IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P45 of 2011

BETWEEN:

FORTESCUE METALS GROUP LTD
(ACN 002 594 872)
Appellant
and

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
First Respondent
and

JOHN ANDREW HENRY FORREST
Second Respondent

RESPONDENT'S SUBMISSIONS

Part I: SUITABILITY FOR PUBLICATION

1 It is certified that these submissions are in a form suitable for publication on the internet.

Part II: STATEMENT OF THE ISSUES

2 The first respondent (**ASIC**) contends that this appeal gives rise to the following issues:

2.1 Whether the statements made by the appellant (**FMG**) on the occasions set out in Schedule A to the Full Court's reasons for judgment (**FMG's announcements**) to the effect that it had executed binding agreements with each of CREC, CHEC and CMCC to build, finance and transfer the railway, port and mine for FMG's proposed Pilbara iron ore project (**the Project infrastructure**) would have been understood by ordinary and reasonable members of the investing public as conveying statements of fact or merely statements of opinion as to which a contrary view was reasonably open.

2.2 If FMG's announcements would have been understood as statements of fact, whether those statements contravened s 1041H of the *Corporations Act 2001* (Cth) in that they did not accurately describe the material terms or effect of the framework agreements.

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2.3 If FMG's announcements would have been understood as statements of opinion, whether FMG held an honest and reasonable belief in their accuracy.

2.4 For the purposes of s 674(2) of the *Corporations Act,* whether FMG and its directors were "aware" of the terms of each of the framework agreements, or whether the only "information" of which FMG and its directors were "aware" was the making of each framework agreement and their opinion as to its meaning and effect.

Part III: NOTICE UNDER S 78B OF THE *JUDICIARY ACT 1903*

3 It is certified that ASIC has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and considers that no such notice is required.

Part IV: STATEMENT OF MATERIAL FACTS

4 Subject to the comments that follow, ASIC agrees with the statement of facts set out in pars 7-22 of FMG's submissions.

5 There was no evidence that FMG and the Chinese contractors reached any agreement beyond that recorded in the framework agreements.

Events prior to the CREC framework agreement

6 A Prefeasibility Report (**PFS**) for the Project was completed in June 2004: TJ [183]. It was not clear on the evidence that the PFS had been made available to the Chinese Contractors before each framework agreement was signed: FC [129].

7 In any event, on 20 July 2004, FMG announced to the ASX that it had moved the focal point of its mining operations from Mt Nicholas to Christmas Creek. This had inevitable consequences for the design, layout and cost of the works: FC [129]. It followed that the works referred to in the PFS are not the "Works" mentioned in the framework agreements: FC [18].

8 In relation to par 10 of FMG's submissions, the trial judge found that FMG representatives met with CREC and CMCC representatives in April 2004: TJ [137]. They did not meet with CHEC: cf FMG's submissions, par 10. The visit by CREC from 3-6 August 2004 included only 1.5 hours in the Data Room and only one day negotiations involving senior management (on 5 August): see the itinerary at **TB272**.

Announcements regarding the CREC framework agreement

9 In relation to par 11 of FMG's submissions, it should be noted that while a draft (in English) of the 23 August 2004 media release was provided by email to an officer of CREC (TJ [151]), there was no evidence of CREC expressly approving it. The trial judge inferred that CREC approved the material wording in the media release: TJ [155]. The letter to the ASX was not provided to or approved by CREC. FMG's board was not provided with copies of the 23 August 2004 announcements in advance of publication.

10 FMG requested a trading halt before the announcements on 23 August 2004: FC [7].

11 Following the publication of the 23 August 2004 letter and media release, Forrest and other FMG executives gave a press conference in which Forrest made additional statements about the terms and effect of the CREC framework agreement. Having been asked the question "... what is the project cost of the railway line itself?", Forrest answered: "... the price of the railway line and rolling stock is confidential, but we are pleased to say it is competitive": FC [6], [194]; **TB 351**, pages 8-9. This and other statements were repeated in numerous media articles published soon after (**TB 389, TB 393, TB 397**).

12 In relation to par 15 of FMG's submissions, and the statement that "after the announcements in November 2004, CMCC in particular (and CREC and CHEC) wished to obtain a majority equity interest in the project", it should be noted that the issue of equity investment in the Project by a Chinese investor was raised by representatives of CREC and the Chinese National Development and Reform Commission (**NDRC**) at least as early as 17 August 2004 and negotiations as to the size and nature of that equity interest continued thereafter: TJ [157], [713], [718], [727], [737].

Forrest's 27 October 2004 email

13 In an email dated 27 October 2004, from Forrest to Heyting and Huston, Forrest outlined his aims in relation to ongoing negotiations with CREC: FC [136]; **TB 755**. In the email, Forrest wrote that he believed Mr Bai from CREC was under pressure "to sign a detailed contract, as detailed enough to be binding on the total delivery of the project".

The CHEC and CMCC framework agreements

14 CHEC and CMCC informed FMG that they only wanted to sign an agreement in the same form as the CREC framework agreement: TJ [169]. In relation to CHEC, there was evidence of an itinerary similar to that for the CREC visit: [**TB539**]. There was no evidence of an itinerary for CMCC's visit or of what occurred during that visit.

15 In relation to par 13 of FMG's submissions, there was no express approval of the 5 November 2004 media release by CHEC or CMCC. The evidence was that copies (in English) of the media release were left on chairs at the signing ceremony on 5 November 2004 and no objection was taken: TJ [177]. FMG's board was not provided with copies of the 5 and 8 November 2004 announcements before publication.

16 FMG requested a trading halt before the announcements on 5 November 2004: FC [7].

17 In relation to par 14 of FMG's submissions, the first sentence fails to convey the context in which the 8 November 2004 letter was provided by FMG. Following receipt of the 5 November 2004 letter to the ASX, Tony Walsh of the ASX contacted FMG's company secretary, Rod Campbell and requested that FMG provide additional information about the material terms of the agreements and their effect on FMG: FC [29]; **TB 842**. Walsh informed Campbell that the trading halt would not be lifted until the additional information was provided. Campbell agreed to provide an additional announcement on Monday 8 November addressing these matters: **TB 842**; Walsh statement at [16].

