



HIGH COURT OF AUSTRALIA

Public Information Officer

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BHP BILLITON IRON ORE PTY LTD v THE NATIONAL COMPETITION COUNCIL AND
FORTESCUE METALS GROUP LIMITED
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NATIONAL COMPETITION COUNCIL AND FORTESCUE METALS GROUP LIMITED

The use by Fortescue of a railway line that was integral to BHP Billiton Iron Ore's (BHPBIO) production process would not amount to the use by Fortescue of that production process, the High Court of Australia held today.

Fortescue Metals Group applied to the National Competition Council (NCC) in 2004 for access to parts of the Mt Newman and Goldsworthy railway lines in north-western Western Australia by having them declared a service under Part IIIA of the *Trade Practices Act* (TPA). Declaration of a service meant that a party seeking access was given a right to negotiate access to the service. Fortescue sought access to the Mt Newman railway line from Mindy Mindy in the Pilbara region to Port Hedland, 295km away, and access to 17km of the Goldsworthy railway line from where it crossed the Mt Newman line to Port Hedland. Fortescue planned to build a 17km siding linking Mindy Mindy to the Mt Newman line. BHPBIO was the manager of joint mining ventures in four areas in the Pilbara and it operated the railway lines on behalf of each group of owners. Each line was a single-gauge heavy haulage railway line constructed upon WA Crown land leased at a peppercorn rental. Fortescue was a publicly listed company and a party to an agreement with the State relating to the development of multi-user railway and port facilities. It did not seek access to BHPBIO's locomotives and rolling stock as it would use its own.

The NCC invited submissions about whether the facilities were a service as defined by section 44B of the TPA. BHPBIO submitted that the railway lines were integral to its iron ore production process. In November 2004, the NCC determined that it had jurisdiction over the application as it pertained to the Mt Newman railway line but not with respect to the Goldsworthy line and that the application should be treated as two separate applications, which led to two appeals coming before the High Court. Section 44B provided that "service" did not include "the use of a production process". The NCC concluded that the relevant part of the Mt Newman line was a service to which Part IIIA applied, but that the Goldsworthy line was subject to the production process exception. On 24 December 2004, BHPBIO applied to the Federal Court seeking declarations that the Mt Newman railway line was not a service within the meaning of section 44B and that the NCC did not have jurisdiction to recommend that the railway line be declared. On 22 February 2005, Fortescue applied to the Federal Court seeking declarations that the Goldsworthy line is a service under section 44B and that the NCC had jurisdiction with respect to it. Justice John Middleton heard the two cases together and in December 2006 dismissed BHPBIO's application and made the declarations that Fortescue sought in respect of the Goldsworthy line. The Full Court of the Federal Court dismissed appeals by BHPBIO on 5 October 2007. BHPBIO appealed to the High Court.

The High Court unanimously dismissed the appeals. It held that the subject of Fortescue's application answered the description of a service provided by the use of an infrastructure facility such as a railway line, in accordance with section 44B of the TPA. BHPBIO submitted that the access sought would be to a production process. The Court held that "a production process" meant the creation or manufacture by a series of operations of some marketable commodity. Although BHPBIO used the track and associated infrastructure as part of its production process, it did not follow that use by Fortescue of that track and infrastructure would be excluded from the definition of "service" as being "the use of a production process". Fortescue's proposed use of the railway lines did not constitute use of BHPBIO's production process.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*