IN THE HIGH COURT OF AUSTRALIA **No P44 of 2011**
PERTH REGISTRY

BETWEEN

JOHN ANDREW HENRY FORREST Appellant

and

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION First Respondent

FORTESCUE METALS GROUP LTD
(ACN 002 594 872) Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification that the submissions are in a form suitable for publication on the internet

1. I certify that the submissions are in a form suitable for publication on the internet.

Part II: A concise statement of the issues the Appellant contends that the appeal presents

2. In relation to s1041H of the *Corporations Act 2001* ("the Act"), whether a statement as to the terms and legal effect of a contract, but not as to its actual wording, may ordinarily be taken to convey:

   2.1 as historical fact, and warranty of truth, that the contract contains terms having such legal effect; rather than

   2.2 that the maker of the statement had an honest and/or reasonable belief in the accuracy of the statement, such that the person making the statement will not ordinarily engage in conduct in contravention of s1041H if the person held that honest and/or reasonable belief.

3. Whether an entity has information as prescribed by s674(2)(b) of the Act if:

   3.1 the information is about the true legal effect of a document; and

   3.2 the officers of the entity reasonably and honestly consider that the document has a legal effect different from its true legal effect so that the entity is not "aware" of the information as required by listing rule 3.1 because, pursuant to the definition of "aware" in listing rule 19.12, no director or executive officer has, or ought reasonably to have, come into possession of the information.

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4. Does s180(1) of the Act provide for civil liability of directors for contraventions of other provisions of the Act?

5. In relation to proceedings under s180(1):

   5.1 if those proceedings are based on a contravention of a provision of the Act that contains a specific exculpatory provision, is the statutory defence contained in s180(2) available; and

   5.2 does the business judgment rule in s180(2) apply to decisions which concern compliance with the requirements of the Act?

6. In relation to information which is generally available:

   6.1 is the reasonable investor to be taken to be aware of that information;

   6.2 what responsibility does an investor who receives representations from a company have to be aware of generally available information relevant to those representations;

   6.3 are representations by a company to be understood in the context of that information?

7. Was a miscarriage of justice occasioned to Forrest by the manner in which the Full Court dealt with the appeal?

8. The Appellant wholly relies upon the submissions made on behalf of FMG in matter P45 of 2011.

Part III: Section 78B of the Judiciary Act 1903

9. The Appellant has considered whether any notice should be given in compliance with section 78B of the Judiciary Act 1903 (Cth). No such notice is required.

Part IV: Citation

10. The first instance decision is reported as *Australian Securities & Investments Commission v Fortescue Metals Group Ltd & Anor No.5* (2009) 76 ACSR 506. The appeal is *Australian Securities & Investments Commission v Fortescue Metals Group Ltd* [2011] FCAFC 19.

Part V: A brief statement of the factual background to the appeal

11. The Appellant wholly adopts the factual background prepared by FMG in matter P45 of 2011.

Part VI: The Appellant's argument

Introduction

12. Forrest and FMG made representations to the market concerning three Agreements with Chinese state owned entities. ASIC alleged that the representations were deliberately false and misleading. The hearing before the primary judge was

conducted over five weeks. His Honour was assisted by detailed written submissions. As the Full Court said, his Honour conducted an "exhaustive" examination of the evidence [AJ55]. The primary judge emphatically rejected the case brought by ASIC on a factual and legal basis.

13. The primary judge concluded that "*Forrest exercised his powers and discharged his duties with the degree of care and diligence that a reasonable person would exercise*", that he was "*well satisfied that Forrest acted reasonably to ensure that FMG both complied with s674 of the Act and did not contravene s 1041H of the Act*" and that he did not breach s180(1) "*as alleged by ASIC or at all*" [TJ904].

14. ASIC's pleaded case against Forrest was that Forrest's alleged intentional misleading of the market was in circumstances where he was aware of the totality of information comprised by the CREC Information, CHEC Information and CMCC Information (as pleaded in ASC 19 and 20, 59 and 61, 63 and 65, respectively). Essentially, this information was that he knew that the Agreements did not oblige the Chinese entities to build, transfer and finance the infrastructure.

15. The question of Forrest's belief was not limited to a statutory defence. The onus lay with ASIC to prove that Forrest held that particular belief. The primary judge found that ASIC failed to prove this important aspect of its case [TJ54-55]. In fact, his Honour found, in a detailed judgment that had regard to all of the important issues and arguments, that Forrest and FMG had acted honestly and reasonably at all times.

16. ASIC used its compulsory powers to interview Forrest under oath pursuant to s19 of the *ASIC Act*. Forrest was legally represented. He chose not to exercise the privilege against self-incrimination. At trial, in response to ASIC's notified intent to tender parts of 15 pages of Forrest's s19 examination transcript, Forrest notified ASIC of the parts of 41 pages of the transcript that he intended to tender that provided explanation and context to the selective portions to be relied upon by ASIC. ASIC then withdrew its tender of the sworn interview [TJ890] yet proceeded to criticize the decision to not adduce oral evidence from Forrest.

17. Forrest provided the Full Court with a schedule of 122 documents as an aide-memoire to demonstrate that he and FMG held the honest and reasonable views as found by the primary judge. In oral submissions, Forrest's counsel took the Full Court to some of the documents contained in the schedule. The Full Court did not refer to Forrest's submissions on any document in the schedule nor to the exculpatory evidence of any witness, including those hostile to FMG and Forrest. The Full Court failed to undertake a proper analysis of the evidence or to have due regard to the submissions made on behalf of Forrest. The Appellant made extensive submissions to the Full Court about his belief that the Agreements were binding agreements as represented. The Full Court erred in failing to consider or refer to these submissions.

18. Forrest made submissions about the importance of the *Briginshaw* test as to the nature and strength of the evidence required to persuade the Full Court that Forrest had contravened provisions of the Act. The Full Court (incorrectly in the Appellant's submission) relied on a single document, a comment by Forrest in the course of a telephone conversation with some reporters which was not pleaded by ASIC, selective terms of a draft further Agreement and a finding about legal advice which was in stark contrast to that found by the primary judge. In each of these matters, the Full Court failed to advert in any way to the responsive submissions made by Forrest.

19. The Full Court stated that *"the requirements of s1041H could have been easily met in this case by the simple and obvious expedient of FMG publishing copies of the framework agreements to the ASX and the media at the outset"* [AJ116]. The Full Court asserted that such an approach is *"not likely to be productive of commercial inconvenience"* [AJ116]. There is no requirement in the Act to release the actual terms of an agreement to the market and there was no evidence to support the views expressed by the Full Court. The publication to the ASX of the entirety of confidential commercial documents is, contrary to the statement by the Full Court, very likely to be productive to grave commercial "inconvenience".