18 As it happened, the first 8 paragraphs of the 8 November 2004 letter were concerned with MOUs signed by BGC and ThyssenKrupp with CMCC and CHEC. The letter only turned to the framework agreements on page 2 and even then did not describe them accurately or provide the information sought by the ASX. There is no clause in the framework agreements which provides that the three Chinese companies will be working with FMG and the Worley Group "within the DFS process to establish a firm price which will then be incorporated into a fixed price contract".

Subsequent events

19 In late October and early November 2004, FMG and CREC exchanged drafts of an
10 Advanced Framework Agreement: FC [137]-[150], **[TB11]**, **[TB794]**. The Full Court found that: "The exchange of draft agreements shows that the parties were not *ad idem* as to the manner in which the works were to be valued": FC [147].

20 In relation to par 16 of FMG's submissions, following the publication of the article in the *Australian Financial Review* on 24 March 2005, Walsh (of the ASX) contacted Campbell (of FMG) and suggested that FMG be placed in trading halt, which it was. On 29 March 2005, FMG provided the ASX with a copy of the CMCC framework agreement. Copies of the other two framework agreements were provided on 30 March 2005: FC [9].

Allegations at trial

20 21 The statement of ASIC's pleaded case at pars 19-20 of FMG's submissions is incomplete and omits the primary manner in which ASIC pleaded and presented its case. ASIC's primary allegation was that, objectively, the public statements by FMG and Forrest misrepresented the terms and the effect of the framework agreements. The trial judge did not address ASIC's primary claim in his reasons.

Other public statements about the framework agreements

22 The documents referred to in Sch A to Keane CJ's reasons[1] include annual and quarterly reports, investor presentations and interviews. Five of the presentations and interviews were given by Forrest.

Movement of FMG's share price

30 23 The movement of FMG's share price during the relevant period is traced by Finkelstein J at FC [231].

Part V: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

24 ASIC agrees that the applicable statutory provisions are those set out in Annexure A to FMG's submissions.

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1 TB 366, 354, 351, 180, 1471C, 1417, 553, 848A, 840, 902, 1017, 1083, 1175, 1213, 1220 and 1471A.

Part VI: FIRST RESPONDENT'S ARGUMENT ON THE APPEAL

(1) Summary of the Full Court's decision

25 In August and November 2004, FMG announced that it had executed binding agreements with CREC, CHEC and CMCC to build, finance and transfer the railway, port and mine for FMG's proposed Pilbara iron ore project.[2]

26 The Full Court held that these announcements, which were made in unqualified terms and not said to be matters of opinion, would have been understood "by ordinary and reasonable members of the investing public" (FC [106]) as conveying the historical fact that agreements containing terms accurately summarised in the announcements had been made between the parties and not, as FMG contended, as mere statements of opinion as to which a contrary view was also reasonably open: FC [109], [117], [119] per Keane CJ, [213]-[215] per Emmett J, [218] per Finkelstein J.

27 The Full Court then considered whether the framework agreements[3] were, in law, binding agreements containing the commitments represented by FMG and held that they were not: FC [135], [161], [176] per Keane CJ, [212] per Emmett J, [227]-[228] per Finkelstein J. The Court held that the framework agreements did not "manifest an existing consensus upon the subject matter of the work, or the price, or the schedule for performance", all of which were "matters essential to the conclusion of an enforceable contract to build and transfer the infrastructure for the Project": FC [161]. Rather, "[t]he content of the agreements as to subject matter, scheduling and price, was explicitly left to be agreed between parties" and not by the Court's application of standards of reasonableness or by third party determination: FC [135], [168].

28 It followed that FMG's announcements had contravened s 1041H of the *Corporations Act 2001* (Cth): FC [177], [215]. It was therefore unnecessary to determine whether the framework agreements should be categorized as agreements to agree or void for uncertainty: FC [177], [220].

29 In relation to s 674(2) of the *Corporations Act*, the Full Court held that the terms of each of the framework agreements were information in the possession of each of the directors and of which they were aware: FC [63], [185]. It held further that, "because the misleading statements by FMG were apt to create an understanding on the part of common investors that FMG had secured the construction of the infrastructure for the Project on terms as to deferred payment" (FC [189]), FMG was obliged by s 674(2) to disclose the terms of the framework agreements to correct the misleading understanding that had been created: FC [184], [189]. FMG's failure to disclose that

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2 FMG's announcements comprised letters to the ASX and associated media releases on 23 August 2004 and 5 and 8 November 2004 and the other announcements listed in Sch A to the Full Court Reasons. The text of the letters to the ASX and media releases is set out at FC [23]-[30]. The Full Court considered it sufficient to focus upon the letters to the ASX and media releases: FC [32].

3 The CREC framework agreement is set out in full at FC [17]. The terms of the other two agreements, the CHEC and CMCC framework agreements, were relevantly identical. Relevant variations are set out at FC [19]-[22].

information constituted a breach of s 674(2) in relation to each agreement which continued until March 2005.[4]

30 FMG has not demonstrated any error in the Full Court's reasoning or conclusions.

(2) FMG's contraventions of s 1041H

31 FMG's submissions in relation to s 1041H commence with its construction of the framework agreements and then turn to the question whether FMG honestly and reasonably believed that the agreements had the effect it attributed to them in its announcements. In ASIC's submission, this approach is mistaken. The analysis of whether a person has engaged in conduct that is misleading or deceptive or likely to
10 mislead or deceive must commence with the identification of the conduct in question.

32 Where the conduct consists of the making of a statement or representation, the analysis must commence with the identification of what was conveyed to persons to whom it is published. In particular, in the circumstances of this case, it is necessary to determine whether the representation conveyed a statement of fact or merely a statement of the maker's opinion, as that will affect the manner in which the representation may be falsified: see *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 321 [32] per French CJ; *Middleton v Aon Risk Services Australia Ltd* (2008) 15 ANZ Insurance Cases 61-788; [2008] WASCA 239 at [21] per McLure JA (as her Honour then was) (with whom Murray AJA agreed).

20 **(a) FMG's announcements would have been understood as statements of fact**

33 A statement of opinion *that is identifiable as such* will ordinarily convey the representation that the maker honestly held that opinion and may also convey that there was a reasonable basis for the opinion. In such a case, a statement of opinion will be misleading or deceptive if it was not honestly held or lacked any reasonable basis: see *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 321 [33] per French CJ; *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 88; *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 at [10]; Lockhart, *The Law of Misleading or Deceptive Conduct* (3rd ed, 2011), at [4.39].

