IN THE HIGH COURT OF AUSTRALIA Nos M155, M156 and M157 of 2011
MELBOURNE REGISTRY

B E T W E E N

THE PILBARA INFRASTRUCTURE PTY LTD (ACN 103 096 340) & ANOR

Appellants

and

AUSTRALIAN COMPETITION TRIBUNAL & ORS

Respondents

SUBMISSIONS OF THE BHP BILLITON RESPONDENTS

Part I – Certification for Internet Publication

1. The BHP Billiton respondents (**BHP Billiton**) certify that these submissions are suitable for publication on the internet.

Part II – Statement of Issues

2. The Appellants (Fortescue) seek leave to amend their notice of appeal to raise new grounds of appeal. The first issue is whether Fortescue should be granted that leave. If Fortescue is granted leave, the amended grounds of appeal raise the following issues.

3. First, what is the character of the review which the Tribunal was empowered to undertake under section 44K of the *Trade Practices Act* 1974 (Cth) (**Act**) (now the *Competition and Consumer Act* 2010 (Cth)) and particularly:

   (a) is the Tribunal confined to correcting error applying the principles in *House v The King* and *Minister for Aboriginal Affairs v Peko-Wallsend Pty Ltd*, as contended by Fortescue;[1] or

   (b) is the review a review *de novo*?

4. Secondly, depending on the answer to the first question, did the Tribunal conduct a review within the meaning of section 44K?

5. Thirdly, when the Tribunal conducts a review under section 44K and reconsiders the criterion in paragraph 44H(4)(f), should the meaning of that criterion be read down

[1] Fortescue supplementary submissions at [26], [75] and [76]

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having regard to Chapter III of the Constitution by reason that the Tribunal was, and was required to be, constituted by a presidential member who was a Federal Court Judge (**the Chapter III issue**)?[2]

Part III – Section 78B Certification

6. BHP Billiton notes that Fortescue proposes to give notice under section 78B of the *Judiciary Act 1903* (Cth) if the Court grants leave to amend the notice of appeal in respect of the Chapter III issue.[3]

Part IV – Reasons why leave to amend should not be granted

7. Leave to amend should not be granted for the following reasons.

10 8. First, the new issues sought to be raised by the proposed amended grounds of appeal do not have sufficient prospects of success to warrant the grant of leave to amend. The merits of the proposed grounds of appeal are discussed below.

9. Secondly, unless the decision of the Court on the existing grounds of appeal is to remit the matter to the Tribunal, the interests of justice favour refusing leave to amend. Factors that will bear upon the interests of justice include the finality of litigation, the undesirability of encouraging tactical decisions not to present an issue at first instance and the need for vigilance to avoid injustice to a party having to meet new issues of law for the first time on appeal.[4]

10. The principles governing the grant of leave to raise a new issue on appeal have been
20 discussed by this Court on many occasions.[5] Ordinarily, a party is bound by the conduct of his or her case at trial.[6] The issues raised by the amended grounds of appeal were not raised at the initial hearing before the Tribunal.[7] Nor was the section 44K issue raised before the Full Court. The Chapter III issue was raised before the Full Court but not pursued by Fortescue in this appeal until now.[8]

11. In the circumstances of this case, refusing leave to amend will not work substantive injustice. The fact that no declaration of the rail services has been made does not prevent a further application being made at any time in the future. Fortescue is free to lodge a new application with the Council if it wishes.

12. Thirdly, the issues sought to be raised are not of general importance. Since the Tribunal's
30 decision, section 44K of the Act has been amended. Relevantly, section 44K(4) now provides that the review by the Tribunal is a re-consideration of the matter based on the information, reports and things referred to in section 44ZZOAA. Accordingly, the scope

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[2] Fortescue supplementary submissions at [101]
[3] Fortescue supplementary submissions at [108]
[4] See *Coulton v Holcombe* (1986) 162 CLR 1 at 8 per Gibbs CJ, Wilson, Brennan and Dawson JJ
[5] Cases include *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; *Bloemen v The Commonwealth* (1975) 49 ALJR 219; *O'Brien v Komesaroff* (1982) 150 CLR 310; *Metwally v University of Wollongong* (1985) 60 ALR 68; *Coulton v Holcombe* (1986) 162 CLR 1
[6] *Metwally v University of Wollongong* (1985) 60 ALR 68 at 71
[7] Acknowledged by Fortescue in its supplementary submissions at [73]
[8] Fortescue supplementary submissions at [108]

of a review to be conducted by the Tribunal under section 44K in the future will be reduced.

13. If the matter is to be remitted by reason of the existing grounds of appeal, and if the Court forms the view that the proposed amended grounds of appeal warrant consideration by the Court, it is appropriate that leave to amend be given so that the issues are determined by this Court and the Tribunal is able to reconsider the matter in accordance with law.

Part V – BHP Billiton's Argument on the Substantive Issues

A. Form of review under section 44K

10 ***General principles***

14. The nature of review or appeal rights depends upon the terms of the statute conferring the rights.[9] In *Brandy v Human Rights and Equal Opportunity Commission*[10], Mason CJ, Brennan and Toohey JJ observed:

> "*In considering the nature of the 'review' contemplated by s25ZAC, it is relevant to note that the expression 'review' is commonly used in the context of judicial control of administrative action and in the context of comprehensive administrative review by an administrative tribunal of administrative decisions. But what emerges from the judicial decisions and, for that matter, from statutes is that 'review' has no settled pre-determined meaning; it takes its meaning from*
20 *the context in which it appears.*" (emphasis added).[11]

15. In *Allesch v Maunz*,[12] the plurality summarised the features of three types of appeal rights: appeals in the "strict sense", appeals by way of rehearing and appeals by way of hearing *de novo*.[13]

16. The function of an appellate tribunal hearing an appeal in the strict sense "*is simply to determine whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision was given*".[14] The appellate tribunal can only give the decision which should have been given at first instance.[15]

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[9] *Tasty Chicks v Chief Commissioner of State Revenue* (2011) 281 ALR 687 at 688-9 [5] per French CJ, Gummow, Crennan, Kiefel and Bell JJ; *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 295 [25] per Kirby J, at 311 [92] per Hayne and Heydon JJ and at 324 [132] per Kiefel J; *East Australian Pipeline v ACCC* (2007) 233 CLR 229 at 245-6 per Gummow and Hayne JJ; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 202-3 [11] per Gleeson CJ, Gaudron and Hayne JJ and at 240-1 [118] per Callinan J citing *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621-2 per Mason J, with whose judgment Barwick CJ and Stephen J agreed.