20. FMG and Forrest submitted that the Agreements needed to be read in the context of what the market knew. ASIC's experts gave evidence that the market knew that the price and the viability of the project were dependent upon the completion of a Definitive Feasibility Study [TJ192-194, 545]. The Full Court found that uncertainty about financing and construction of the railway was resolved by the announcement [AJ118]. But the market knew at that stage there was no Definitive Feasibility Study by reference to which the final cost of the project could be determined and that FMG had not established that it held sufficient reserves of iron ore of sufficient quality to sustain a viable project [AJ118]. Thus, the Full Court erred in deciding the CREC Announcement removed uncertainty about the railway.

The primary judge correctly decided the issue of honest and reasonable belief

21. Unlike the Full Court, his Honour dealt extensively with the facts and issues concerning belief [TJ353-468].

22. The CREC release was issued on 23 August 2004 and related to the Agreement for the construction of the railway line. ASIC pleaded, and the Full Court found, that by this date Forrest knew that the Agreements would not deliver the railway [AJ191]. ASIC's case was that FMG and Forrest deliberately misled the market.

23. ASIC says: *"The gravamen of ASIC's case is that, if such a comparison is performed, [between the terms of the agreements and the public announcements] the discrepancies between the framework agreements and the announcements is obvious, and no reasonable person could have honestly believed that the announcements accurately described either the terms, or the legal effect, of the framework agreements"* [ASIC's Summary of Argument at [11]]. The primary judge dealt with this argument and rejected it [TJ18, 19, 25, 41, 49, 71, 257, 259, 266ff].

24. The state of mind of Forrest and the FMG officers was evidenced in the minutes of a Board meeting that took place on 27 August 2004. These minutes record that *"A key topic was the binding agreement signed with CREC whereby CREC will deliver a fully commissioned iron ore railway on a fixed price, fully warranted basis."* [TJ415]. This was consistent with the representations made to the market about the effect of the Agreement. The unanimous view of the Board was demonstrated by the minutes of the meeting which took place only days after the first release. Counsel for the Appellant took the Full Court to this passage. The Full Court did not refer to the minutes.

25. ASIC submitted to the Full Court that the 27 August Board minutes recorded "Forrest's opinion" [AT354.41-42]. The Appellant completely agrees. That is, ASIC submitted to the Full Court that Forrest held the opinion on 27 August 2004, just four days after the first release, that the CREC Framework Agreement was a *"binding*

agreement signed with CREC whereby CREC will deliver a fully commissioned iron ore railway on a fixed price, fully warranted basis".

26. Forrest argued before the Full Court why this submission from the First Respondent was important. The Full Court did not refer to concession made by ASIC or to the argument advanced by Forrest. The Board minutes were also inconsistent with the gravamen of ASIC's case that the terms of the Agreement were self-evidently inconsistent with the representations.

27. Once it is accepted that the Board minutes reflected "Forrest's opinion", how can it be said that he deliberately misled the market by making the same representation? How is this opinion consistent with the gravamen of ASIC's case? How is the opinion consistent with ASIC's submission, and the Full Court's finding, that Forrest and FMG never had that opinion? ASIC failed to prove that Forrest knew the CREC Information, the CHEC Information and the CMCC Information (as pleaded in the ASC at 136).

28. The concession that the minutes reflected "Forrest's opinion" leads directly to another aspect of the evidence. ASIC relied heavily upon the press conference of 23 August. Notwithstanding its failure to plead or open its case at first instance on this point, it strongly asserted that the comment by Forrest about the existence of a "fixed price" was misleading. Yet the Board minutes also refer to a "fixed price". The Full Court accepted the submissions made by ASIC but did not refer to the submissions made by Forrest.

29. Heyting, a former employee of FMG who was called as a witness by ASIC and hostile to FMG and Forrest, was instructed to prepare the agreement with CREC [TJ140]. He did, using his relevant experience which included a course in contract law. He inserted clause 7 for the express purpose of ensuring enforceability [TJ144]. Heyting was also involved in the preparation of the Advanced Framework Agreement [TJ457]. Forrest was entitled to, and did, rely upon his expertise. Heyting ultimately agreed in cross-examination that the Agreement he prepared was one which reflected an offer and acceptance, knowing that these were essential elements of a contract [TJ142].

30. The language used in the title of the CREC Framework Agreement was intended to convey more substance and intent than a memorandum of understanding [TT P-246.20-21]. The language used in the CREC Framework Agreement differed from the language used in memoranda of understanding previously executed by FMG [TT P-257.12-17, TT P-258.8-43] and the Letter of Intent between FMG and Sinosteel [TB 378A and similar documents are at TB 61A and 61B]. The primary judge found that, and explained why, a comparison of the text of this Letter of Intent and the CREC Agreement assisted in appreciating what was objectively understood within FMG about the CREC Agreement [TJ463]. The Full Court did not address this issue.

31. Heyting said that CREC remained anxious to 'do' the project [TJ146] and acted as if it had a contract in place [TJ867]. Heyting was also satisfied of the accuracy of the critical paragraphs of the 23 August 2004 release, which he considered and amended to ensure it accurately reflected his understanding of the terms of the Agreement [TT P-261.34 – P-262.14].

32. One of the documents to which the Full Court was taken in oral submissions by counsel for Forrest was an email sent by Heyting to an employee of Worley Parsons stating, "*In parallel we have signed a number of build and transfer contracts for the*

railway, port and mine with large Chinese construction firms ie China Railway Engineering Corporation (CREC), China Harbour Engineering Corporation (CHEC) and China Metallurgical Construction Corporation (MCC)". Heyting authored a number of documents which were consistent with the releases and inconsistent with ASIC's case. The author of the Agreements destroyed the gravamen of ASIC's case, but his evidence was not referred to by the Full Court.

33. In addition to Heyting, Kirchlechner, a former employee of FMG who was called as a witness by ASIC and also hostile to FMG and Forrest, also agreed that the releases reflected his understanding of the Agreements [TJ427].

34. ASIC called these witnesses who were hostile to FMG and Forrest. It sought to rely upon their written statements. Notwithstanding that ASIC called these people as witnesses, by virtue of their evidence given in cross-examination, ASIC must now be contending that they are not 'reasonable' people? Heyting performed the exercise of comparison which ASIC said was the gravamen of its case. His understanding was not what is suggested as being self-evident by ASIC. His conclusion was the same as that of Forrest. That is why Heyting subsequently wrote letters which assumed that the company had entered into "*build and transfer contracts*".

35. Forrest made representations which were the same as those made by Heyting. Why should Forrest have had a different understanding of the Agreements to those held by their author? Or of Kirchlechner? Or of the Board? Heyting and Kirchlechner held senior management positions at FMG. ASIC failed to produce any witness who held a contrary view. ASIC has never properly addressed these issues.

36. The Chinese parties believed that they had committed to binding agreements to the effect represented by FMG. FMG and Forrest took the prudent step of ensuring that CREC was comfortable with the proposed ASX/press release [TJ400].