30 34 The question whether a representation is to be characterised as one of fact depends upon the effect it would have had upon ordinary or reasonable members of the class of persons to whom it was directed in light of all the relevant circumstances, including the context in which it was made, the subject matter of the information and the terms in which it was conveyed. There is no special legal principle that a statement concerning the terms of a contract must, or ordinarily should, be construed or understood as only representing that the author of the statement reasonably believes the statement to be correct. The particular terms of a statement about a contract, considered in the relevant circumstances, determine whether a person of the class to whom the statement is directed would understand the statement as making

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4 On 24 March 2005, an article was published in the *Australian Financial Review* which asserted, inter alia, that the framework agreements did not impose any legally binding obligations on the Chinese counterparties to build, finance and transfer the Project infrastructure. On 29 and 30 March 2005, FMG published copies of the framework agreements to the ASX: FC [8]-[9].

representations of fact about the terms of the contract, or representations of opinion about the effect of the contract. FMG accepts that there is no special principle in this respect: par 87 of FMG's submissions. That is consistent with the authorities on which the Full Court relied: *Middleton v Aon Risk Services Australia Ltd* (2008) 15 ANZ Ins Cas 61-788; [2008] WASCA 239 at [21]-[23]; *Inn Leisure Industries Pty Ltd v D F McCloy Pty Ltd* (1991) 28 FCR 151 at 166-7; *SWF Hoists and Industrial Equipment P/L v SGIC* (1990) ATPR 41-045 at 51,606-08; and Spencer Bower's *Actionable Misrepresentation* (4th ed, 2000) at [41] and [43]-[44].

35 The Full Court correctly approached this question in accordance with those principles and held that FMG's announcements would have been understood "by ordinary and reasonable members of the investing public" (FC [106]) as conveying the fact that agreements containing terms accurately summarised in the announcements had been made between the parties and not as mere statements of FMG's opinion: FC [100]-[119], [213]-[215], [218]. There was no error in this conclusion.

36 The relevant circumstances were as follows:

36.1 FMG requested a trading halt before each of the announcements.

36.2 The statements were made in formal communications to the ASX to be released to the market through the ASX company announcements platform and accompanied by media releases and press conferences.

36.3 FMG's other announcements were either published to the ASX and shareholders or were made to attendees at conferences at which investor presentations were given or both.[5]

36.4 The class of persons to whom the statements were addressed would have included both sophisticated and unsophisticated investors: cf *Australian Securities & Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199; 71 ACSR 368 at [314][6]. FMG would have understood, and would have intended, that the investors and brokers to whom the statements were published would have relied on them when making decisions about whether to purchase, sell or retain shares in FMG.

36.5 FMG's announcements concerned a very substantial project in terms of both the size of the infrastructure involved and the represented value of the works.

36.6 The statements were expressed in unequivocal and unqualified terms and were not stated to be matters of opinion. As the trial judge said, the announcements "were assertive in nature and were not expressly said to be expressions of opinion": TJ [684], FC [53].

36.7 The 23 August 2004 media release described the CREC framework agreements as "Build and Transfer (**BT**) contract" and said that "BT contracts are common

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5 In relation to one of these conferences, the RIU Explorers Conference, the trial judge declined to find that the audience consisted of actual or potential investors. The Full Court considered it unnecessary to reach a concluded view: FC [179]-[180].

6 Overturned on appeal, but on different grounds: *Morley v Australian Securities & Investments Commission* (2010) 274 ALR 275.

in the international engineering and construction industry": FC [23]. It also stated that "Under the terms of the contract, CREC will take full risk under a fixed price agreement". These statements imply that the description of the agreement was not merely a matter of opinion. The 5 November 2004 letter [**TB848A**] announced the execution of "binding contracts" with CHEC and CMCC and said that the "binding agreement" with CREC was "substantially in the same form" as the CHEC and CMCC agreements.

36.8 The actual contents and terms of the framework agreements were known to FMG and Forrest; they were not available to the brokers, financial journalists or actual and potential investors to whom the statements were made.

37 In these circumstances, ordinary and reasonable members of the investing public would have expected that in making an announcement in unqualified terms that it had secured a binding agreement to build and finance one of the three principal parts of a $1.85bn infrastructure project, FMG was making a statement which accurately summarised the terms of the agreement and not merely that that was its honest and reasonable opinion of the effect of the agreement. FMG's announcements would have been understood by ordinary and reasonable investors as statements of fact about the actual terms, content and character of the agreements. They were simply not identifiable, on any reasonable view, as expressions of opinion.

38 This conclusion is supported by authority and commentary in relation to the general law and in relation to s 52 of the *Trade Practices Act 1974* (Cth) to the effect that:

38.1 a person may make a statement about something he or she merely believes as opinion in such form and in such circumstances that it will be understood as a statement of fact: see Spencer Bower's *Actionable Misrepresentation* (4th ed, 2000) at [28], [31], [32] and the authorities there cited; and *Middleton v Aon Risk Services* (2008) 15 ANZ Ins Cas 61-788; [2008] WASCA 239 at [22]; and

38.2 a statement as to the content or general effect of a document, including a legal document, may be understood as a statement of fact: see Spencer Bower's *Actionable Misrepresentation* (4th ed, 2000) at [43]-[44] and the authorities there cited, which was quoted by Keane CJ at FC [110]; *Middleton v Aon Risk Services* (2008) 15 ANZ Ins Cas 61-788; [2008] WASCA 239 at [23], also referring to Spencer Bower; Heydon, *Trade Practices Law* (ThomsonReuters, looseleaf service), vol 2, at [11.180], referring to *SFW Hoists* [1990] ATPR 41-405; 6 ANZ Ins Cas 61-002; [1990] FCA 272 at [39]-[40].

39 FMG does not suggest any error of principle in the Full Court's approach. It merely asserts that, in all of the circumstances, a reasonable reader would have treated the announcements as expressions of FMG's genuinely and reasonably held opinion: FMG's submissions, par 88.