[10] (1995) 183 CLR 245

[11] At 261. See also *Tasty Chicks v Chief Commissioner of State Revenue* (2011) 281 ALR 687 At 688-9 [5] per French CJ, Gummow, Crennan, Kiefel and Bell JJ

[12] (2000) 203 CLR 172 at 180-1 [22]-[23] per Gaudron, McHugh, Gummow and Hayne JJ

[13] These principles were also summarised by the plurality in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 202 [11] – [14] per Gleeson CJ, Gaudron and Hayne JJ

[14] *Allesch v Maunz* (2000) 203 CLR 172 at 180 [22] citing *Mickelberg v The Queen* (1989) 167 CLR 259 and *Eastman v The Queen* (2000) 203 CLR 1

[15] *Allesch v Maunz* (2000) 203 CLR 172 at 180-1 [23]

17. In an appeal by way of rehearing "*the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error*".[16] On an appeal by way of rehearing, an appellate tribunal can substitute its own decision based on the facts and law as they stand at the time of the appeal.[17] An appeal by way of rehearing is usually indicated where the appellate tribunal has power to receive further evidence and make such orders as it thinks fit.[18]

18. On an appeal *de novo*, all of the powers of the lower tribunal may be exercised again by the appellate tribunal regardless of error.[19]

The text of section 44K

19. Sub-sections (1) and (2) of section 44K create a right to apply to the Tribunal for review of the Minister's decision under section 44H. The sub-sections are directed to the two available outcomes under section 44H: declaration and non-declaration. The two sub-sections differ grammatically. Sub-section (1) is written in the active voice and initiates a "review of the declaration". Sub-section (2) is written in the passive voice and initiates a "review of the designated Minister's decision" not to declare a service. Nothing turns on those grammatical differences. The expression "review of the declaration" in sub-section (1) must, in context, connote a review of the Minister's decision to declare a service under section 44H. It can be observed that section 44H(1) provides that the designated Minister "must either declare the service or decide not to declare it". It is implicit that "declare" means "decide to declare", and this is made plain by section 44H(1A).[20]

20. Contrary to Fortescue's supplementary submissions,[21] section 44HA(1) does not constrain the Minister's discretion under section 44H such that the Minister's task is merely to decide whether he or she agrees or disagrees with a declaration recommendation. The expression "his or her decision on a declaration recommendation" merely identifies the decision in respect of which reasons must be published. Section 44H predates section 44HA and there is no indication from the text or extrinsic materials that Parliament intended section 44HA to constrain the power in section 44H. A great part of Fortescue's argument is built upon that false premise.[22]

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[16] *Allesch v Maunz* (2000) 203 CLR 172 at 180-1 [23] citing *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111] per McHugh, Gummow and Callinan JJ

[17] *Allesch v Maunz* (2000) 203 CLR 172 at 180-1 [23] citing *Werribee Shire Council v Kerr* (1928) 42 CLR 1 at 20-21 per Isaacs J; *Victorian Stevedoring & General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 107 per Dixon J; *Mickelberg v The Queen* (1989) 167 CLR 259 at 278 per Deane J, and at 298 per Toohey and Gaudron JJ; *Re Coldham; Ex parte Brideson [No. 2]* (1990) 170 CLR 267

[18] *Re Coldham; Ex parte Brideson [No. 2]* (1990) 170 CLR 267 at 272 per Deane, Gaudron and McHugh JJ

[19] *Allesch v Maunz* (2000) 203 CLR 172 at 180-1 [23]

[20] It appears that in drafting sub-sections (1) and (2) of section 44K, the Parliamentary draftsperson adopted the manner of expression in sub-section 44H(1), using the language of "the declaration" (which connotes the decision to declare) and the language "decides not to declare".

[21] Fortescue supplementary submissions at [12] and [15]

[22] Fortescue supplementary submissions at [15], [18], [27], [28] and [40]

21. Sub-section (4) provides that the "*review by the Tribunal is a re-consideration of the matter.*" For reasons set out in these submissions, the matter must be the issue or question whether or not to declare the service under section 44H(1) which has been enlivened by an application to the Council under section 44F and a recommendation made by the Council under section 44G. To reconsider the matter is to decide the question afresh on the evidence before the Tribunal and the law on the date that the Tribunal makes its decision.

22. Sub-section (5) provides that:

> "(5) *For the purposes of the review, the Tribunal has the same powers as the designated Minister.*"

23. The relevant powers of the Minister are contained in sections 44H and 44I. Section 44H gives the Minister a binary decision making power subject to various constraints. The binary decision is to declare or not to declare the service. Accompanying that power is an implicit power to determine the duration of the declaration (see sub-section (8) and section 44I). The limitations on the exercise of that power are set out in the various sub-sections of section 44H. Many of those sub-sections state pre-conditions to the exercise of the power (see sub-sections (3), (3A), (4) and (6B)). Other sub-sections constrain the exercise of the Minister's power by requiring the Minister to have regard to various matters (see sub-sections (1) and (2)). The effect of sub-section 44K(5) is that the Tribunal has the same powers, with the same limitations, as given to the designated Minister under sections 44H and 44I.

24. Sub-section (6) empowers the Tribunal to require the Council to assist the Tribunal in a specified manner. There is no limitation on the information, assistance and reports that the Tribunal may seek from the Council. In particular, there is no limitation that any such information and reports must be confined to facts that existed on the date that the Minister made a decision under section 44H, or evidence that was before the Council when it made its recommendation or that was before the Minister when the Minister made his or her decision.

25. Sub-sections (7), (8) and (9) provide that:

> "*(7) If the designated Minister declared the service, the Tribunal may affirm, vary or set aside the declaration.*
>
> *(8) If the designated Minister decided not to declare the service, the Tribunal may either:*
>
> > *(a) affirm the designated Minister's decision; or*
> >
> > *(b) set aside the designated Minister's decision and declare the service in question.*
>
> *(9) A declaration, or varied declaration, made by the Tribunal is to be taken to be a declaration by the designated Minister for all purposes of this Part (except this section).*"

26. The meaning of those sub-sections is plain. The Tribunal is empowered to "stand in the shoes" of the Minister and decide whether or not to declare the service and the duration of the declaration.