37. The Chinese accepted that they were bound by a contract and acted accordingly [TJ401]. In particular, CREC acted in a way that gave FMG executives a great deal of comfort that CREC would complete the Framework Agreement [TT P-271.7-12]. FMG personnel dealt with each other and the Chinese on the basis of being bound by contracts [TJ414]. In the case of CREC, this was consistent with its desire to construct a railway in a first world country [TJ138]. Such was CREC's desire to be involved in the project that:

    37.1 CREC expressed the view that it wished to perform the entirety of the construction of the Project's infrastructure, not just the railway [TB 386, 501 and 520] and to be the leader of the Chinese consortium [TB 441]; and

    37.2 later in or about July 2005, in the face of significant delays by CHEC and CMCC, an Engineering Engagement Agreement was drafted by FMG so that the first component of the CREC Framework Agreement (being the engineering stage) could be commenced without further delay [TB 1377], the intention of the Engineering Engagement Agreement being that it would directly lead to the performance of the CREC Framework Agreement and would do nothing to diminish CREC's obligations under the CREC Framework Agreement [TB 1377].

38. Consistent with this desire, CREC represented to FMG that it was coordinating Chinese companies as part of managing its obligations under the CREC Framework

Agreement [TB 1090; TT P-272.34-35]. CREC also insisted that it could and would perform its obligations under the CREC Framework Agreement [TB 1196, page 3449 and 1372]. The documentary evidence, both internal communications and external correspondence to third parties, shows that Forrest at all times honestly believed that the CREC Framework Agreement was a binding agreement relating to the building and financing of the railway [see TB 420, 458, 505, 507, 580, 583, 630 page 0843, 649, 650, 761, 779, 798, 805, 875, 974, 1018 page 0572, 1145, 1239, 1289A, 1313, 1377, 1392, 1438, 1440, 1454, 1456 and 1459].

39. The signing ceremonies for the Agreements were of some significance. The signing ceremony that was held for the CREC Framework Agreement was a high level, serious and, by Chinese custom, a solemn occasion [TT P-164.40-42]. At that signing ceremony, pictures were taken of Forrest and Qin (the CREC President) that were described by Qin as "*solidifying the marriage*" [TT P-165.15-16, TB 134 and 321]. There was an expectation on the part of FMG executives at the signing ceremony that each party would fulfill its obligations under the CREC Framework Agreement [TT P-165.38-39]. The first paragraph of the 23 August letter accorded with the understanding of FMG executives as to what had occurred at the signing ceremony in Beijing in August 2004 [TT P-168.3-5].

40. ASIC, as the Full Court agreed, says that CREC did not have any interest in the accuracy of the release. With respect, the primary judge was correct to conclude that Bai would not have approved the release unless he believed it was accurate [TJ400-402]. ASIC alleged that the release was misleading and did not reflect the parties' intention. This raises the question: if FMG made the representation contended for by ASIC, what would have happened if CREC complained to the ASX that FMG had misrepresented the effect of the Agreement?

41. Further, ASIC's submission that the release was misleading and did not reflect the intention of the parties misses a further point. Forrest's conduct demonstrates an important step that he took to ensure accuracy. If, as ASIC contends, Forrest deliberately and knowingly misled the market, why would he seek CREC approval? Further, CREC's approval does not only reflect their state of mind, it gave Forrest reassurance that his representations, as reflected by the Release, were accurate. Bai's concurrence was also consistent with the important Recital that CREC later inserted into the Advanced Framework Agreement – "*By a Framework Agreement dated 6 August 2004, FMG accepted CREC's offer to carry out and complete the Build and Transfer of the railway.*"

42. Barclay Mowlem, a potential subcontractor to CREC in respect of the railway, had a copy of the CREC Agreement attached to its MOU with CREC. Barclay Mowlem issued a press release in relation to this MOU whereby CREC expressly acknowledged its agreement with FMG [TJ155]. This further demonstrates why CREC would have wanted the FMG release to accurately reflect the parties' intentions. Barclay Mowlem believed that the Agreements were binding agreements to the effect represented by FMG. The position taken by Barclay Mowlem is also inconsistent with the gravamen of ASIC's case.

43. Ultimately, ASIC did not adduce any evidence which proved that Forrest, FMG or even the Chinese were aware of the CREC, CHEC or CMCC Informations as pleaded.

44. Forrest's comments during the 23 August 2004 press conference were the subject of submissions. The Full Court erred by failing to consider any of Forrest's submissions.

The alleged inaccuracies of the price comments made by Forrest during the press conference of 23 August 2004 were not pleaded as a misleading statement. By the time of the press conference, the share price had already started to retreat from its opening price.

45. Although the allegation that the price comments were misleading and deceptive is and was denied, as the allegation was not pleaded nor opened, there was no need for Forrest to adduce any evidence in response. In its lengthy opening at the trial, ASIC took the primary judge to a number of statements made during this press conference. It did not refer to this unpleaded statement which it now says was the most important misrepresentation. ASIC successfully sought to amend its pleadings during the hearing. It did not seek to amend its pleading regarding the press conference.

46. Further, the market understood that the price of the works under the Agreement had not been determined. The 23 August 2004 release itself referred to the Definitive Feasibility Study and Worley Parsons. The 8 November 2004 release made explicit what had been implicit: the price would be determined in the future. No complaint was made by the ASX, or any media commentary, that the 8 November release was inconsistent with the 23 August release. ASIC's experts did not contend that there were any negative perceptions about the absence of a determination of price [TJ881].

47. An investor has some responsibility to understand what relevant information is in the market. Disclosure requires materiality to be determined in the context of generally available information. The CREC Agreement provided a very competitive price to FMG, that is, price determined by reference to the Definitive Feasibility Study and payable in installments upon completion of the railway works. The comments by Forrest during the 23 August 2004 press conference were consistent with the terms of the 23 August 2004 release and the 8 November 2004 release. The views expressed by Forrest were consistent with the minutes of the FMG Board meeting of 27 August 2004 [TJ415-416]. Forrest also said the price was confidential. A matter of price will almost inevitably be confidential, even if confidentiality is not an express term of an agreement.

48. In this case, an investor reading the press release would be primarily concerned with one matter regarding the representation: do both parties agree with what is being represented? The subtleties of contract law would be largely irrelevant. A joint press release, which is effectively what the 23 August 2004 release was, gives confidence to the market that the parties intend to do what was stated in the release. As ASIC agreed, CREC approved the 23 August 2004 release [AJ133]. ASIC could not demonstrate that any investor had been misled or lost money [AJ201]. Indeed, not a single investor made any complaint whatsoever [AJ201].

49. In August 2004, CMCC expressed a desire to execute an agreement with FMG on the same terms as CREC by mid September 2004 [TB 382] and requested to be sent a similar framework agreement as FMG had executed with CREC [TB 382]. CMCC stressed that the terms and conditions of the agreement were required to be consistent as the financing packages would most likely be secured together from Chinese banks [TB 382].