40 FMG refers to only two matters in support of this assertion. First, it says that the fact that the statements were made by a public company on a serious occasion would have meant that they would have been treated by recipients as conveying no more than that FMG had a reasonable basis for the statements: FMG's submissions, par 89. Taken in context with all other relevant circumstances, however, this factor supports the conclusion that FMG's statements would have been understood as statements of fact.

41 Secondly, FMG says that the references in other public statements to the completion of the pre-feasibility study and the commencement of the definitive feasibility study meant that FMG's announcements would have been understood "as indicating FMG's belief that the Chinese entities had committed their financial might to the Project even before the Project's feasibility had been finally determined": FMG's submissions, par 90. There is no logical reason why those facts should result in FMG's announcements being construed as expressions of opinion rather than as statements of fact. Rather, as Keane CJ held, ordinary and reasonable investors would have taken the 23 August announcement to mean that "the uncertainty which had previously attended the financing and construction of the railway for the Project was now resolved": FC [118].

42 In these circumstances, the Full Court was correct to conclude that FMG's announcements would have been understood by ordinary and reasonable investors as statements of fact that agreements containing terms accurately summarised in the statements had been made by the parties: FC [117].

43 This conclusion makes it unnecessary to determine whether FMG honestly and reasonably held the opinion that the framework agreements had the effect attributed to them in FMG's announcements (which is the subject of pars 94-116 of FMG's submissions). However, in the event that the Court finds that the announcements would have been understood as statements of opinion rather than fact, this question is addressed in paragraphs 74-85 below.

(b) The effect of the framework agreements

44 The Full Court held that the framework agreements were not binding agreements to build, finance and transfer the railway, port and mine for the Project: [120]-[177] per Keane CJ, [212] per Emmett J, [228] per Finkelstein J. It is respectfully submitted that the Court was correct to so hold.

45 It may be accepted that each of the framework agreements evinced an intention to contract and that the court should seek to give effect to that intention. Nevertheless, it is still necessary to ascertain the nature of the obligations to which the parties intended to bind themselves and to determine whether in fact they succeeded in doing so. The answer to those questions must be objectively ascertained from the terms of the framework agreements.

46 For the reasons given below, there was no intention for the Chinese parties to be immediately bound by the framework agreements to build, finance and transfer the Project infrastructure. The intention of FMG and the Chinese parties was limited to an intention to negotiate toward such an agreement. For this reason, it is not necessary to decide whether the framework agreements were legally binding agreements to negotiate or simply void for uncertainty. On either view, they were not accurately described in FMG's announcements: FC [177], [211]-[212].

47 As there is no relevant distinction between the three framework agreements, the process of construction may be undertaken by reference to the CREC framework agreement (as was done below: FC [125], [207]).

48 Recital A to the CREC framework agreement stated that CREC had represented to FMG that it had the necessary skills, personnel and equipment to carry out and complete "the Build and Transfer of the railway (the 'Works') for the Pilbara Iron Ore and Infrastructure Project".

49 Recital B then recorded the fact that "CREC, having closely examined all proposed documents, has submitted an offer to execute the Works and the FMG has accepted the CREC's offer and the parties now wish to evidence their agreement." The plain meaning of Recital B is that the parties understood and intended that their agreement was what was set out in the remainder of the document, rather than in the recitals.

50 Clause 1.1 is the principal operative provision. It provided that "[t]he parties will jointly develop and agree on" a number of matters. Those matters included such critical aspects of the agreement as "a General Conditions of Contract suitable for a Build and Transfer type contract in good faith", "[t]he Scope of Work to be included in the Contract", and the "[d]etermination of the Value of the Works". It is evident from this clause that the extent of any obligations incurred by the parties was to "jointly develop and agree" on these matters.

51 The remaining provisions of the framework agreement did not alter or add to the nature of that principal obligation. There was no agreement as to the works to be carried out. There was no agreement as to the price or value of the works. And there was no agreement that a third party should or could determine the scope of the works or their price. These matters were expressly reserved for development and agreement by the parties themselves. As Keane CJ held, at [135]:

> "However compelling the evidence of each side's willingness to enter into a binding contract may be, the only operative statement of the content of the agreement which they had actually made is to be found in the text of each of the framework agreements. The content of the agreements as to subject matter, scheduling and price, was explicitly left to be agreed between the parties. The express terms of the framework agreements contemplate that the parties will seek to reach agreement on these matters. Those very terms are inconsistent with the fixing of the necessary content by the Court's application of standards of reasonableness."[7]

52 The framework agreements did not "in terms, manifest an existing consensus upon the subject matter of the work, or the price, or the schedule for performance", all of which were "matters essential to the conclusion of an enforceable contract to build and transfer the infrastructure for the Project": FC [161]. Nor did they provide for "a third party determination mechanism which would supply the content of the framework agreement[s]" in respect of those matters: FC [176], [212].

53 FMG's submissions to the contrary should not be accepted. They depend upon the acceptance a number of irrelevant or untenable arguments about the construction of the framework agreements. These are addressed in the following paragraphs.

54 **Clause 7.** FMG submits that clause 7 of the CREC framework agreement evinced the parties' intention to make an immediately binding agreement but one which was to be followed by a more detailed agreement at a later time and that the Full Court's decision "does not sufficiently recognize" that agreements of this kind, the so-called "fourth category" of the *Masters v Cameron* (1954) 91 CLR 353 line of cases, are immediately binding: FMG's submissions, par 28. FMG's reliance on *Masters v Cameron*, *Meehan v Jones* (1982) 149 CLR 571 at 589 and *G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 643 (and the other cases referred to in fn 10 of FMG's submissions) is misplaced. Those authorities are

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7 See also Keane CJ at [171]-[176].

irrelevant to resolution of this case: FC [222]. It may be accepted that the parties intended the framework agreement to be immediately binding, but that does not resolve the nature of the obligations they intended to undertake. If the framework agreements did not contain binding obligations to build, finance and transfer the Project infrastructure, it was irrelevant whether they immediately bound the parties to negotiate toward a future agreement: see FC [161]-[163], [177], [211], [220].