27. Section 44K does not confine the Tribunal's review to the correction of error whether of law, fact or discretion. Nor does the section stipulate that the Tribunal is to make the decision which should have been made by the Minister at first instance. Rather, the Tribunal is empowered to reconsider the matter, exercising the same powers as the Minister and with full power to affirm, vary or set aside the Minister's decision.

28. The powers given to the Tribunal by sub-sections (5), (7), (8) and (9) (which, as discussed below, are substantially the same as the powers given to the Administrative Appeals Tribunal by section 43(1) and (6) of the *Administrative Appeals Tribunal Act* 1975 (Cth) considered by this Court in *Shi v Migration Agents Registration Authority*[23]) tell strongly in favour of the conclusion that the Tribunal's jurisdiction under section 44K is to determine the matter afresh on the material before the Tribunal, which may include information about events and circumstances that occurred after the decision under review was made.

Contextual considerations

29. There are five matters of legislative context that are relevant to determining the nature of the review rights specified in section 44K.

30. First, the subject of a review under section 44K is a decision by the Minister to declare, or not to declare, a service under section 44H. The decision to declare or not to declare a service is administrative in character. It involves the creation of new rights and obligations, not the declaration of existing rights and obligations.[24]

31. Secondly, the power of review and adjudication exercised by the Tribunal under section 44K is also administrative and is not judicial.[25]

32. Thirdly, by virtue of the operation of sub-section 44H(9), the Tribunal is empowered to review a "deemed decision" of the Minister not to declare a service under that sub-section. A "deemed decision" is not amenable to a review in the strict sense as there is no decision or reasons to review for error.

33. Fourthly, in undertaking a review under section 44K, the Tribunal is empowered to inform itself of relevant facts in a number of ways, including under sub-section 44K(6), regulation 22(1) of the Trade Practices Regulations (now renamed the Competition and Consumer Regulations) and Division 2 of Part IX. Those powers are described below.

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[23] See *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 295 [25] per Kirby J, at 311 [92] per Hayne and Heydon JJ and at 324 [132] per Kiefel J

[24] See for example *Waterside Workers' Federation of Australia v JW Alexander Ltd (Alexander's Case)* (1918) 25 CLR 434 at 463 per Isaacs and Rich JJ; *Ha v New South Wales* (1997) 189 CLR 465 at 503-4 per Brennan CJ, McHugh, Gummow and Kirby JJ

[25] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 371-2 per McTiernan J, at 374 per Kitto J, at 398-9 per Windeyer J, at 408-9 per Owen J and at 415-6 per Walsh J

Fortescue's contention that neither regulation 22 nor Division 2 of Part IX is applicable to a review under section 44K[26] is incorrect for the reasons explained below.

34. Fifthly, an examination of the relevant legislative history (which is also described below):

    (a) demonstrates the close parallels between the review powers given to the Tribunal under sections 101 and 102 and section 44K;

    (b) explains the choice of the word "re-hearing" in sub-section 101(2), "re-consideration" in sub-section 44K(4) and "re-arbitration" in sub-section 44ZP(3); and

    (c) evidences Parliament's intention (through the relevant extrinsic materials) to confer a merits review power on the Tribunal under section 44K, along with all other powers of review given to the Tribunal in the Act, save where Parliament has chosen to limit expressly the materials to which the Tribunal may have regard in conducting a review.

Constitution and powers of the Tribunal

Constitution of the Tribunal

35. The Tribunal is created by Part III of the Act and its powers derive from the Act. As an administrative body, the Tribunal is constituted as follows:

    (a) A person cannot be appointed as a presidential member of the Tribunal unless he or she is a Judge of the Federal Court (section 31(1)).

    (b) A person cannot be appointed as a member of the Tribunal other than a presidential member unless he or she appears to the Governor-General to be qualified for appointment by virtue of his or her knowledge of, or experience in, industry, commerce, economics, law or public administration (section 31(2)).

    (c) Currently, four Judges of the Federal Court have been appointed as presidential members of the Tribunal, and nine other persons have been appointed as members.[27]

    (d) For the purpose of hearing and determining proceedings, the Tribunal must be constituted by a Division of the Tribunal consisting of a presidential member and two members who are not presidential members (section 37).

    (e) The presidential member who is a member of a Division must preside at proceedings of that Division (section 41).

    (f) A question of law arising in a matter before a Division of the Tribunal must be determined in accordance with the opinion of the presidential member presiding (section 42(1)).

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[26] Fortescue's supplementary submissions at [29], [54]ff and [66]ff

[27] www.competitiontribunal.gov.au/about/members

(g) Otherwise, a question arising in proceedings before a Division of the Tribunal must be determined in accordance with the opinion of a majority of the members constituting the Division (section 42(2)).

36. The Act contemplates that the Tribunal will exercise its powers under the Act by being constituted into a Division and conducting a proceeding. The Act does not empower the Tribunal to be constituted or exercise its powers in any other manner. There are no other provisions in the Act that enable a presiding member of the Tribunal to exercise powers of review by themselves, and the Act does not contemplate that the Tribunal will exercise powers through all appointed members. Sub-section 44K(6) assumes that, in a review under section 44K, the Tribunal will be constituted with a presiding member, thereby invoking section 41 and its reference to a proceeding.

37. In this context, it is apparent that the word "proceeding" takes its ordinary meaning as the formal process by which a matter is determined by the Tribunal. Section 103 of the Act, which for the reasons explained below applies to all proceedings of the Tribunal, stipulates that the procedure of the Tribunal is (subject to the Act and the regulations) within the discretion of the Tribunal and that the proceedings should be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Act and a proper consideration of the matters before the Tribunal permit.

38. Fortescue's contentions to the effect that a review by the Tribunal under section 44K does not involve "parties" (although it does involve participants) and does not involve pleadings[28] are of no particular consequence. Fortescue fails to address the question of the manner in which the Tribunal may be lawfully constituted to conduct a review under section 44K if the review does not involve a proceeding within the meaning of the Act.