50. A signing ceremony for the CHEC and CMCC Framework Agreements was held on 5 November 2004 [TB 848]. It was attended by Chinese dignitaries [TT P-288.43-44, TT P-289.40-41 and TT P-812.47 to P-813.7] and CREC representatives. All attendees were provided with a copy of the 5 November Media Release [TT P-290.5-

13], including the CHEC and CMCC representatives who signed the CHEC and CMCC Framework Agreements [TJ177, 181, TT P-290.15-16].

51. Widespread Chinese coverage resulted from the solemn signing ceremony [TJ179]. No one suggested that the releases were incorrect or misleading [TJ180]. The evidence demonstrated that the Board of FMG believed that the releases were accurate [TJ394].

52. The documentary evidence, both internal communications and external correspondence to third parties, shows that FMG's executives including Forrest at all times honestly believed that the CHEC and CMCC Framework Agreements were binding first arrangements relating to a design, build and finance arrangement for the harbour and mine infrastructure, respectively, to be followed by further more detailed agreements [see TB 382, 580, 582, 644, 705, 805, 875 and 974].

53. The finding of the Full Court that the only available evidence of legal oversight was that Huston examined the Agreements in January 2005 [AJ193] overlooks a great deal of relevant evidence. The primary judge dealt with all of the evidence [TJ 42-49, 358-394].

54. Huston advised upon the Agreements from at least October 2004. In early October, Forrest wrote an email which contained the following, under the heading "*Legally Binding Contracts*": "*...please ensure with Peter* [Huston] *complete legal enforceability on the agreements that we are all relying on to construct FMG*". The primary judge found that from at least October 2004, one of Huston's principal roles was to oversee the legal enforceability of FMG's agreements [TJ 44, 354, 370, 380]. Huston was also involved in the preparation of the Advanced Framework Agreements [TJ457].

55. Relevantly, Huston was the solicitor for Anaconda Nickel Ltd (a company of which Forrest was chief executive officer at the relevant time) in proceedings in the Supreme Court of Western Australia concerning the enforceability of a short letter said to be a "heads of agreement": *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* (2000) 22 WAR 101 [TJ45, 368]. The primary judge held that in certain respects, the *Tarmoola* heads of agreement bore a remarkable similarity to the Agreements [TJ41, 368]. The majority in *Tarmoola* held that the heads of agreement was a binding contract. The primary judge found that Forrest and Huston's personal knowledge of the *Tarmoola* case was relevant in determining Forrest's beliefs [TJ387-391].

56. Huston met with Walsh from the ASX in early November [TJ375-379]. The primary judge found that Huston must have read the three releases in order to have engaged in these discussions with Walsh [TJ46, 379]. There was no evidence that Huston informed the FMG Board or Forrest that the releases were inconsistent with the Agreements. ASIC had pleaded that Huston was a qualified and experienced commercial solicitor [TJ44]. Given Huston's role at FMG, he would have been obliged to inform the FMG Board and Forrest if any representations or releases in relation to the Agreements (including the 23 August 2004 and 5 November 2004 releases) were incorrect or not reasonably based. The primary judge so found [TJ 46]. Huston did not advise the FMG Board or Forrest otherwise. The Appellant was clearly (and quite properly) relying upon his General Counsel to inform him if any releases to the market were inaccurate. Indeed, as the primary judge found, Huston was involved in preparing the 8 November letter about which ASIC complains [TJ374]. The Full Court erred when it found that the only available evidence of legal

oversight started in January 2005. The Full Court failed to have regard to the submissions advanced by Forrest.

57. The primary judge found that both the Board minutes of 22 January 2005 and the email of 30 March 2005 record Huston's advice that the Agreements were binding build and transfer contracts [TJ381-385]. The Full Court also erred in failing to decide that, if Huston were asked to advise on the issue of the legal enforceability of the CREC Agreement before the 23 August 2004 release, it is reasonable to infer that his opinion and reasons were, or would have been, the same as he later provided to FMG's Board (a finding made by the primary judge at TJ381). ASIC failed to prove that legal advice would have resulted in FMG or Forrest becoming aware of the legal effect of the agreements as pleaded by ASIC.

58. The Full Court erred in failing to consider Forrest's submissions in relation to the 27 October 2004 email. In a trial with thousands of pages of evidence, transcript and submissions, it was not possible to consider this document without due regard to the other material. The submission made by ASIC, and accepted by the Full Court, is inconsistent with the entirety of the evidence. CREC was positioning itself to be the lead Chinese entity for the entire project. This is evident from prior internal correspondence in mid-September 2004 between FMG officers reporting on meetings with a senior representative of the relevant Chinese entity [TJ159]. The 27 October 2004 email was also sent in the context that the CHEC and CMCC Agreements were, at that time, not yet binding. That is why the email refers, a few lines above the reference to "hard asks", to "total delivery of the project" and to the request from CREC a few lines below [TJ421]. The ceiling price refers to Forrest's attempt to minimise the cost. It was not inconsistent with what had been agreed. Forrest was using CREC's desire to manage the entire project, and increase its own profit, to drive down the price that FMG would otherwise have to pay CREC.

59. In commenting upon the Advanced Framework Agreement, CREC inserted a significant recital [TJ458, 459]. The Chinese insertion was: *"By a Framework Agreement dated 6 August 2004 ("original Date"), FMG accepted CREC's offer to carry out and complete the Build and Transfer of the railway (The "Works") as defined in clause 4 for the Pilbara Iron Ore and Infrastructure Project (The "Project") upon the terms and conditions there set out ("Framework Agreement")."* [TJ458]. The insertion evidenced CREC's understanding of the Framework Agreement, that is, that it was an agreement consistent with the terms of the 23 August 2004 release [TJ459]. The recital was capable of reinforcing the beliefs of Forrest (and was consistent with the representations being made by Forrest) and was a matter that the primary judge correctly placed weight upon [TJ457-9].

60. The primary judge found that the Chinese contractors regarded themselves as bound by the framework agreements to 'build the infrastructure' [TJ53]. His Honour further found that the conduct of the Chinese was consistent with the belief held by Forrest and FMG that the 23 August and 5 November media releases were accurate [TJ177].

Steps taken by Forrest

61. ASIC maintains that Forrest did not take any steps with respect to the accuracy of the representations. What steps were taken must be considered in light of the following:

61.1 The evidence before the primary judge was that FMG:

61.1.1 in 2003, was a "very small company", which employed seven people, operated from a residential home and was in the business of "obtaining and exploring mining tenements in the Pilbara" [TT P-2.27-37, TB 1417 page 0212, Morrin Statement CB 12 paragraph 3]; and

61.1.2 in 2004, was a corporate minnow [TB 292, TT P-347.13–19, P-351.18-20] had no revenue [TT P-354.20, Sisson Expert Report CB 17 page 2 paragraph 5] and employed 57 people [TB 1417 page 0212].

61.2 Forrest was the CEO of the organisation. He necessarily relied on others. This is not a case whereby a CEO or director asserts that his subordinates failed him. The steps taken by Forrest include those taken by his employees in the course of their duties.

