*supersede*"[15] the sworn evidence (which had been subjected to cross-examination) already before the Tribunal on the central question of the likelihood and timing of Fortescue proceeding to construct the proposed Dixon line in the event that Fortescue did not obtain access to the Hamersley service.

18 This was not a question of peripheral significance. It was critical in the reasoning of the Tribunal not to declare the Hamersley service, in relation to its analysis under criterion (f) and the exercise of its residual discretion[16] (and to its analysis under criterion (a)[17]).

19 The conclusion by the Tribunal on this question was plainly adverse to Fortescue. The argument by Rio Tinto to the contrary[18] does indeed have "*an air of unreality*".[19] As a person whose interests were likely to be affected by the exercise of power by the Tribunal, Fortescue was entitled to be given an opportunity to deal with relevant matters adverse to its interests which the Tribunal proposed to take into account in deciding upon its exercise.[20] A party is entitled to respond to any adverse conclusion drawn by the decision-maker even on material known to the party which is not an obvious and natural evaluation of that material.[21]

20 Moreover, the legitimate expectation engendered by the Tribunal's assurance as to the factual matrix upon which it would rely bore upon the content of the obligation

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[12] FC[131].
[13] Rio Tinto submissions at [80].
[14] FC[132].
[15] T[455].
[16] T[1196], [1301], [1324]-[1331].
[17] T[1129].
[18] Rio Tinto submissions at [78].
[19] FC[130].
[20] *Kioa v West* (1985) 159 CLR 550 at 628 per Brennan J; *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at 631 [123] per McHugh J; *Saeed v Minister for Immigration and Citizenship* (2010) 267 ALR 204 at 210 [19] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.
[21] *Commissioner for the Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592 per Northrop, Miles and French JJ, which has been repeatedly cited by this Court with apparent approval: *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 117 [194] per Kirby J; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 219 [22] per Gleeson CJ, Gummow and Heydon JJ; *Re Ruddock; Ex parte Applicant S154/2002* (2003) 201 ALR 437 at 448 [48] per Gummow and Heydon JJ.

to accord procedural fairness.[22] Not every departure from a stated intention necessarily involves unfairness, even if it defeats an expectation,[23] but "*[t]here are undoubtedly circumstances in which the failure of an administrative decision-maker to adhere to a statement of intention as to the procedure to be followed will result in unfairness and will justify judicial intervention to quash the decision*".[24]

Consequences of the breach

21 Relief for breach of procedural fairness may only be withheld if a court reaches an affirmative (and even, perhaps, certain)[25] conclusion that compliance by the decision-maker with the requirements of procedural fairness could have made no difference to the result.[26] This Court has emphasised that such an outcome will be a rarity and that it will be no easy task to convince a court to adopt it, especially where (as was the case here) the issue is one of fact concerning the acceptance or rejection of the testimony of a witness.[27]

22 The Full Court properly respected these principles, stating that it was not able to conclude that the material irregularly provided by Rio Tinto (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.[28]

23 It could not safely have been concluded that compliance with the rules of procedural fairness could have made no difference to the result. The non-compliance infected the Dixon line analysis, which was a critical element in the reasoning of the Tribunal not to declare the Hamersley service. The Tribunal itself described its conclusion that the Dixon line was highly likely to be constructed if declaration were refused as "*particularly important*" and said, accordingly, that "*[o]ther benefits which might ordinarily flow from access to a natural monopoly facility do not necessarily arise here*".[29]

24 The foundation for the contention that the denial of procedural fairness could have made no difference appears to be twofold.

25 First, Rio Tinto gave notice that it wished to contend that there was other material before the Tribunal upon which the Tribunal was entitled to conclude that it was likely that Fortescue would construct the Dixon line by 2013/14.[30] This contention is only faintly pressed in Rio Tinto's written submissions, where oblique reference is made to "*a wealth of other material*" and it is argued that Fortescue failed to mount a case that there might have been a different outcome.[31] It was not and is not incumbent upon Fortescue to mount any such case. That is to invert the correct test. It was for Rio Tinto to demonstrate that compliance with the requirements of

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[22] *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *Annetts v McCann* (1990) 170 CLR 596 at 599 per Mason CJ, Deane and McHugh JJ; *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291-292 per Mason CJ and Deane J; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 (***Lam***) at 9 [25], 13 [34] per Gleeson CJ.
[23] *Lam* at 13 [34] per Gleeson CJ.
[24] *Lam* at 9 [25] per Gleeson CJ.
[25] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 (***Aala***) at 89 [4] per Gleeson CJ.
[26] *Aala* at 89 [4] per Gleeson CJ, 130-131 [131] per Kirby J, 153-155 [211] per Callinan J.
[27] *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-146 per Mason, Wilson, Brennan, Deane and Dawson JJ; *Aala* at 130-131 [131] per Kirby J, 153-155 [211] per Callinan J.
[28] FC[133], [135].
[29] T[1301].
[30] Rio Tinto notice of contention filed 18 November 2011 at [3(b)].
[31] Rio Tinto submissions at [82].

procedural fairness could have made no difference to the result.[32] In any event, the reference to "*other material*" ignores the Tribunal's own acknowledgement that it in fact relied upon the new material to "*supersede*"[33] the sworn evidence (which had been subjected to cross-examination) already before the Tribunal on the question of the likelihood and timing of Fortescue constructing the proposed Dixon line. The Full Court was quite correct to observe that the conclusions by the Tribunal as to the timing of any construction of Dixon[34] "*obviously came from references in the March 2010 presentation to 'target timeline 2013/14' and 'can be delivered in 2013/2014*"'.[35]

26 Second, Rio Tinto contends that the Tribunal considered the scenario in which there was access to the Hamersley service and the Dixon line was not built.[36] However, that misses the point of the complaint. The complaint before the Full Court was that the Tribunal did not afford procedural fairness to Fortescue before concluding that the Dixon line was likely to be constructed within the relevant timeframe in the event that there was no access to the Hamersley service. This was the critical scenario (no access to Hamersley and no Dixon line construction) and one overlooked by the Tribunal.[37] The Tribunal, relying upon the irregularly provided material, did not even contemplate this scenario as a possibility. The suggestion by Rio Tinto that the Tribunal considered this critical scenario implicitly within some (unarticulated) counterfactual analysis[38] should be rejected. The Tribunal made explicit precisely the three scenarios which it was considering.[39] The Tribunal was not considering the critical, fourth scenario because of its earlier stated conclusion that Fortescue was highly likely to construct the Dixon line if it did not obtain access to the Hamersley service.[40] That was the very conclusion which was infected by the non-compliance with the rules of procedural fairness.[41] Accordingly, compliance could plainly have made a difference to the result.

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[32] See paragraph 21 above, referring to *Aala* and *Stead*.
[33] T[455].
[34] T[450], [891].
[35] FC[127.3]; see also FC[128].
[36] Rio Tinto submissions at [84].
[37] T[1324ff], cf. Rio Tinto submissions at [87].
[38] Rio Tinto submissions at [87].
[39] The Tribunal said: "*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*": T[1324].
[40] T[454].
[41] FC[134], [135].