Sources of power to obtain evidence and conduct hearings

39. The Tribunal has two sources of power in the Act to obtain evidence and conduct hearings in the course of a review under section 44K. The first derives from section 44ZZP which provides that regulations may make provision about various matters concerning the functions of the Tribunal under Part IIIA, including procedure and evidence.

40. The Trade Practices Regulations (now renamed the Competition and Consumer Regulations) contain various regulations applicable to a review under section 44K, including the following:

(a) Regulation 20A(1)(a) specifies the form to be lodged for the purposes of an application to the Tribunal under sub-sections 44K(1) and (2).

(b) Regulation 22(1), expressed to be without limitation to the generality of the powers of the Tribunal under the Act and the regulations, empowers the Tribunal to give directions about various matters of procedure and evidence in any proceedings before it including:

[28] Fortescue supplementary submissions at [41]-[43]

(i) for securing, by means of preliminary statements of facts and contentions, and by the production of documents, that all material facts and considerations are brought before the Tribunal by all persons participating in any proceedings before the Tribunal; and

(ii) with respect to evidence in proceedings before the Tribunal, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report).

(c) Regulation 22A provides that the Tribunal may permit a person to give evidence in proceedings before the Tribunal by tendering a written statement.

(d) Regulation 22B specifies the persons who may participate in a review under section 44K. Those persons are the provider of the service and the person who applied for the declaration recommendation.

41. Fortescue's contention that regulation 22 is not applicable to a review under section 44K[29] should be rejected. Its arguments misstate the meaning and effect of various provisions of the Act.

42. First, Fortescue's reliance on regulation 7B[30] is misconceived. Section 44ZZP is a regulation-making power in respect of the functions of the Tribunal under Part IIIA. Section 44ZZR contains a regulation-making power in respect of the functions of the Tribunal under a State / Territory energy law or a designated Commonwealth energy law. Sub-section 44ZZP(2) provides that regulations made for the purposes of sub-section 44ZZP(1) do not apply in relation to the functions of the Tribunal under a State / Territory energy law or a designated Commonwealth energy law. The scheme of the regulations is that they have general application to the functions of the Tribunal under Part IIIA by virtue of section 44ZZP(1). By virtue of sub-section 44ZZP(2), they do not have general application to the functions of the Tribunal under a State / Territory energy law or a designated Commonwealth energy law. Regulation 7B is made pursuant to section 44ZZR(2) and specifies which of the regulations are to apply in that latter context.

43. Secondly, Fortescue's argument that the terms of regulation 22 are identical to the regulation-making power conferred in section 104[31] is wrong. Section 104 is a regulation-making power. It states that the regulations may make provision about the stated matters. In contrast, regulation 22 empowers the Tribunal to give directions about those matters. It may be accepted that there are two sources of power for regulation 22, section 104 and section 44ZZP(1). That does not invalidate the regulation. Nor does it lead to the conclusion that the regulation should be confined to section 104.

44. Thirdly, Fortescue's argument that the word "proceeding" is inapplicable to a review under section 44K[32] should be rejected for the reasons explained above.

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[29] Fortescue supplementary submissions at [66]
[30] Fortescue supplementary submissions at [67]
[31] Fortescue supplementary submissions at [68]
[32] Fortescue supplementary submissions at [69]

45. The Tribunal's second source of power derives from Division 2 of Part IX which governs the form of all proceedings before the Tribunal, except where the Act provides to the contrary. The question whether Division 2 of Part IX is applicable to a review under section 44K of the Act has been considered by the Tribunal on a number of occasions. On each such occasion, the sitting presidential member of the Tribunal formed the view that Division 2 of Part IX was applicable.[33]

46. Fortescue's contention that Division 2 of Part IX is not of general application[34] should be rejected. Again, its arguments misstate the meaning and effect of various provisions of the Act.

47. First, Fortescue's observations about Division 1 of Part IX[35] do not assist. It may be accepted that, at the time Division 2 of Part IX was first enacted, the only reviews to which it applied were those referred to in Division 1 of Part IX (as that Division was the sole source of the Tribunal's review power at that time). However, that is no reason to read down the breadth of the provisions in Division 2 and there are statutory indications that Parliament intended the Division to have general application (see particularly sections 44ZQ, the note to sections 10.82B and 10.82E and sections 10.82C and 10.82G).

48. Secondly, for the reasons explained earlier, Fortescue's contention that the word "proceeding" (as used in Division 2) is inapplicable to a review under section 44K[36] should be rejected.

49. Thirdly, the contrast that Fortescue draws between Divisions 2 and 3 of Part IX[37] is irrelevant. Division 2 is concerned with procedure and evidence for Tribunal proceedings. Division 3 empowers the Tribunal to review determinations of the Commission under Sub-division B of Division 3 of Part VII. Accordingly, Division 3 is another source of review power of the Tribunal, akin to Division 1 (sections 101 and 102) and section 44K.

50. Fourthly, Fortescue's reliance on section 44ZQ[38] is misconceived. Section 44ZQ provides, relevantly, that sections 103 – 110 do not apply in relation to a review (under section 44ZP) by the Tribunal of a final determination made by the Commission in respect of an access dispute. There is an obvious reason for that exclusion. Access disputes are private matters and section 44ZD(1) provides that, as a general rule, an arbitration hearing for an access dispute before the Commission is to be in private. It would be inconsistent with that requirement for a review before the Tribunal to be in public. Section 106(1) provides that, in general, the hearing of proceedings before the Tribunal shall be in public. Accordingly, the provisions of Division 2 of Part IX are

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[33] *Re Freight Victoria Ltd* [2002] ACompT 1 at [17] (with Goldberg J as the presiding member); *Re Asia Pacific Transport Pty Ltd* [2003] ACompT 1 at [7] (with Hely J as the presiding member); *Re Lakes R Us Pty Ltd* [2006] ACompT 3 at [26]-[28] per French J; *Re Fortescue Metals Group Ltd* [2006] ACompT 6 at [14]-[22] per Goldberg J

[34] Fortescue supplementary submissions at [54]ff

[35] Fortescue supplementary submissions at [54]-[59]

[36] Fortescue supplementary submissions at [59]

[37] Fortescue supplementary submissions at [60]

[38] Fortescue supplementary submissions at [61]

inappropriate for the review of an access dispute arbitration, and are excluded by section 44ZQ. The powers of the Tribunal to regulate its review proceedings under section 44ZP are set out in Part IIA of the Regulations (which are made pursuant to the power in section 44ZZP). Contrary to Fortescue's contention, section 44ZQ provides a clear indication that Parliament intended that Division 2 of Part IX would be generally applicable to proceedings of the Tribunal (except where expressly excluded).