62. Forrest took a number of steps with respect to the representations:

62.1 The person asked to prepare the Agreements, Heyting, had drafting experience and had undertaken a course in contract law.

62.2 Heyting was asked to check the accuracy of the first Release. His suggested changes to that Release were accepted.

62.3 A number of other persons were involved in drafting the Release.

62.4 The Board was given the Agreements prior to the Release.

62.5 Forrest checked directly with CREC Vice President Bai. CREC approved the Release.

62.6 Other releases regarding the CHEC Framework Agreement and the CMCC Framework Agreement were provided to CHEC, CMCC and others. No problems were raised.

62.7 The primary judge found that Forrest was at pains to ensure that there was no ambiguity concerning Government approval. His Honour found that this 'cautionary' approach would have also been taken to the matter of the media release [TJ155].

62.8 A full time in-house lawyer, was employed. Further, Huston and his employed solicitor, Hsin Luen-Tan, had for a long time provided legal advice to FMG and Forrest. Forrest relied on Huston to ensure enforceability of agreements. Forrest, as would any CEO, relied on his General Counsel to inform him and the Board if any public representations made were inaccurate.

62.9 When the ASX wanted to speak with FMG about the November release, Huston was part of the FMG delegation.

Miscarriage of justice

63. In oral submissions, the Appellant asked the Full Court whether it required counsel to take the Court to all of the evidence contained in the aide memoire (being the Schedule of 122 documents relating to honest and reasonable belief) or whether only selected documents should be read to the Full Court. The Full Court stated that the latter approach sounded "attractive" [ATP265.7-35].

64. The Full Court erred by failing to consider any of the documents contained in the Schedule. For example, one of the documents that the Court was not taken to orally, but was part of the Schedule, was TB1239 (being document 84 of the Schedule). This was an email dated 7 March 2005 written by a director of FMG, Mr Scrimshaw, to the Assistant Minister for Education [TJ751]. The email included the following "these discussions have resulted in several agreements whereby certain Chinese state owned construction companies have agreed to fund and construct the Fortescue iron ore project (China Build & Transfer Agreements)". This email was forwarded on the same day to Forrest and was another example of the view held by the Board of FMG as to the effect of the Agreements.

65. ASIC effectively sought a re-hearing of the facts before the Full Court. The Full Court ought to have conducted a thorough examination of the evidence. It did not.

66. Further, the Full Court erred in failing to apply the *Briginshaw* standard. It had regard to limited evidence and argument. Even on those aspects, it did not deal with the submissions made by the Appellant. Unlike the primary judge, it failed to conduct a thorough examination of the evidence. The Full Court further erred by holding that the *Briginshaw* issue was a peripheral issue [AJ78].

ASIC's case regarding s674(2) of the Corporations Act

67. ASIC's case at trial relied mainly on the non-disclosure of certain information, defined in the ASC as being the CREC Information, CHEC Information and CMCC Information (see ASC 19 and 20, 59 and 61, 63 and 65, respectively).

68. ASIC's submission at trial was summarised by the primary judge as being that '*FMG engaged in a concerted and designed course of conduct in which it made false, misleading and exaggerated statements to the ASX of which Forrest was the architect*' [TJ 49]. More particularly, ASIC contended at trial that:

68.1 "*[Forrest] knew full well that the statements were false, misleading and deceptive and that unqualified and emphatic statements could not be made concerning the execution of binding, build and transfer contracts by the three Chinese contractors. He knew that the ASX announcements and the company presentations had been crafted to induce a positive effect on the price or value of FMG shares by positively influencing investors.*" [ASIC Trial Closing Submissions [722]]; and

68.2 "*[Forrest] knew that the false announcements withheld from the market the true information concerning the terms, legal effect and significance of the actual Framework Agreements.*" [ASIC Trial Closing Submissions [722]].

Information for the purposes of s674(2) of the Act

69. Listing Rule 3.1 of the ASX Listing Rules obliges an entity to notify the ASX of certain information of which it is "aware". The ordinary meaning of "aware" in Listing Rule 3.1 is extended by the definition of "aware" in Listing Rule 19.12 to include information of which a director or executive officer "has, or ought reasonably to have, come into possession ... in the course of the performance of their duties, etc".

70. Representations by a company about the legal effect of an agreement are necessarily matters of opinion. As the Chief Justice stated in the Full Court, whether a binding contract exists is always a question of law for decision by a Court [AJ106].

71. Therefore what is required of the entity in order to comply with its continuous disclosure obligations is to express its honestly and reasonably held opinion as to the legal effect of the relevant agreement. Such an approach satisfies both section 674(2) and Listing Rule 3.1 as these provisions are concerned with the requirement to disclose information. Those provisions are not intended to target inaccurate disclosure, or misleading or deceptive disclosure. Inaccurate, misleading or deceptive disclosure is the purview of s1041H. If a release contains inaccurate or misleading information, this will fall within the provisions of s1041H.

72. Unlike s1041H, s674 requires more than an objective consideration of correctness. Section 674 requires that the entity releasing the information to be aware (actually or constructively) of the 'correct' information. The approach adopted by the Full Court means that an entity that is ultimately found to have mis-described the terms of an agreement in an ASX announcement (without releasing the agreement in the first instance) will necessarily breach s674 by having failed to release the agreement. This is because, on the Full Court's reasoning, the actual terms of the agreement constitute information of which the entity is aware. Such an approach is contrary to the intent of s674.

73. It is incumbent upon an entity to be able to satisfy the Court that the opinions expressed through the relevant representations were honestly and reasonably held. Where those representations concern the legal effect of an agreement, it is necessary to consider all of the evidence that relates to the belief of the entity and its directors or executive officers. The hearing before the primary judge was conducted over five weeks and the substantial volume of evidence was the subject of detailed written submissions. This resulted in the primary judge's "exhaustive" examination of the evidence [AJ55].

74. On the proper construction of section 674(2) and Listing Rule 3.1 and as a matter of logic, if a director or executive officer holds an honest and reasonable belief about a matter, an opposing or differing belief cannot be said to have been, or ought reasonably to have been, held by the director or executive officer for the purposes of Listing Rule 19.12. This interpretation of the Listing Rule is consistent with the words and purpose of the Listing Rules and the proper scope of s674. If s674 required otherwise, then a company may have to disclose multiple items of "information" which may be conflicting or even "information" which no director or executive officer of the company actually believes. It is submitted that the Listing Rules do not impose an obligation on an entity to disclose information that is contrary to the honest and reasonable beliefs of its directors or executive officers.

75. Information for the purposes of section 674(2) and Listing Rule 3.1 is not to be artificially or unnecessarily confined. That is, the information for the purposes of those provisions is to be determined by the circumstances of the case. The Full Court's failure to conduct a proper examination of the evidence meant that it failed to consider a large portion of the information that was known to FMG and its directors and executives. For example, Forrest submitted to the primary judge and the Full Court that the beliefs of the Chinese counterparties were information for the purposes of s674. This submission was not addressed by the Full Court.

