

**FORREST v. AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  
AND ANOR (P44/2011)**  
**FORTESCUE METALS GROUP LTD v. AUSTRALIAN SECURITIES AND  
INVESTMENTS COMMISSION AND ANOR (P45/2011)**

Court appealed from: Full Court of the Federal Court of Australia  
[2011] FCAFC 19

Date of judgment: 18 February 2011

Date of grant of special leave: 29 September 2011

Andrew Forrest was the chairman and CEO of Fortescue Metals Group ("FMG"). In 2004, FMG entered into "framework agreements" with three Chinese companies for a mining project in the Pilbara Region. In August and November 2004, FMG provided information to the Australian Securities Exchange ("ASX") about the projects, relevantly stating that the parties had executed binding agreements to build, finance and transfer the infrastructure for the project. In 2006, ASIC commenced proceedings against FMG and Forrest, alleging that FMG breached s 1041H of the *Corporations Act 2001* (Cth) ("the Act") or s 52 of the *Trade Practices Act 1974* (Cth) by engaging in misleading or deceptive conduct by falsely representing that the framework agreements were binding. FMG was alleged to have breached its continuing disclosure obligations under s 674(2) of the Act. That provision required FMG to notify the ASX of information that was not generally available and that was information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the entity's securities. Forrest was also alleged to have breached his duties as a director under s 180 of the Act.

Justice Gilmour dismissed ASIC's proceedings. In relation to the alleged breach of s 674, his Honour noted that the information ASIC contended ought to have been disclosed comprised an assertion as to the meaning and legal effect of the framework agreements. That assertion was necessarily the product of a judgment or opinion and there was no evidence that FMG or Forrest ever held the opinions postulated by ASIC. There were reasonable grounds for FMG and Forrest to have held the view that the framework agreements were binding as claimed. Those views were based on legal advice and were honestly and reasonably held. In relation to the alleged breach of s 1041H of the Act, Gilmour J found that the relevant disclosures did not amount to misleading and deceptive conduct. ASIC's case against Forrest under s 180 of the Act was contingent upon FMG's breach of ss 674(2) and 1041H and, accordingly, failed.

ASIC's appeal was allowed by the Full Court (Keane CJ, Emmett and Finkelstein JJ). Keane CJ gave the principal judgment of the Court. His Honour noted that, in relation to s 1041H of the Act and s 52 of the *Trade Practices Act*, the issue was what ordinary and reasonable members of the investing public would have understood from the various announcements. It was the effect of the statements on the persons to whom they were published rather than the mental state of the publisher which determined whether the statement was misleading or deceptive.

In relation to Forrest, his known participation in the events leading to FMG's breach of s 1041H of the Act established that he was involved in its contraventions for the purposes of the Act. He was also a person involved in FMG's contravention of s 674 pursuant to s 674(2A). He failed to discharge the onus of showing that he took all reasonable steps to ensure that the agreements were, in law, binding agreements to

the effect represented by FMG and he was unable to rely on the defence under s 674(2B) of the Act. Further, he was unable to avail himself of the business judgment rule under s 180(2) of the Act. The decision not to make an accurate disclosure about the terms of a major contract could not be described as an exercise of business judgment.

The grounds of appeal include:

P44/2011 (Forrest)

- The Full Court erred in holding that the second respondent contravened ss 674(2) and 1041H of the Act and the appellant contravened ss 180(1) and 674(2A) of the Act in making announcements that the framework agreements were binding agreements under which the Chinese entities had agreed to build, finance and transfer the infrastructure for the Project and, in particular, that the financing risk for the Project had been agreed to be taken by the Chinese entities.

P45/2011 (FMG)

- The Full Court erred in holding that the appellant contravened ss 674(2) and 1041H of the Act in making announcements that the framework agreements were binding agreements under which the Chinese entities had agreed to build, finance and transfer the infrastructure for the Project and, in particular, that the financing risk for the Project had been agreed to be taken by the Chinese entities.

The first respondent cross-appeals, in each appeal, subject to the grant of special leave, from paragraph 2.1 of the judgment of the Full Court of the Federal Court of Australia given on 18 February 2011, as varied by orders made on 20 May 2011.

The grounds of cross-appeal are materially identical for each appeal and include:

P44/2011 (Forrest)

- The Full Court should have held that the appellant contravened s 674(2A), by reason of his knowing involvement in [the] contraventions of s 674(2A) by the second respondent.

P45/2011 (FMG)

- Applying the test of "likely influence" for the purposes of s 677 of the Act as explained by the Full Court at para 188 of its reasons, and leaving aside the effect of any public announcement by the appellant concerning the framework agreements, the Full Court should have held that the appellant contravened s 674(2) of the Act, by reason that the appellant failed to notify the ASX, in accordance with the ASX Listing Rules, of the material terms or effect of each of the framework agreements immediately after the appellant and the board of the relevant Chinese counterparty approved each framework agreement.

The first respondent has also filed a notice of contention in identical terms in each appeal. The first respondent contends that the judgment of the Full Court should be affirmed on the following ground: "If and insofar as the Full Court failed to find that there was no reasonable basis for [Forrest and FMG] to believe that their public announcements accurately described the terms or legal effect of the framework agreements, the Full Court ought to have so found (although the first respondent contends that the Full Court did so find)."