51. Fifthly, the same implication arises from the note to sections 10.82B and 10.82E to the effect that Division 2 of Part IX applies to proceedings before the Tribunal. Fortescue's contention that the purpose of the note is unclear[39] should be rejected. The same implication arises from sections 10.82C and 10.82G.

52. Sixthly, for the reasons explained earlier, Fortescue's reliance on sections 44ZZP and 44ZZR[40] is misconceived.

53. The inclusive definition in section 102A does not alter the foregoing analysis. This section was inserted by item 33 of Schedule 1 to the *Trade Practices Legislation Amendment Act (No 1)* 2006 (Cth) in connection with the introduction of new merger authorisation and clearance procedures. Subdivision C of Division 3 of Part VII gave to the Tribunal a direct power to authorise conduct for the purposes of the Act (mergers) which power did not involve a review of another person's decision. It seems likely that section 102A was introduced to ensure that there was no doubt that Division 2 of Part IX was to apply even when the Tribunal was exercising its direct authorisation power (and not conducting a review). The inclusion in section 102A of paragraph (b), which relates to a review of the Commission's powers to grant merger clearances under Division 3 of Part IX, is out of an abundance of caution. The relevant extrinsic materials do not provide any assistance.[41]

Legislative History

Part IX

54. The origins of section 44K can be traced to sections 101 and 102 of the *Trade Practices Act 1974* (Cth) as first enacted. Those sections contained the same elements as are seen in section 44K:

    (a) sub-section 101(1) provided that a person dissatisfied with a determination by the Commission in relation to an authorisation may apply to the Tribunal for a review of the determination;

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[39] Fortescue supplementary submissions at [62]

[40] Fortescue supplementary submissions at [64]

[41] The original Bill introduced into Parliament framed the proposed section 102A in a different way. Item 34 of Schedule 1 of that Bill proposed the insertion of a section 102A that stated that Division 2 applied for the purposes of review under Division 1 (see Explanatory Memorandum to the *Trade Practices Legislation Amendment Bill (No 1)* 2005 (Cth), schedule 1 item 34, p 44). There was no necessity for such a provision. Item 34 was subsequently removed from the Bill and replaced by item 33 which inserted the current section 102A. The Supplementary Explanatory Memorandum concerning the amendments to the Bill merely stated, in respect of item 33, that the definition inserted by section 102A specifies that proceedings are to include applications made to the Tribunal under Subdivision C of Division 3 of Part VII and applications made to the Tribunal under Division 3 of Part IX (Supplementary Explanatory Memorandum (House of Representatives), Amendment No. 41, p 20).

(b) sub-section 101(2) provided that a review by the Tribunal is a re-hearing of the matter;

(c) sub-section 102(1) provided that upon a review, the Tribunal may make a determination affirming, setting aside or varying the determination of the Commission and, for the purposes of the review, may perform all the functions and exercise all the powers of the Commission;

(d) sub-section 102(2) provided that a determination by the Tribunal shall be deemed to be a determination by the Commission;

(e) sub-section 102(3) provided that for the purposes of the review, the presiding member of the Tribunal may require the Commission to furnish such information, make such reports and provide such other assistance to the Tribunal as the member specifies; and

(f) sub-section 102(4) provided that for the purposes of the review, the Tribunal may have regard to any information furnished, documents produced or evidence given to the Commission in connection with the making of the determination.

55. The above elements of sections 101 and 102 have remained unaltered since 1974.

56. The primary difference between the language in sections 101 and 102 and in section 44K is the use of the word "re-hearing" rather than "re-consideration". The meaning of the expression "re-hearing" is to hear the matter afresh. The meaning of the expression "re-consideration" is to consider the matter afresh. As described below, powers of review are given to the Tribunal in many contexts in the Act, and the Parliamentary draftsperson has chosen a description of the review that corresponds to or reflects the character of the original function being reviewed. In the case of authorisation determinations under Division 1 of Part IX, from the enactment of the *Trade Practices Act* in 1974, the Commission was empowered to hold a public hearing in relation to applications for authorisation (see sub-section 90(2) as originally enacted). The language of sub-section 101(2) as originally enacted reflected the fact that a hearing may have been held by the Commission in making an authorisation determination. Public hearings into authorisation applications were abolished by section 56 of the *Trade Practices Amendment Act 1977*, but the descriptive expression "re-hearing" was not altered in sub-section 101(2). In the case of a decision under section 44H, no hearing is required to be held by the Minister; rather, the Minister must consider various matters.

57. The nature of a review under sections 101 and 102 was first considered by the Tribunal in *Re Queensland Co-operative Milling Association*.[42] The Tribunal (with Woodward J as the presiding member) stated:

> *"It is not necessary for the applicant to allege any particular error on the part of the Commission or to criticize the Commission's proceedings in any way. Indeed the Tribunal could have no interest in investigating any alleged procedural defect in the Commission's proceeding. It is concerned only to determine the right*

[42] (1976) 8 ALR 481

answer to the question posed by the applicant's request for authorization, and to do so by a fresh hearing.

. . . the grant of an authorization under the Act is the exercise of an administrative discretionary power. A review of the exercise of that discretion is quite different from an appeal by way of re-hearing in the strict judicial sense, and so different considerations apply. . . . The reviewing body, in this case the Tribunal, must really do the task again from the beginning while using any short cuts provided by the earlier proceedings which may be appropriate in the particular case."[43]

58. The conclusion that a review under sections 101 and 102 of the Act involves a *de novo* re-hearing has been followed in all subsequent Tribunal decisions. In *Re Herald & Weekly Times Ltd*, the Tribunal (with Deane J as the presiding member) made the additional observation that the Tribunal is an administrative body but is under a duty to act judicially, that is with judicial fairness and detachment, and is required to determine an application for review upon the material placed before it during the hearing.[44]

59. The review jurisdiction of the Tribunal under the Act was substantially expanded first, by the enactment of Part IIIA by the *Competition Policy Reform Act* 1995 and secondly, by the enactment of Part XIC by the *Trade Practices Amendment (Telecommunications) Act* 1997. At the time of those amendments, the conclusions of the Tribunal concerning the nature of the review under sections 101 and 102 were well established and can be presumed to have been known to Parliament.