Forrest did not contravene s674(2A) of the Corporations Act

76. Forrest submits he did not contravene s674(2A) of the Act for the following reasons (this is consistent with the findings of the primary judge at TJ 35):

76.1 FMG did not contravene s674(2) of the Act (because FMG took all steps necessary to ensure that it correctly disclosed all required information in relation each of the releases made in respect of the Framework Agreements) and therefore he could not have been a person who was involved in a contravention of that subsection pursuant to subsection (2A);

76.2 Forrest was not, and could not have been, aware of the 'information' constituted by the CREC, CHEC and CMCC Informations and each of the Inadequate CREC, CHEC and CMCC Disclosure (as those terms are defined in the ASC);

76.3 Even if subsection (2A) was made out (which is denied), Forrest did not contravene that subsection because, for the purposes of subsection (2B) he:

76.3.1 took all steps that were reasonable in the circumstances to ensure that FMG complied with its obligations under s674(2) of the Act; and

76.3.2 believed on reasonable grounds that FMG was complying with its obligations under s674(2); and

76.4 the threshold element of being "involved in" pursuant to s79 of the Act is not established, as Forrest was not aware of the information ASIC alleges FMG was required to announce to the ASX (being the CREC Information, CHEC Information and CMCC Information as defined in the ASC).

77. On appeal, ASIC departed from its pleaded case in that its Full Court submissions failed to allege that Forrest was aware of the totality of information comprised by the CREC Information, CHEC Information and CMCC Information. Before the Full Court, ASIC sought to contend that Forrest's knowledge was less than pleaded in the ASC, by the use of the following far more generalised allegations.

> *"There was ample evidence that Forrest knew the facts and circumstances which rendered FMG's announcements and public statements misleading and deceptive. He knew, for instance, the gross disparity between the actual terms of the Framework Agreements and FMG's public statements, and he knew that he and FMG had misstated the essential nature and contents of the Framework Agreements"* [ASIC FC Submissions [195]].

78. Forrest submits that ASIC should be held to its pleaded case, being that:

78.1 Forrest's alleged intentional misleading of the market was in circumstances where he was aware of the totality of information comprised by the CREC Information, CHEC Information and CMCC Information; and

78.2 the legal effect and significance of the Framework Agreements was as pleaded in the following paragraphs of the ASC:

78.2.1 Paragraphs 19 and 20 - CREC Framework Agreement;

78.2.2 Paragraphs 59 and 61 - CHEC Framework Agreement; and

78.2.3 Paragraphs 63 and 65 - CMCC Framework Agreement.

79. Accordingly, by reason of the manner in which ASIC pleaded its case, that is, that FMG engaged in a concerted and planned course of conduct in which it made false, misleading and exaggerated statements to the ASX of which Forrest was the architect, ASIC had to prove that Forrest was:

79.1 aware of each of the CREC, CHEC and CMCC Information as pleaded in ASC 19 and 20, 59 and 61, 63 and 65, respectively; and

79.2 an intentional participant based on his knowledge of the essential facts which constitute the alleged contravention and his intentional participation or assistance in the contravening conduct.

80. In *Yorke v Lucas* (1983) 49 ALR 672 at 676 (affirming *Yorke v Lucas* (1985) 158 CLR 661 at 670), the majority comprising Mason ACJ, Wilson, Deane and Dawson JJ, observed that: [Emphasis added]

> '*[the words of the section require a] party to a contravention to be* ***an intentional participant****, the necessary intent being based upon knowledge of the essential elements of the contravention.....****There can be no question that a person cannot be knowingly concerned in a contravention unless he has knowledge of the essential facts constituting the contravention.***'

81. In *Australian Securities and Investments Commission v Maxwell and Ors* [2006] NSWSC 1052: [Emphasis added]

> '***The widest of those concepts is that of being "knowingly concerned" in a contravention, and even that involves (a) knowledge of the essential facts which constitute the contravention which, in the case of provisions such as those in issue here, requires knowledge that the relevant representation is being made and is misleading, and (b) some intentional participation or assistance in the contravening conduct*** *[Giorgianni v R (1985) 156 CLR 473 at 494 and 501; Yorke v Lucas (1985) 158 CLR 661; Smithers v Beveridge (1994) 14 ACSR 197 at 201].*

82. The mere circumstance that a person is a director of a company that engages in contravening conduct is insufficient to establish that he or she is a person involved in it.

83. Before the primary judge, ASIC failed to prove each of the matters referred to in paragraphs 78 and 79. In fact, the primary judge found that:

83.1 "*there was no basis for ASIC to assert dishonesty on the party of FMG, its board and, in particular, Forrest*" [TJ 49];

83.2 "*it was asserted that FMG engaged in a concerted and designed course of conduct in which it made false, misleading and exaggerated statements to the ASX of which Forrest was the architect. In my view the evidence does not support such a serious allegation*" [TJ 49];

83.3 *"FMG's opinion which underpinned its disclosures as to the legal effect of the Framework Agreements was reasonably and honestly held by it through its board including Forrest."* [TJ 903];

83.4 *"Forrest exercised his powers and discharged his duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of FMG in FMG's circumstances; and if they occupied the offices of Forrest within FMG and had the same responsibilities within FMG as Forrest."* [TJ 904];

83.5 *"[Forrest] as a consequence of his own appreciation of the decision in Anaconda; his reliance on the legal oversight and advice of Huston; and his appreciation that the Chinese Contractors held the same view that the Framework Agreements were legally binding, had reasonable grounds for approving or permitting to be made the disclosures, complained on by ASIC, by FMG between August 2004 and March 2005."* [TJ 904]; and

83.6 *"I am well satisfied that Forrest acted reasonably to ensure that FMG both complied with s 674 of the Act and did not contravene s1041 of the Act."* [TJ 904].

Section 674(2B)

84. Section 674(2B) affords a defence to an alleged contravention of section 674(2A). There has been no substantive judicial consideration of the provision for individual liability for continuous disclosure breaches.

85. Section 674(2B) operates to relieve a person of liability in circumstances where the Court is satisfied that the person has:

85.1 taken all steps (if necessary) that were reasonable in the circumstances to ensure that the listed disclosing entity complied with its obligations in section 674(2); and

85.2 after taking the steps in the preceding sub-paragraph, believed on reasonable grounds that the listed disclosing entity was complying with its obligations under section 674(2).

86. By way of interpretation of the section, in the Supplementary Explanatory Memorandum to the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, it was stated:

86.1 Section 674(2B)(a) encompasses an assessment whether the particular information is required to be disclosed and the process for disclosing it (at 4.83);

86.2 The notion of reasonable steps is a matter for the Court to decide on the facts of a particular case and may include instances of delegation and reliance on others (at 4.84); and

86.3 The phrase 'in the circumstances' refers to all the conditions surrounding the disclosing entity's compliance with section 674(2) and may include the

circumstances of the person taking the steps (including his or her role) and of the disclosing entity and the nature of the information (at 4.85).