55 **The recitals.** FMG's submissions seek to treat Recital B to the CREC framework agreement as the principal operative provision of the agreement. That is inconsistent with the authorities and with the operative provisions of the framework agreement. The authorities referred to by FMG make clear that, although recitals are part of an agreement and can be used as an aid to the construction of the agreement, they are not themselves operative provisions: see *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at [380](2). Where it is acknowledged in the recitals that the parties have agreed to do certain acts but have failed to include an express promise to that effect, the recitals may be used to support the implication of an operative term to the same effect but only in the absence of a contrary intention such that it may safely be inferred that the absence of a contractual provision was due to oversight or inadvertence: *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 72; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at [380](5). Where a recital is in conflict with an operative provision of an agreement, the operative provision prevails: *Bebarfeld & Co Ltd v Macintosh* (1911) 12 CLR 139 at 161-163; *Franklins v Metcash* (2009) 76 NSWLR 603 at [390].

56 To use the recitals to the CREC framework agreement to imply into it a promise by CREC to build, finance and transfer the railway infrastructure would be inconsistent with the obligation expressed in clause 1.1 to "jointly develop and agree on" all of the critical ingredients of such a contract. Moreover, it is not open to construe the operative provisions of the CREC framework agreement, by reference to the recitals, as an obligation to carry out the works that are to be included in the formal contract if and when those works have been developed and agreed upon. Either course would fundamentally alter the nature of the agreement that is otherwise apparent from the operative provisions.

57 **Uncertainty of subject matter.** Moreover, any use to which the recitals might be put depends upon the content of the "Works" defined in Recital B being sufficiently certain. Contrary to FMG's submissions (at pars 32-36 and 43), neither Recital A nor clause 2 defines the subject matter of the framework agreement – the "Works" – with anything like the necessary degree of certainty.

57.1 Recital A defines the "Works" simply as the construction of a railway. FMG concedes, with considerable understatement, that "there might be differences of view as to the *precise* ambit of the expression used in Recital A": FMG's submissions, par 36.

57.2 Recital C, which states that the Project is also to consist of a mine and a port, is incapable of assisting the definition of the content of the "Works" the subject of the CREC framework agreement (cf FMG's submissions, par 32).

57.3 Clause 2 of the CREC framework agreement contains nothing more than the barest list of general types or categories of work and obvious stages of construction (eg, detailed engineering design, project management, and

procurement, construction and commissioning of the Works). It does not contain a sufficient description of the scope of works required to be carried out.

58 FMG also submits that any differences of view about "the *precise* ambit" of the "Works" could be resolved by a court looking to evidence of the surrounding circumstances to identify their subject matter: FMG's submissions, par 36. In this respect, FMG refers to evidence that it gave "a detailed presentation" of the Project to CREC in January 2004 and that CREC representatives received further presentations and documents during a visit to Western Australia in August 2004: FMG submissions, pars 33-35. The evidence does not support this submission.

58.1 The purpose of the January 2004 China visit by three FMG representatives was "to establish the viability of infrastructure manufacturer potential" [**TB82**, at pg 1189]. CREC was one of many "potential suppliers" to whom presentations were given [see **TB82**, at pg 1189].

58.2 The itinerary for the August 2004 visit included another presentation (covering the whole Project, not just the railway) and an hour and a half in the "Data Room", followed by a single day of negotiations involving senior management [**TB272**]. Mr Bai, who signed the framework agreement on CREC's behalf, was not scheduled to arrive until after the presentation and Data Room visit: TJ [141].

58.3 Before the Full Court FMG argued for the first time that the "Works" were defined by the PFS: FC [18], [52], [93] and [129]. The Full Court rightly rejected this contention: FC [129]-[130]. It was not clear whether one of the documents the CREC representatives were shown during the August visit was the PFS: FC [128]. In any event, the description of the works referred to in the PFS was not of the works which were to be the subject of the Project because, following the completion of the PFS, FMG shifted the focus of its mining activities from the Mt Nicholas location stated in the PFS to a site in Christmas Creek: FC [18], [129]; [**TB177**, **TB178** and **TB229**]. As Keane CJ observed, "[t]his decision had inevitable consequences for the design and layout of the works and the cost of production which were the subject of consideration in the DFS": FC [129].

58.4 The DFS, or definitive feasibility study, which was intended in part "to identify the work necessary to build the infrastructure" for the Project, was yet to be completed: FC [131].

58.5 No director of FMG gave evidence. And there was no evidence from any FMG officer that any agreement was made with any of the Chinese contractors as to the scope or definition of the "Works", aside from what appears in the framework agreements.

59 In these circumstances, the proposition that the detailed scope of "Works" the subject of the CREC framework agreement could be defined by a court considering the extrinsic evidence of events prior to the execution of the agreement and applying standards of reasonableness cannot be accepted.

60 **No price specified.** FMG concedes that the framework agreement does not specify the price or value of the "Works", but submits that, in the event of disagreement

between it and CREC, that could have been determined "by persons experienced in costing the cost of such railway works and applying an appropriate profit element to it": FMG's submissions, par 57. FMG submits that such a determination could take place leaving aside altogether the application of clause 1.2: FMG submissions, par 57.

61 The basis for such a determination is not clear. FMG no longer appears to make any submission in reliance on *Hall v Busst* (1960) 104 CLR 206 (which was the subject of one of its special leave questions) to the effect that the framework agreement contained a promise to pay a "fair" or "reasonable" price. It is clear that it did not.

62 The proposed railway was a complex and unique piece of infrastructure worth hundreds of millions of dollars. It was not something for which there was a ready market which could be used as a benchmark for assessing a fair and reasonable value. There was no objective basis for a third party to determine the "fair" or "reasonable" value of the works. How, for example, would a third party arrive at "an appropriate profit element"?

63 Clause 3 of the framework agreement is of no assistance in this regard. It may be accepted that clause 3 set out a structure or framework for payment under which CREC was to bear 90% of the initial cost of constructing the railway (FMG's submissions, pars 47-48), but the clause was of no assistance to the parties unless and until a price was agreed.

64 **No provision for third party determination.** FMG submits that to the extent that the parties were unable to agree on the subject matter, scheduling and value of the "Works" to be carried out by CREC, those matters could have been determined by a third party pursuant to clause 1.2 of the framework agreement: FMG's submissions, pars 58ff, referring to *Godecke v Kirwan* (1973) 129 CLR 629 at 642, 645. The Full Court correctly rejected this construction: FC [164]-[176].