Part IIIA

60. As enacted, section 44K took substantially the same form, and had the same elements, as were contained in sections 101 and 102 of the Act. The Tribunal was also given jurisdiction to review access determinations made by the Commission under Division 3 of Part IIIA. Section 44ZP also followed the same form as sections 101 and 102 of the Act. Sub-section 44ZP(3) described the review by the Tribunal as a "re-arbitration" of the access dispute. This language reflects the character of the function undertaken by the Commission at first instance. In Division 3, a proceeding before the Commission to resolve an access dispute is consistently described as an arbitration.

61. Given the substantially identical form of sections 44K and sections 101 and 102 and the longstanding approach of the Tribunal under sections 101 and 102, it is both unsurprising and correct for the Tribunal to have consistently taken the view that a review under section 44K is a *de novo* re-consideration of the decision whether or not to declare a service, requiring the Tribunal to apply the criteria in section 44H.[45]

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[43] At 487-8

[44] (1978) 17 ALR 281 at 295-6

[45] *Re Sydney International Airport* [2000] ACompT 1 at [8] (with Goldberg J as the presiding member); *Re Freight Victoria Ltd* [2002] ACompT 1 at [22] (with Goldberg J as the presiding member); *Re Services Sydney Pty Ltd* [2005] ACompT 7 at [9] (with Gyles J as the presiding member)

62. Subsequent amendments to section 44K also reveal that Parliament intended the section to empower the Tribunal to undertake a de novo re-consideration of the question whether to declare, otherwise referred to as full merits review.

63. Section 44K(4) was first amended by the *Trade Practices Amendment (National Access Regime) Act* 2006 (Cth) to insert a note cross-referencing a new section 44ZZOA. The latter section introduced a requirement that the Tribunal must use its best endeavours to make a decision on a review within 4 months or such further period as extended.[46] The Amendment Act also introduced a new section 44ZZBF, giving the Tribunal jurisdiction to review decisions by the Commission to accept access undertakings under section 44ZZA and access codes under section 44ZZAA. Section 44ZZBF described the jurisdiction of the Tribunal to review such decisions in substantially the same terms as section 44K. The Explanatory Memorandum accompanying the relevant Bill described the review rights under section 44ZZBF as "merits review".[47]

64. Section 44K(4) was further amended by the *Trade Practices Amendment (Infrastructure Access) Act* 2010 (Cth). The effect of the amendment was to confine the information and other materials to which the Tribunal may have regard in conducting a review, cross referencing a new section 44ZZOAA. The Explanatory Memorandum accompanying the relevant Bill consistently referred to the review by the Tribunal as "merits review".[48] The expression "limited merits review" was used to describe merits review that is based upon limited material, being the material that was before the Council and the Minister.[49] Moreover, the Explanatory Memorandum stated in respect of section 44K: "*Subject to the limits on the information the Tribunal may consider in section 44ZZOAA (see Chapter 1), the review is a reconsideration of the matter. The Tribunal will draw its own conclusions from the material before it comes to a decision on the application.*"[50] (emphasis added).

Part XIC

65. Part XIC uses similar concepts to those found in Part IIIA, but has a number of administrative differences. First, it is the Commission, not the Minister, which may declare relevant telecommunication services for the purposes of Part XIC.[51] Secondly, declaration immediately imposes "standard access obligations" on suppliers of declared services.[52]

66. On the enactment of Part XIC in 1997, the Tribunal was not given jurisdiction to review decisions by the Commission to declare a service. However, the Commission was

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[46] Fortescue's argument (Fortescue supplementary submissions, at [35]) that an implication arises from section 44ZZOA that the record is closed and the Tribunal is confined to material before the Minister is insupportable. The later enactment of section 44ZZOA cannot alter the jurisdiction previously conferred on the Tribunal by section 44K.

[47] Explanatory Memorandum to the *Trade Practices Amendment (National Access Regime) Bill 2005* (Cth) at paragraph 1.17. See also paragraphs 5.243ff

[48] See paragraphs 1.13, 1.107, the heading above paragraph 1.126 and paragraph 1.144

[49] At paragraph 1.144

[50] At paragraph 2.96

[51] Section 152AL

[52] Section 152AR

empowered to exempt a person from compliance with the standard access obligations following declaration of a service (see section 152AT). The Tribunal was given jurisdiction to review exemption decisions of the Commission. Sections 152AV and 152AW, as first enacted, closely follow the model in sections 101 and 102 and 44K of the Act. Notably, those sections do not provide a description of the review to be conducted by the Tribunal. Sub-section 152AV(3) simply provided that "the Tribunal must review the decision". Clearly, Parliament did not regard the description of the review as essential in conferring jurisdiction and power upon the Tribunal. The relevant jurisdiction was conveyed by the use of the word "review". The Explanatory Memorandum accompanying the Bill that enacted Part XIC stated: "*Under proposed s152AT, a person whose interests are affected by a decision to make, or refuse to make, an exemption will be able to seek merits review of the decision by the Australian Competition Tribunal.*"[53] (emphasis added)

67. The Tribunal was also given jurisdiction to review determinations of the Commission in respect of access disputes. Again, section 152DO adopted the same form as sections 101 and 102 and 44ZP of the Act. Sub-section 152DO(3) described the review by the Tribunal as a "re-arbitration" of the access dispute, in like terms to sub-section 44ZP(3). Again, the use of the expression "re-arbitration" is appropriate because resolution of access disputes by the Commission under Part XIC is called an arbitration.

