IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY **No P.45 of 2011**

BETWEEN:

FORTESCUE METALS GROUP LTD
Appellant

and

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
First Respondent

JOHN ANDREW HENRY FORREST
Second Respondent

APPELLANT'S SUBMISSIONS

PART I. SUITABILITY FOR PUBLICATION

1. The appellant certifies that the Submission is in a form suitable for publication on the internet.

PART II. ISSUES

2. Whether the statements made by FMG in the respects contended for by ASIC in Schedules 1 to 10 to its Supplementary Notice of Appeal to the Full Court of the Federal Court contravened s.1041H of the *Corporations Act 2001* in stating that the "framework agreements" entered into by FMG with Chinese companies were binding agreements under which those entities had agreed to build, finance and transfer the infrastructure referred to in them, or contravened s.1041H in other respects referred to in such Schedules.

3. If such statements were not correct, whether FMG had an honest belief that they were correct and such belief was reasonably based. If FMG held such a belief, whether the making of the statements could amount to a contravention of s.1041H.

4. Whether the Full Court erred by failing:

   (a) to determine whether FMG had "information" for the purposes of s.674(2)(b) of the *Corporations Act* (when read with ASX's listing rule 3.1 and the definition of "aware" in listing rule 19.12);

   (b) to conclude that, because FMG honestly and reasonably believed that the framework agreements were enforceable agreements for the Chinese entities to build, finance and transfer the infrastructure, it did not have information that the framework agreements did not, at law, have that effect (assuming that the position at law); and

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(c) to conclude that FMG did not contravene s.674(2) because it did not have information that the framework agreements were, at law, unenforceable to make the Chinese entities build, finance and transfer the infrastructure.

PART III. *JUDICIARY ACT 1903*, S.78B

5. FMG has formed the view that notices pursuant to s.78B are not required.

PART IV. REPORT OF DECISIONS BELOW

6. Gilmour J.'s decision is reported at (2009) 264 ALR 201 and (2009) 76 ACSR 506. The Full Court's decision allowing the appeal is reported at (2011) 190 FCR 364, and its decision varying its orders is at (2011) 83 ACSR 399.

PART V. RELEVANT FACTS

7. By its Order 2.2(a) the Full Court declared that FMG had contravened s.1041H between 23 August 2004 and 28 February 2005 by engaging in a course of conduct in relation to its own shares that was misleading or deceptive, or likely to mislead or deceive investors in it, in that on the occasions set out in Schedule A to the Full Court's Reasons, it misrepresented the material terms and effect of the "CREC Framework Agreement".[1]

8. By its Order 2.1(a) the Full Court also declared that from 23 August 2004 to 24 March 2005 FMG contravened s.674(2) in, to put it shortly, failing to notify the ASX of the material terms and effect of the CREC Framework Agreement.[2] Contraventions of s.674(2) – unlike contraventions of s.1041H - may result in the imposition of pecuniary penalties: s.1317G(1A)(1).

9. In 2004 FMG had a project, the Pilbara Iron Ore and Infrastructure Project, which involved three elements – mining iron ore on FMG's tenements in the Pilbara Region, constructing a railway from the mine to a port facility at Port Hedland, and building the port facility at Port Hedland: J[1], FC[1]. From early 2004 FMG was negotiating with three Chinese government owned bodies, China Railway and Engineering Corporation (CREC), China Harbour Engineering Company (Group) (CHEC) and China Metallurgical Construction (Group) Corporation (CMCC) concerning the construction respectively of the railway, port and mine: J[3].

10. Presentations of the Project were given to CREC and CHEC in January 2004 (J[134], [136]). Meetings between FMG and CREC, CHEC and CMCC took place in April 2004 (J[137]). Senior executives and technical representatives of CREC visited Western Australia from 3-6 August 2004, the events which took place being summarised at J[145]-[148]. The conclusion of matters was the signing of a "framework agreement" on 6 August 2004. As required by its cl.5, there was then a formal signing ceremony on 19 August 2004 in China: FC[50]; J[149].