65 *Godecke v Kirwan* is of no assistance to FMG. Clause 1.2 cannot be construed as providing for the appointment of a third party to determine the content, scheduling or price of the "Works". Following on from clause 1.1, which obliges the parties to develop and agree upon the scope of the Works, the scheduling of the Works and the value of the Works, clause 1.2 provides for FMG to undertake a particular scope of work, comprising "technical peer review" and an "independent review of the schedule and value of the Works". It does not contemplate that the Works and the schedule and value of the Works will be determined by a third party. Rather, as Keane CJ said at [171] and [174], clause 1.2 defines a scope of work to be undertaken by FMG (with which CREC is to co-operate) because that work is intended to facilitate the process of development and agreement referred to in clause 1.1. That is consistent with the ordinary meaning of the word "review", the civil engineering understanding of the phrase "peer review" (see FC [173]) and the manner in which FMG used the phrase "peer review" in other documents [eg **TB181** at pp 1704, 1739, 1754, 1771, 1787, 1828, 1830 and 1879; **TB673**; **TB726**]. It is also consistent with the fact that clause 1.2 is expressed to operate immediately and not when the parties fail to reach agreement after following the process required by clause 1.1.

66 The clause does not use the language of a mechanism requiring a third party determination. As Keane CJ held, at FC [168]:

> "The terms of these provisions and their collocation do not disclose an intention that the person or persons referred to in clause 1.2 are authorised to resolve differences which might arise in the process prescribed by clause 1.1."

Not only is there no reference to a binding third party determination, the whole notion is inconsistent with the fundamental stipulation in clause 1.1 that these matters were explicitly left to the parties to agree themselves: FC [135].

(c) Conclusion as to FMG's contraventions of s 1041H

67 Ultimately, FMG's case requires the Court to accept the proposition that a commercial party would undertake obligations to build, finance and transfer a major, complex and unique piece of infrastructure likely to cost almost $1bn pursuant to a "framework" agreement which left the definition and scheduling of the works and the price to be paid to be agreed by further negotiation between the parties and, failing agreement, by means of an undefined review process by an unidentified third party nominated by FMG. Such a construction is so uncommercial and so unlikely that it should not be adopted unless it were clearly required by the terms of the framework agreements. Moreover, such a construction should not be adopted when there is a perfectly reasonable and commercial explanation for clause 1.2. Keane CJ correctly regarded clause 1.2 as doing no more than providing for independent assistance to facilitate the process of development and agreement referred to in clause 1.1: FC [171]-[173].

68 The Full Court was correct to conclude that none of the CREC, CHEC or CMCC framework agreements constituted an agreement to build, finance and transfer to relevant part of the Project infrastructure. It follows that FMG's announcements that they had entered into binding agreements with CREC, CHEC and CMCC to build, finance and transfer the railway, port and mine for the proposed Pilbara iron ore project were false and were therefore misleading or deceptive or likely to mislead or deceive in contravention of s 1041H of the *Corporations Act*.

(3) Contraventions of s 674(2)

69 In the Full Court, ASIC put its case in relation to s 674(2) of the *Corporations Act* in two ways. First, it alleged that FMG contravened s 674(2) by failing to disclose the material terms or true effect of the framework agreements instead of making the announcements that it actually made. Secondly, ASIC alleged that, having made announcements as to the effect of the framework agreements which were inaccurate and misleading, FMG thereafter contravened s 674(2) by failing to disclose the material terms or true effect of the framework agreements and by failing to disclose that its earlier announcements were inaccurate and misleading.

70 The Full Court held that FMG had contravened s 674(2) on the second of these formulations of ASIC's case. Having done so, the Court did not consider it necessary to consider the first formulation: FC [181]. This alternative submission is addressed at pars 89-94 below in relation to ASIC's notice of cross-appeal.

71 The Full Court reached its conclusion by two steps:

71.1 First, it held that the "terms of each of the framework agreements were information in the possession of each of the directors and of which they were aware" for the purposes of Listing Rule 3.1: FC [185].

71.2 Secondly, the Court held that the terms of the framework agreements were information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of FMG's securities

for the purposes of ss 674(2) and 677 and hence FMG was obliged by s 674(2) to notify the ASX of that information: FC [189].

72 FMG's appeal concerns only the first of these steps. FMG submits that a person who has information about the contents – that is, the terms – of a legal document, but who holds an erroneous yet reasonable belief about its legal effect, cannot be aware of information about "the true status of the contents of the document": FMG's submissions, pars 126-127. This submission should be rejected for the reasons set out below.

73 There is no doubt that FMG was aware of the terms of the framework agreements: FC [185]; **[TB303, TB304, TB809]**. The principal operative term of each framework agreement was that the parties had agreed "to jointly develop and agree" on the terms, subject matter, scheduling and price of a build and transfer type contract. Plainly, the directors were "aware" of this and the other terms of the framework agreements within the meaning of Listing Rules 3.1 and 19.12.

74 In any event, FMG's submission depends upon the premise that Forrest and the other directors of FMG honestly and reasonably believed that the framework agreements had the legal effect it ascribed to them in its public statements. That premise cannot be substantiated. FMG did not plead that it honestly and reasonably believed that the framework agreements were binding agreements requiring the Chinese parties to build, finance and transfer the Project infrastructure. FMG did not call any of its directors to give evidence, so no relevant officer or director of FMG gave evidence that he held such a belief. In all the circumstances, there was no reasonable basis on which FMG could have believed that the framework agreements were binding agreements with CREC, CHEC and CMCC to build, finance and transfer the railway, port and mine for the Project.

75 First, there was a significant disparity between the actual terms of the framework agreements and the representations made by FMG as to their effect. No reasonable person in the position of a director of FMG reading the terms of the framework agreements could have believed that they obliged CREC, CHEC and CMCC to build, finance and transfer major, complex and unique pieces of infrastructure at a combined total cost of approximately $1.85bn. The Full Court made an explicit finding to this effect in relation to Forrest: FC [191].

76 Secondly, before making an announcement that described the framework agreements in such profoundly different terms to the terms of the agreements themselves, a publicly listed company acting reasonably ought to have taken steps to ensure that the true legal effect of the framework agreements was to the effect represented in the announcement. In each case, FMG had a period of weeks in which to do so between the initial signing of the framework agreements and the making of the announcements immediately following the formal signing ceremonies.[8] The Full Court held that Forrest could not show that he took any such steps: FC [193]. There was no evidence that any other officer of FMG had taken any such steps: FC [67], [68] and [70].