68. Section 152DOA was inserted by the *Trade Practices Amendment (Telecommunications) Act* 2001 (Cth). The effect of that section was to limit the information to which the Tribunal may have regard in a review of an access determination by the Commission. The purpose of the amendments made by that Act, as described in the Explanatory Memorandum accompanying the relevant Bill, was to reduce undue delay in resolving access disputes.[54] The Explanatory Memorandum consistently referred to the Tribunal's review of access determinations as "merits review".[55]

69. Further amendments to Part XIC were made by the *Telecommunications Competition Act* 2002. Section 152ATA was inserted, with a consequential amendment to section 152AV. Section 152ATA empowered the Commission to exempt from the standard access obligations a person who expected to be a supplier of declared services. Such exemptions were titled "anticipatory individual exemptions". In addition, the Tribunal's jurisdiction to review access determinations by the Commission under section 152DO was abolished. The Explanatory Memorandum accompanying the relevant Bill described the review under section 152DO (to be deleted by the Bill) and under section 152AV (being retained by the Bill) as "merits review".[56]

70. In *Re Seven Network Limited*,[57] the Tribunal (with Goldberg J as the presiding member) heard contested argument concerning the nature of the review to be conducted by the Tribunal pursuant to section 152AV. The Tribunal considered the legislative history of

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[53] At p 51
[54] At p 3ff
[55] At pp 6, 13 and 14
[56] At p 2
[57] [2004] ACompT 10

Part XIC as described above and concluded that the review contemplated by section 152AV of the Act was a *de novo* hearing or "merits review".[58]

71. Section 152AV was repealed by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act* 2010 (Cth). The Explanatory Memorandum accompanying the relevant Bill stated that the effect of the repeal of that section was "*to remove merits review in the Australian Competition Tribunal of ACCC decisions relating to anticipatory individual exemptions.*"[59] (emphasis added).

Analogous enactments

72. The provisions of the Act governing the powers of review by the Tribunal discussed above are closely analogous to the equivalent provisions of the *Administrative Appeals Tribunal Act* 1975 (Cth) (**AAT Act**). The Administrative Appeals Tribunal (**AAT**) is a body constituted in a similar manner to the Tribunal and the powers of review given to the AAT are materially the same as the powers of review given to the Tribunal. In particular, section 25(1) of the AAT Act is equivalent to section 101(1) (and 44K(1)) of the Act; section 43(1) of the AAT Act is equivalent to section 102(1) (and 44K(5) and (8)) of the Act; and section 43(6) of the AAT Act is equivalent to section 102(2) (and 44K(9)) of the Act. The AAT Act does not describe the review by the AAT as a rehearing.[60]

73. In *Shi v Migration Agents Registration Authority*,[61] this Court decided that the jurisdiction and power conferred on the AAT by section 43(1), enlivened by relevant provisions of the *Migration Act* 1958 (Cth), was to reach its own decision on the matter on the material before it including any new material that it had received as relevant to its decision.[62] In so doing, the Court endorsed the statement of Bowen CJ and Deane J in *Drake v Minister for Immigration and Ethnic Affairs*[63] that: "*The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.*"[64] (emphasis in original).

74. In contrast, Fortescue's argument gains no support from this Court's decision in *East Australian Pipeline Pty Ltd v ACCC*.[65] The observations of Justices Gummow and Hayne to which Fortescue refers concerned the review provisions in the National Third Party Access Code for Natural Gas Pipeline Systems. Under those provisions, the

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[58] At [38] and [40]
[59] Item 152 at page 172
[60] In more recent times, section 25 has been amended to empower the AAT to determine the scope of the review it undertakes by limiting the questions of fact, the evidence and the issues it considers (see sub-section (4A) inserted in 2005).
[61] (2008) 235 CLR 286
[62] At 298-9 [35]-[38] per Kirby J, at 314-5 [97]-[100] per Hayne and Heydon JJ, at 319 [117] per Crennan J and at 324-7 [134]-[140] per Kiefel J
[63] (1979) 24 ALR 577 at 589. Smithers J reached the same conclusion at 599.
[64] At 298 [35] per Kirby J, at 314 [98] per Hayne and Heydon JJ and at 327 [141] per Kiefel J. This statement was also cited with approval by the majority in *Esber v The Commonwealth* (1992) 174 CLR 430 at 440 per Mason CJ, Deane, Toohey and Gaudron JJ.
[65] (2007) 233 CLR 229

grounds of review by the Tribunal were expressly limited to three types of error on the part of the original decision maker, and the materials to which the Tribunal could have regard were expressly limited to the materials before the original decision maker.[66]

Conclusion on the first question

75. Each of the text, context and legislative history of section 44K strongly support the conclusion that a review by the Tribunal under that section is intended to be a reconsideration *de novo* of the question whether or not to declare a service.

76. Fortescue's construction of section 44K "*would treat the Tribunal's task as confined to the correction of demonstrated error in administrative decision-making in a manner analogous to a form of strict appeal in judicial proceedings*".[67] The Minister's decision under section 44H would ordinarily be subject to judicial review by the courts under section 39B of the *Judiciary Act* 1901 (Cth) and the *Administrative Decision (Judicial Review) Act* 1976 (Cth) as applicable. There is no reason why Parliament would vest a power of review that was equivalent to judicial review in a specialist competition body members of which are appointed for their expertise in industry, commerce, economics, law or public administration.[68]

B. Did the Tribunal conduct a review within the meaning of section 44K?

77. It is common ground that the Tribunal in the present matter considered that it was empowered by section 44K to undertake a review *de novo*. The Tribunal observed:

> "*. . . the Tribunal must reconsider each application afresh. This allows the parties to put before the Tribunal for its consideration any material that may be relevant to the issues raised, whether or not that material was before the Minister. In addition, the rules of procedural fairness require the Tribunal to afford a party which may be adversely affected by its decision, the right to be heard, to be legally represented at a hearing before the Tribunal and to lead evidence and cross-examine witnesses. Speaking very generally, the Tribunal is master of its own forms and procedures. But the rules of procedural fairness act as a strong brake on the Tribunal's ability to control the parties' conduct in a proceeding.*"[69]

78. For the reasons set out in the preceding section, it is submitted that the above statements were correct and that section 44K empowered the Tribunal to undertake a *de novo* review.

C. The Chapter III issue

79. Construing criterion (f) in section 44H(4) in accordance with its ordinary meaning does not conflict with Chapter III of the Constitution.

