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

FIRST RESPONDENT'S REPLY SUBMISSIONS ON NOTICE OF CONTENTION AND NOTICE OF CROSS-APPEAL

Part I: SUITABILITY FOR PUBLICATION

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

Part II: REPLY SUBMISSIONS

Notice of contention

2 ASIC's submissions in relation to its notice of contention are set out in paragraph 88 of its primary submissions (**ASIC Primary Submissions**), which refers to paragraphs 74-85 of those submissions.

3 The Appellant (**FMG**) in its reply submissions (**FMG Reply Submissions**), at paragraph 28, merely refers back to paragraphs 117-129 of its primary appeal submissions. Those paragraphs address a different issue to that raised by the notice of contention.

Notice of cross-appeal

4 ASIC's submissions on its cross-appeal are set out in paragraphs 89-94 of the ASIC Primary Submissions. (As described in paragraphs 69-70 of the ASIC Primary

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Submissions, ASIC put its case in the Full Federal Court in two ways. The Full Court decided the matter on one of these bases. The cross-appeal relates to the other way in which ASIC put its case in the Full Court.)

5 FMG's response, contained in paragraphs 29-33 of the FMG Reply Submissions, should be rejected, for the following reasons.

6 From the time when the framework agreements were approved by the boards of FMG and the Chinese contractors, FMG had information concerning the material terms and effect of those agreements which (in terms of s 677) it was required to disclose. FMG failed to do so and thereby contravened s 674(2) of the Act on three occasions corresponding to the information relating to each of the three agreements.

7 FMG contends that, if the framework agreements were only agreements to negotiate, then the entry into those agreements was not information which was likely to influence investors in deciding whether to acquire or dispose of FMG shares. See FMG's Reply submissions, pars 30-31.

8 FMG appears to accept that it is appropriate to apply a commonsense test in determining whether information that it had entered into the framework agreements would have been likely to influence investors in deciding whether to acquire or dispose of FMG shares: FMG Reply Submissions, par 31. That is consistent with the observations of Keane CJ at FC [188], that the "likely influence" test in s 677 does not create a high threshold or require proof that information, if released, would have actually caused a change in the price of the shares.

9 Applying a commonsense test: even though the framework agreements were merely agreements to negotiate, the fact that they had been entered into nevertheless satisfied the likely influence test in s 677. In particular, in a context where a major obstacle to the achievement of the project was that FMG needed to secure a finance and construction package for very substantial mine, rail and port infrastructure:

(a) the terms of each agreement provided a framework for the parties to negotiate the terms of a Build and Transfer type contract for the projects works, including terms that involved the Chinese contractors agreeing to finance the project infrastructure on staged terms;

(b) subject to the outcome of those negotiations, the agreements contemplated the construction and funding of the project infrastructure and as such were a significant step forward in the advancement of FMG's project;

(c) the agreements were with very large State-owned Chinese companies, with experience in the various aspects of construction necessary for FMG's project.

10 The only evidence from experts experienced in the purchase and sale of mining shares was that information that FMG had entered into framework agreements with 3 Chinese State-owned enterprises would have influenced or been likely to influence

investors in deciding whether to acquire FMG shares.[1] Nevertheless, the trial judge rejected that evidence.[2] His grounds for rejecting that evidence are unsustainable, and their evidence on this issue ought to have been accepted.[3]

Dated: 1 December 2011

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[1] See the export report of Reginald Keene CB 15 at [22] - [23], supplementary expert report of Reginald Keene CB 16 at [3] - [6], expert report of Andrew Sisson CB 17 at [27] - [40], [45] - [56], [58] - [64] and supplementary expert report of Andrew Sisson CB 18 at [15] - [24].

[2] TJ [521], [528]-[529].

[3] In respect of Sisson, the trial judge said that Sisson had applied the wrong test, by referring to whether investors would have been influenced in considering whether to acquire FMG shares instead of referring to investors being influenced in deciding whether to acquire FMG shares: TJ [521]. However, the statutory language does not require an actual decision to buy or sell the relevant securities. Hence, the trial judge rejected Sisson's evidence on a false basis. In relation to Keene, who was a professional stockbroker, the trial judge characterised his evidence on this issue as assertion: TJ [529]. However, it was not simply assertion for Keene to provide an opinion as to how the market would react. Given the multitude of factors which affect a market and Keene's practical experience, his evidence was relevant and entitled to weight. In the absence of any other basis for challenging the evidence of Sisson and Keene, that evidence ought to have been accepted, and was wholly consistent with the application of a commonsense test of likely influence.