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[8] The CREC framework agreement was signed on 6 August 2004, the CHEC framework agreement was signed on 1 October 2004 and the CMCC framework agreement was signed on 20 October 2004.

77 In particular, there was no evidence that FMG had obtained legal advice on the effect of the framework agreements prior to January 2005, well after the impugned announcements: FC [193], see also at [67], [68] and [70]. Huston was engaged after the 23 August 2004 announcements. He had been engaged by the time of the November announcements, but there was no evidence that he gave advice on the CHEC or CMCC framework agreements or the terms of the 5 November 2004 announcements. Huston did not give evidence.

78 Thirdly, there was evidence that, long after the announcements, Huston gave advice to a 22 January 2005 directors' meeting that the framework agreements "could be determined through the judicial system to be binding" **[TB1145]**. However, that advice did not go beyond the possibility that the framework agreements could be enforced as agreements to negotiate. It does not address the question whether the framework agreements imposed legally enforceable obligations on the Chinese contractors to build, finance and transfer the relevant infrastructure. Nor does that evidence support an inference that Huston gave advice on the enforceability of the framework agreements at any earlier point in time: FC [68]-[70]. On the contrary, it suggests that this was the first occasion Huston had given advice to the Board on that topic. Moreover, FMG's submission (at par 111) that the reasonableness of its asserted belief is supported by Huston's advice or conduct should be evaluated in the context that there were many documents over which FMG maintained its claim to privilege which might have shed some light on what advice FMG's directors were or were not given.[9]

79 FMG also relied on an email from Huston of 30 March 2005 (long after the relevant events) that confronts the same problems.

80 Fourthly, in an internal email of 27 October 2004, to which FMG does not refer in its submissions, Forrest discusses the negotiations for a "detailed contract, as detailed enough to be binding on the total delivery of the project" (FC [136]) and refers to a number or "hard asks" in the negotiations, such as ceiling price and a guaranteed schedule. The Full Court found that this email "shows that [Forrest] knew that further steps were necessary to reach agreement on the scope, financing, subject matter and price of the project": FC [194].

81 Fifthly, Forrest's statements at the press conference of 23 August 2004 (see paragraph 11 above) cannot be reconciled with the contention that there was a reasonable basis for Forrest to honestly believe that the announcements were accurate and not misleading: FC [87], [150], [194].

82 Sixthly, the drafts of the advanced framework agreements that FMG exchanged with CREC demonstrate that FMG did not believe that there was any binding agreement as to price, value or financing obligations: FC [137]-[151]. As a result, the Full Court concluded that there was no reasonable basis for FMG's claims that the CREC framework agreement contained a fixed price in which CREC had assumed 100% of the risk: FC [150].

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[9] As to the minutes of 22 January 2005, privilege over that document was only waived after ASIC had closed its case: FC [70].

83 None of the matters referred to by FMG in its submissions provide any reasonable grounds for the belief that the framework agreements bound CREC, CHEC and CMCC to build and transfer the Project infrastructure. In reality, they support the view that the framework agreements were no more than agreements to negotiate toward such an agreement.

83.1 Visits by FMG representatives to China in January and April 2004 and CREC's apparent anxiousness to "do" the Project cannot logically be relied on as evidence of the reasonableness of a view as to the effect of an agreement entered into in August 2004: cf FMG submissions, par 96. In any event, an email dated 20 October 2004 from Rowley, a director of FMG, paints a different picture: by this time, Rowley sees one of the challenges facing FMG to be "to get CREC off the fence and start moving on our project" and states that Forrest "is of the belief that we should take the opportunity to ensure CHEC and MCC do not repeat CREC's 'slow motion'." **[TB705]**

83.2 The solemnity of the signing ceremony in China on 19 August 2004 indicates that the Chinese parties treated the CREC framework agreement as an important step on the path toward a potential build and transfer agreement, but it does not signify more than that: cf FMG submissions, pars 97-98.

83.3 Similarly, CREC's apparent approval of FMG's 23 August 2004 media release and the failure of CHEC or CMCC to object to FMG's 5 November 2004 media release (the releases were made available to them on that day, but they were not asked for their approval) does not provide support for the reasonableness of FMG's asserted belief: cf FMG submissions, par 99. The media releases were not of significant concern to the Chinese contractors. They were not joint announcements. It was important for FMG to ensure the accuracy of its releases to satisfy its obligations under the *Corporations Act*. That imperative did not apply to the Chinese companies.

83.4 As Keane CJ said at [134]:

> "It is hardly surprising that both sides to the framework agreements were eager to proclaim the success of their negotiations to that point. Any involvement on the part of the Chinese Contractors in the Project was a positive development, both for them and for FMG. That each side was enthusiastic about that involvement – and the potential benefits of that involvement – does not afford a reliable indication of the extent of the mutual involvement upon which they had actually achieved agreement. In this regard, it is important to bear in mind that the only statement by both sides of the terms on which they had actually reached agreement is to be found in the text of the framework agreements, including the recitals... [T]he conduct of the parties does not suggest that the parties had agreed upon anything more than what was stated in the framework agreements."

83.5 The MoU dated 1 September 2004 between CREC and Barclay Mowlem **[TB454]** (referred to in FMG's submissions at par 100), refers in a recital to an agreement between CREC and FMG "for the build and transfer of the Project". It does not assert that the framework agreement actually contains build and

transfer obligations. Indeed, clause 1 of the MoU appears to contemplate a joint venture between CREC and Barclay Mowlem for the purpose of submitting "a proposal(s) to FMG for the build and transfer of the Project ... based on principles of the Head Agreement and the Joint Venture Agreement." And clause 11 contemplates that the MoU might terminate upon "[t]he issuance by FMG of a notice of award to a third party without the involvement of CREC". These statements are consistent with a view of the framework agreement as an agreement to negotiate, not as an agreement under which CREC is already bound to build and transfer the railway infrastructure.