87. Forrest made detailed submissions to the primary judge and the Full Court as to why, if it was necessary, he had established the requirements of s674(2B). The relevant "circumstances" surrounding FMG's compliance are set out in paragraphs 22 to 60. Further, Forrest is entitled to rely upon each of the steps taken by FMG directors or executives referred to in paragraph 62 herein. Forrest's conduct was exhaustively considered by the primary judge.

88. It is submitted that when the totality of the evidence is considered, Forrest took more than adequate steps which would satisfy s674(2B). Further, he believed that FMG was complying with all of its obligations. He was entitled to rely upon Huston to advise him otherwise.

Section 180 and the business judgment rule

89. ASIC alleged that:

89.1 on each occasion when FMG contravened ss1041H and 674(2), Forrest caused, authorised, permitted or did not prevent FMG from committing such contravention, and Forrest thereby himself contravened s180 [ASIC Full Court Grounds of Appeal [56]]; and

89.2 by causing or permitting FMG to contravene ss674 and 1041H, Forrest exposed FMG to a foreseeable risk of harm and thereby breached s180 [ASIC Full Court Grounds of Appeal [57]].

90. ASIC contends that Forrest was involved in the contraventions referred to in the preceding paragraph on the basis of:

90.1 his role and duties as an executive director of FMG;

90.2 his knowledge and approval of the terms of each of the Framework Agreements;

90.3 his knowledge, participation in or approval of each of the Disclosures; and

90.4 his knowledge of the requirements of Listing Rule 3.1.

91. ASIC's claim that Forrest contravened s180 is contingent upon ASIC:

91.1 succeeding in its claim(s) that FMG breached ss674(2) or 1041H [ASC 117, ASIC Trial Opening Submissions [11] and TT P-58.39-P-59.2]; and

91.2 proving that FMG's contraventions were serious [TT P-59.5-6] as contended in the ASC.

92. If (which is denied) FMG contravened ss674(2) and 1041H, Forrest submits that the Court ought to uphold the decision of the primary judge and find that Forrest did not contravene s180(1) because:

92.1 Forrest exercised a reasonable degree of care and diligence in the discharge of his duties;

92.2 at all material times, Forrest acted honestly and reasonably believed that he was acting in FMG's best interests;

92.3 Forrest's conduct did not expose FMG to a foreseeable risk of harm;

92.4 FMG had not suffered damage as a result of Forrest's conduct; and

92.5 FMG benefitted from Forrest's actions; or

92.6 the Business Judgment Rule applies.

93. Directors' roles differ from case to case and are dependent entirely on the circumstances (*Vrisakis* (1993) 9 WAR 395 per Ipp J at 451 and Malcolm CJ at 407). No rule of universal application can be formulated as to a director's obligations in all circumstances. The extent of the director's duties depends on the function he or she was required to perform (*Gould v Mount Oxide Mines Ltd (In Liq)* (1916) 22 CLR 490 per Isaacs and Rich JJ at 531).

94. Forrest is not required to exhibit a greater degree of skill in the performance of his duties than may reasonably be expected from persons of commensurate knowledge and experience in the relevant circumstances (*Australian Securities Commission v Gallagher* (1993) 11 WAR 105 at 116; *Australian Securities & Investments Commission v Maxwell* [2006] NSWSC 1052 at [101]). At trial ASIC did not tender any direct evidence regarding Forrest's (or any other FMG directors') duties or call expert evidence regarding the role of a director or a chief executive officer in a company like FMG at the material times.

95. The issues which the Court must consider include, but are not limited to, FMG's type, constitution, size, business nature, board composition and the distribution of work between the Board and other officers (*Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 427; *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115 at 125; *Gallagher* (supra) at 115; *Maxwell* (supra) at [100]). The evidence before the primary judge regarding FMG's circumstances is set out in paragraph 61.1.

96. The mere fact that a director participates in conduct that carries with it a foreseeable risk of harm to a company's interest does not necessarily mean that the director failed to exercise a reasonable degree of case and diligence in the discharge of his or her duty (*Vrisakis v Australian Securities Commission* (*supra*) per Ipp at 449 – 450; *Vines v Australian Securities and Investments Commission* (2007) 62 ACSR 1 per Santow J at [598] and [599]).

97. Whether there is a breach of directors' duties depends on the analysis of:

97.1 whether and to what extent the corporation's interests were jeopardised and, if they were, whether the risks obviously outweighed any potential countervailing benefits; and

97.2 whether there were reasonable steps which could have been taken to avoid the jeopardy (*Maxwell* (supra) at [110]).

98. At law, Forrest's alleged acts or omissions are incapable of constituting a failure to exercise care and diligence, unless, at the time of the alleged breach, it was reasonably foreseeable that the alleged breach may cause harm to FMG (*Vrisakis (supra)* per

Ipp J at 449 to 450; *Vines* (*supra*) per Ipp J [814], Santow J at [779] and Spigelman CJ at [539]; *ASIC v Doyle* [2001] WASC 187 at 222).

99. Whether a particular risk was reasonably foreseeable must be judged by what Forrest knew or reasonably should have known at the time and not with the wisdom of hindsight (*Vines* (*supra*) per Santow J at [781], Ipp J at [814] and Spigelman J at [539]). When the relevant circumstances and the steps Forrest took (whether personally or by his reliance upon other FMG directors or executives) are properly considered (see paragraphs 22 to 60 and 61.1 herein), it cannot be concluded that such a risk was foreseeable.

Interaction between s180 and other Corporations Act provisions

100. Section 180 should not provide a backdoor method for visiting on company directors civil liability for contraventions of the Act in respect of which the Act does not otherwise provide for civil liability (*Australian Securities and Investments Commission v Maxwell and Ors* [2006] NSWSC 1052 at [110]).

101. In relation to the alleged contraventions of s1041H by FMG, they were characterized by ASIC at trial on the following basis: *"The case against the company of misleading conduct is the platform for contending that Mr Forrest breached his duties under section 180 as a director. Section 180 attracts civil penalty consequences. A civil breach of section 1041H or section 52 of the Trade Practices Act by Fortescue does not attract any penalty consequences. We seek no penalties against Fortescue in respect of that conduct. It is the platform for a complaint against Mr Forrest."*

102. Further, the Full Court erred by holding that Forrest was liable under s180 for FMG's contraventions of s1041H [AJ200], which were based on the same conduct it complains of as being contraventions of s674(2A). The conduct complained of should (if established) be treated as a single contravention of the specific provision, namely s674(2A), upon which ASIC primarily relies.

No limitation upon the Business Judgment Rule

103. "*Business judgment*" means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation (s180(3) of the Act).