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[66] See at [77]-[80]
[67] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 314 [97] per Hayne and Heydon JJ
[68] Section 31(2) of the Act
[69] Tribunal decision at [24]

Relevant Principles

80. It is well established that Parliament may not confer non-judicial powers, other than those incidental to the judicial power of the Commonwealth, on courts which exercise the judicial power of the Commonwealth under Chapter III of the Constitution. [70]

81. Non-judicial powers such as administrative and executive powers may, however, be conferred on judges of Chapter III courts in their personal capacity - *persona designata*.[71] Whether a power is conferred upon a judge as *persona designata* or upon the court as a judicial body is a matter of construction of the statute conferring the power. Factors which indicate that a power is conferred on a judge in his or her personal capacity include:

    (a) that the power does not automatically apply to all judges of a particular court and is conferred on selected judges or on judges on an ad hoc basis;

    (b) that the nature of the power is not judicial (or incidental to a judicial power); and

    (c) that the relevant court's rules and governing legislation (such as the *Federal Court of Australia Act* 1976 (Cth)) do not apply to the exercise of the power.[72]

82. The power to confer non-judicial functions on judges of Chapter III courts in their personal capacity is subject to two conditions stated in *Grollo v Palmer*: *"first, no non-judicial function that is not incidental to a judicial function can be conferred without the judge's consent; and, second, no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power ('the incompatibility condition')"*.[73]

83. The majority in *Grollo v Palmer* stated that the incompatibility condition may arise in a number of ways:

    (a) by requiring so permanent and complete a commitment to the performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable;

    (b) by requiring the performance of non-judicial functions of such a nature that the judge's capacity to perform his or her judicial functions with integrity is impaired or compromised; or

    (c) by requiring the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or the capacity of the judge to perform his or her judicial functions with integrity is diminished.[74]

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[70] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 289 and 296 per Dixon CJ, McTiernan, Fullager and Kitto JJ.
[71] *Hilton v Wells* (1985) 157 CLR 57 at 68 per Gibbs CJ, Wilson and Dawson JJ
[72] *Hilton v Wells* (1985) 157 CLR 57 at 72-3 per Gibbs CJ, Wilson and Dawson JJ
[73] (1995) 184 CLR 348 at 364-5 per Brennan CJ, Deane, Dawson and Toohey JJ
[74] At 365 per Brennan CJ, Deane, Dawson and Toohey JJ

84. In *Wilson v Minister for Aboriginal Affairs*,[75] the plurality listed a number of practical considerations that are relevant to determining whether the conferral of a power on a judge is compatible with the maintenance of confidence in the integrity of the judiciary as an institution or the capacity of the judge to perform their judicial functions with integrity:

    (a) whether the function is an integral part of, or is closely connected with, the functions of the Legislature or the Executive Government;

    (b) whether the function is required to be performed independently of any instruction, advice or wish of the Legislature or the Executive Government;

    (c) whether any discretion given to the judge is to be exercised on political grounds - that is, on grounds that are not confined by factors expressly or impliedly prescribed by law.

85. The plurality also observed that it will often be relevant to note whether the function to be performed must be performed judicially, that is, without bias and by a procedure that gives each interested person an opportunity to be heard and to deal with any case presented by those with opposing interests.[76] Justice Gaudron stated the relevant considerations in similar terms, particularly whether the function is carried out in public, whether it is manifestly free from outside influence and whether it results in a report or other outcome that can be assessed according to its own terms.[77]

86. The foregoing principles from *Wilson v Minister for Aboriginal Affairs* have been recently endorsed by members of this Court in *Wainohu v State of NSW*.[78]

Application to the Tribunal

87. The principle of *persona designata* is applicable to the conferral of power under section 44K on the Tribunal.

88. Appointment of Federal Court judges as presidential members of the Tribunal is personal. As noted earlier, only 4 judges of the Federal Court are currently so appointed. Further, as stated earlier, the powers given to the Tribunal under the Act, including under section 44K, are administrative and not judicial.

89. The incompatibility condition, as described in *Grollo v Palmer*, does not arise. First, presidential members of the Tribunal are not required to make a permanent and complete commitment to the performance of the activities of the Tribunal. Secondly, the review jurisdiction given to the Tribunal does not conflict with the presidential member's capacity to perform his or her judicial functions with integrity, and is not of such a nature that public confidence in the integrity of the judiciary as an institution is diminished.

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[75] (1996) 189 CLR 1
[76] At 17
[77] At 25-6
[78] (2011) 243 CLR 181 at 207 [41] per French CJ and Kiefel J, at 225-6 [94] per Gummow, Hayne, Crennan and Bell JJ

90. The review function given to the Tribunal under section 44K is not an integral part of, or closely connected with, the functions of the Legislature or the Executive Government. A decision to declare a service under section 44H merely activates the provisions of Division 3 of Part IIIA in respect of that service. It is classically an administrative function, creating various rights and obligations by administrative act.

91. The exercise of the review function under section 44K is performed by the Tribunal independently of any instruction, advice or wish of the Legislature or the Executive Government.

92. The discretion given to the Tribunal under section 44K is not to be exercised on political grounds as that expression was used by the plurality in *Wilson v Minister for Aboriginal Affairs*. The discretion must be exercised on grounds that are prescribed by law.

93. Fortescue's argument on this point is based solely on the breadth of the expression "public interest" in criterion (f). Although the meaning of the expression "public interest" is broad, its meaning is prescribed by law. It is an expression found in many statutes and is therefore inherently subject to legal construction. By definition, the application of that criterion by the Tribunal is not a political act, as the Tribunal is bound by the legal meaning of the expression within the Act.

94. As noted earlier, it is long established that the powers of review of the Tribunal must be exercised judicially, that is without bias and affording procedural fairness. In the present matter, the Tribunal expressly acknowledged that it was bound by the rules of procedural fairness[79] and it is apparent that the Tribunal endeavoured to act judicially both in the conduct of the proceeding before it and by the publication of detailed reasons for its decision.

95. For those reasons, Fortescue's contentions with regard to Chapter III of the Constitution should be rejected.

Dated: 5 April 2012

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[79] Tribunal decision at [24]