83.6 FMG's board minutes of 27 August 2004 **[TB420]** (referred to in FMG's submissions at par 103) record a report given by Forrest on his visit to China for the signing ceremony of the CREC framework agreement. Contrary to the suggestion in FMG's submissions, it does not evidence *the board's* consideration that the framework agreement was a binding agreement to build and transfer the railway infrastructure. Moreover, Forrest's description of the framework agreement contains further inaccuracies: nothing in the framework agreement suggests that it contains a "fixed price" or is "fully warranted", as Forrest asserts. The description may represent the agreement he hoped to obtain after further negotiations, but it does not provide a reasonable basis for the company's asserted belief about the effect of the framework agreement.

83.7 FMG also refers (at par 104) to its external communications on 2 and 10 September 2004 as reflecting its belief as to the nature of the CREC framework agreement. It is hardly surprising that in its external communications immediately following the 23 August 2004 announcement FMG puts forward the same description of the CREC framework agreement.

83.8 FMG's submits that the views of Heyting and Kirchlechner support a finding of honest and reasonable belief: FMG submissions, pars 105-108. There is no evidence that Forrest or any other director of FMG relied on Heyting's or Kirchlechner's views in any way. In any event, any such reliance would not provide a reasonable basis for the asserted belief. Neither Heyting nor Kirchlechner were relevant decision-makers of FMG: see FMG's July 2004 Project Brief which lists Kirchlechner as head of marketing and does not list Heyting as part of FMG's management team at all **[TB263**, at pp 2242-2245]. Heyting prepared the first draft of the CREC framework agreement, but he was not involved in all of the negotiations with CREC on 5 August 2004: TJ [146]. Further, in relation to Heyting's references to "BT contracts", it is not surprising that in correspondence with third parties he described the framework agreements consistently with FMG's public announcements.

83.9 As to the role of Huston (FMG submissions, par 111), ASIC refers to its submissions at pars 77-79 above.

84 In all the circumstances, there is no reasonable basis on which the officers of FMG could have believed that the framework agreements were accurately described in FMG's announcements.

85 On the contrary, the directors of FMG ought reasonably to have been aware of their true legal effect. There was no difference between the ordinary meaning of the terms

used in framework agreements and their true legal effect. No special technique of construction or inference was required to discern their meaning and effect. The nub of the framework agreements was apparent from the principal operative term which stated clearly that the parties had agreed to "jointly develop and agree" on a number of matters essential to the making of a build and transfer agreement.

86 Once it is accepted that FMG was aware of the material terms of the framework agreements and aware, within the meaning of Listing Rule 19.12, of the true legal effect of the framework agreements, it must follow that, in the state of affairs pertaining after release of FMG's announcements, it was obliged by s 674(2) of the Act to notify the ASX of that information.

87 As Keane CJ said, this is not to suggest that s 674(2) imposes an obligation *per se* to correct misleading information provided to the ASX: FC [184]. It is simply a question of applying s 674(2) in the factual situation that existed immediately after FMG made its misleading ASX announcements. In the particular circumstances of this case, the misleading nature of FMG's announcements rendered it clear beyond argument that information regarding the material terms of the framework agreements was material within the meaning of s 677. Amongst other considerations, FMG's announcements "were apt to create an understanding on the part of common investors that FMG had secured the construction of the infrastructure for the Project on terms as to deferred payment", so information as to the material terms of the framework agreements, which would falsify that understanding, was material information and was required by s 674(2) to be disclosed: FC [189].

Part VII: STATEMENT OF THE FIRST RESPONDENT'S ARGUMENT ON ITS NOTICE OF CONTENTION AND NOTICE OF CROSS-APPEAL

Notice of contention

88 If, contrary to ASIC's submissions, FMG's announcements would have been understood by ordinary and reasonable members of the investing public as statements of FMG's honestly and reasonably held *opinion* as to the effect of the framework agreements, and not as a statement of fact, ASIC contends that the orders of the Full Court can be supported on the ground that there was no reasonable basis for any belief that the framework agreements constituted binding agreements to build, finance and transfer the Project infrastructure. ASIC relies upon its submissions on this point in paragraphs 74-85 above.

Notice of cross-appeal

89 The Full Court's findings that FMG contravened s 674(2) of the *Corporations Act* should also be maintained on ASIC's first formulation of its case (see par 69 above), namely that FMG was required by s 674(2) to disclose the material terms or true effect of the framework agreements *instead of* making the announcements that it actually made. The reason this argument is put by way of cross-appeal is that the words in parentheses in par 2.2 of the Full Court's orders refer to the contraventions of s 674(2) commencing after the ASX notifications given by FMG. On this first formulation of ASIC's case, those words would not be necessary and could be deleted.

90 As stated above, FMG was in possession of information as to the terms of the framework agreements. In addition, for the reasons discussed in par 85 above, it ought reasonably to have been in possession of information as to the true legal effect of the framework agreements. FMG was therefore aware, for the purposes of Listing Rules 3.1 and 19.12, of the terms and true legal effect of the framework agreements. That information was information that would, or would have been likely to, influence persons who ordinarily invest in securities in deciding whether to acquire or dispose of FMG's shares: see s 677.

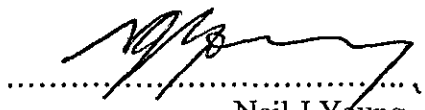
91 The "likely influence" test in s 677 is a common sense test for the Court. It does not present a high threshold. The significance of information as to FMG's entry into the framework agreements has to be seen in context.

92 At the time of the 23 August 2004 announcement, FMG had a market capitalisation of about $300m. The proposed Pilbara iron ore project was its one and only project. It had described the cost of financing the proposed project as the critical barrier to achieving its stated aim of becoming the "third force in iron ore" in Australia. In these circumstances, the announcement by FMG that it had entered into a framework agreement with a Chinese contractor which provided for the parties to jointly develop and agree on the terms and conditions of an agreement under which the contractor would build and finance the rail infrastructure for its $1.85bn project would have been understood as a significant step forward for FMG.

93 Accurate announcements of the material terms of the CHEC and CMCC framework agreements would have built upon the CREC announcement. Investors would have understood that FMG had agreements in place which provided for the negotiation of agreements for the construction of each aspect of the whole Project.

94 Accurate information in relation to material terms of each of the framework agreements would have influenced persons who commonly trade in shares in deciding whether to invest in FMG. It was therefore information which would have had a material effect on FMG's share price and FMG was required by s 674(2) of the *Corporations Act* to disclose it.

Dated: 17 November 2011



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