104. There is no statutory limitation placed upon the scope of s180(2). The *Corporate Law Economic Reform Program Bill Explanatory Memorandum* states that the Business Judgment Rule will be "*confined to cases involving the decision making about the ordinary business operations of the company*" (Explanatory Memorandum paragraph 6.8). This is a very broad notion that ASIC seeks to constrict. The intended breadth of the definition of "business judgment" is demonstrated by s180(3), where the term is defined. The Full Court erred by imposing a limitation on the scope of s180(2) that is not consistent with the statute [AJ197-199].

105. The Full Court erred in its identification of the matter about which the business judgment was formed [AJ197]. Forrest did not decide "not to disclose the true effect of the agreements" [AJ197]. The relevant business judgment was that the disclosure made was correct and satisfied FMG's obligations under the Act.

106. The Full Court held that '*s180(2) cannot be construed as affording a ground of exculpation for a breach of s180(1) where the director's want of diligence results in a*

contravention of another provision of the Act and where that other provision contains specific exculpatory provisions enacted for the benefit of the director' [AJ199]. The Full Court erred as s1041H does not have an exculpatory provision.

Evidence regarding the business judgment

107. Forrest made detailed submissions to the primary judge and the Full Court as to why, if it was necessary, he had established the business judgment defence. The Full Court did not consider these submissions. The tenor of these submissions is set out in paragraphs 22 to 60 and 61.1 herein. Forrest submits that the matters set out in those paragraphs set out why, if it was necessary, he had established the business judgment defence.

Part VII: The applicable legislative provisions as they existed at the relevant time

108. Corporations Act: ss79, 180, 674, 677, 10141H as attached.

Part VIII: The precise form of orders sought by the appellant

i. Appeal allowed with costs.

ii. Orders 1, 2.1, 2.2, 2.3, 2.4, 3 and 4 made by the Full Federal Court of Australia on 18 February 2011, as varied on 20 May 2011, be set aside, in place thereof, an order that the appeal to that Court be dismissed with costs.

.....

AJ Myers
Counsel for the Appellant
M Thangaraj

27 October 2011

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

ON APPEAL FROM THE FULL FEDERAL COURT

No. P44 of 2011

BETWEEN:

10

John Andrew Henry Forrest

Appellant

and

Australian Securities and Investments Commission

First Respondent

Fortescue Metals Group Ltd (ACN 002 594 872)

Second Respondent

20

ANNEXURE TO PART VII OF THE APPELLANT'S SUBMISSIONS APPLICABLE LEGISLATION PROVISIONS

Corporations Act Section 79
Involvement in contraventions

A person is involved in a contravention if, and only if, the person:

30 (a) has aided, abetted, counselled or procured the contravention; or

(b) has induced, whether by threats or promises or otherwise, the contravention; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

Date of document: 27 October 2011
Filed on behalf of: **The Appellant**
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James Scovell

Corporations Act Section 180
Care and diligence—civil obligation only

Care and diligence—directors and other officers

(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

(a) were a director or officer of a corporation in the corporation's circumstances; and

(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 1317E).

Business judgment rule

(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

(a) make the judgment in good faith for a proper purpose; and

(b) do not have a material personal interest in the subject matter of the judgment; and

(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

(d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence)—it

does not operate in relation to duties under any other provision of this Act or under any other laws.

(3) In this section:

business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

Corporations Act Section 674
Continuous disclosure—listed disclosing entity bound by a disclosure requirement in market listing rules

Obligation to disclose in accordance with listing rules

(1) Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.

(2) If:

(a) this subsection applies to a listed disclosing entity; and

(b) the entity has information that those provisions require the entity to notify to the market operator; and

(c) that information:

(i) is not generally available; and

(ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;

the entity must notify the market operator of that information in accordance with those provisions.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 3: An infringement notice may be issued for an alleged contravention of this subsection, see section 1317DAC.

(2A) A person who is involved in a listed disclosing entity's contravention of subsection (2) contravenes this subsection.

Note 1: This subsection is a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 2: Section 79 defines ***involved***.

(2B) A person does not contravene subsection (2A) if the person proves that they:

(a) took all steps (if any) that were reasonable in the circumstances to ensure that the listed disclosing entity complied with its obligations under subsection (2); and

(b) after doing so, believed on reasonable grounds that the listed disclosing entity was complying with its obligations under that subsection.

(3) For the purposes of the application of subsection (2) to a listed disclosing entity that is an undertaking to which interests in a registered scheme relate, the obligation of the entity to notify the market operator of information is an obligation of the responsible entity.

(4) Nothing in subsection (2) is intended to affect or limit the situations in which action can be taken (otherwise than by way of a prosecution for an offence based on subsection (2)) in respect of a failure to comply with provisions referred to in subsection (1).

Obligation to make provisions of listing rules available

(5) If the listing rules of a listing market in relation to a listed disclosing entity contain provisions of a kind referred to in subsection (1), the market operator must ensure that those provisions are available, on reasonable terms, to:

(a) the entity; or

(b) if the entity is an undertaking to which interests in a registered scheme relate—the undertaking's responsible entity.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Corporations Act Section 677
Sections 674 and 675—material effect on price or value

For the purposes of sections 674 and 675, a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.

10 **Corporations Act Section 1041H**
Misleading or deceptive conduct (civil liability only)

(1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

Note 1: Failure to comply with this subsection is not an offence.

Note 2: Failure to comply with this subsection may lead to civil liability under section 1041I. For limits on, and relief from, liability under that section, see Division 4.

(2) The reference in subsection (1) to engaging in conduct in relation to a financial
20 product includes (but is not limited to) any of the following:

(a) dealing in a financial product;

(b) without limiting paragraph (a):

(i) issuing a financial product;

(ii) publishing a notice in relation to a financial product;

(iii) making, or making an evaluation of, an offer under a takeover bid or a recommendation relating to such an offer;

(iv) applying to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);

(v) permitting a person to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);

(vi) a trustee of a superannuation entity (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) dealing with a beneficiary of that entity as such a beneficiary;

(vii) a trustee of a superannuation entity (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) dealing with an employer-sponsor (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer-sponsor, of that entity as such an employer-sponsor or associate;

(viii) applying, on behalf of an employee (within the meaning of the *Retirement Savings Accounts Act 1997*), for the employee to become the holder of an RSA product;

(ix) an RSA provider (within the meaning of the *Retirement Savings Accounts Act 1997*) dealing with an employer (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer, who makes an application, on behalf of an employee (within the meaning of that Act) of the employer, for the employee to become the holder of an RSA product, as such an employer;

(x) carrying on negotiations, or making arrangements, or doing any other act, preparatory to, or in any way related to, an activity covered by any of subparagraphs (i) to (ix).

(3) Conduct:

(a) that contravenes:

(i) section 670A (misleading or deceptive takeover document); or

(ii) section 728 (misleading or deceptive fundraising document); or

(b) in relation to a disclosure document or statement within the meaning of section 953A; or

(c) in relation to a disclosure document or statement within the meaning of section 1022A;

does not contravene subsection (1). For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.