11. On 23 August 2004 FMG notified the ASX that it had entered into a "binding agreement" with CREC to "build and finance" the railway component of the Project: FC[23]. By an accompanying media release of 23 August 2004, it said (*inter alia*) that under the terms of

[1] Similar declarations, albeit relating to a period starting on 5 November 2004 and relating to some only of the occasions set out in Schedule A were made in relation to the "CHEC Framework Agreement" and the "CMCC Framework Agreement": see Orders 2.2(b) and 2.2(c).

[2] Similar orders were made, albeit with different commencing dates, in respect of the CHEC and CMCC Framework Agreements: see Orders 2.1(b) and 2.1(c).

the contract, "CREC will take full risk under a fixed price agreement on the rail project which [FMG] proposes be held separate to the parent company, in a new entity called The Pilbara Infrastructure (TPI)": FC[25]. CREC approved the terms of the media release: J[153]-[155].

12. In October 2004, following negotiations with them, FMG entered into "framework agreements" with CHEC and CMCC. CHEC and CMCC required that the agreements be in similar terms to the CREC agreement: J[169]. There was again a formal ceremony for the signing of the joint statements necessary to make the CHEC and CMCC agreements binding: FC[50]; J[176].

13. By letter of 5 November 2004, FMG notified the ASX that it had executed the agreements with CHEC and CMCC, and made comments concerning the agreements and their effects: FC[27]. There was an accompanying media release of 5 November 2004: FC[28]. CREC, CHEC and CMCC were aware of the terms of the media release. None made any complaint about its terms before 24 March 2005: J[176]-[181].

14. By letter to the ASX of 8 November 2004, FMG gave further information: FC[30]. It said that "FMG now has the three important component parts of its Pilbara Iron Ore and Infrastructure Project (ie. rail, port and processing plant) covered within three separate agreements", that the "aggregate capital cost of the assets covered under the respective agreements is estimated at A$1.7 billion" and that all three Chinese companies "will be working with FMG and the Worley Group within the Definitive Feasibility Study Process to establish a firm price which will then be incorporated into a fixed price contract with each party". The letter also said that "As contemplated under the respective agreements entered into to date, the first stage of work covering design and engineering will allow for the confirmation of a mutually agreed set price for embodiment into formal construction contracts": FC[30].

15. The agreements made no provision for the Chinese contracting companies to have an equity interest in the project but, after the announcements in November 2004, CMCC in particular (and CREC and CHEC) wished to obtain a majority equity interest in the project: J[713], [755]. CMCC became the "point of contact". In January 2005 Mr Ma of CMCC - when seeking to negotiate for a majority interest - asserted that the CMCC framework agreement was only a "MOU". When contested, that assertion was retracted. The judge found that the suggestion that the framework agreements were merely MOUs was a "negotiating tactic" and it did not represent CMCC, CREC and CHEC's "true view as to the legal effect of these agreements": J[762]-[764].[3]

16. In late January 2005, CMCC suggested that equity negotiations should not in any way obstruct the earlier agreed relationships between the parties: J[768]. In March 2005, at a meeting with FMG and CMCC representatives, Mr He of the National Development Reform Commission said that he had not previously understood that a majority equity interest was unavailable: J[779]. Mr He said that he would "discuss an alternative way of cooperation": J[780]. Instead of cooperating, however, Mr He caused an article to be published in the *Australian Financial Review* that asserted many negative things including that the Chinese entities were not bound under the framework agreements. As Gilmour J found, it was an attempt to renegotiate the agreements to obtain a better arrangement: J[52], [53], [798]-[813]; it was a "negotiating tactic" to pressure FMG: J[784]-[789], [807].[4] It was only when

[3] This finding was not challenged by ASIC on appeal.

[4] Again this finding was not challenged by ASIC on appeal.

the Chinese entities sought a majority interest that they began to make arguments about the legal effect of the framework agreements.

17. At trial ASIC conceded that "as a matter of objective inference, the agreements were intended to be legally binding": J[343].

18. FMG made a number of other statements about the framework agreements between August 2004 and February 2005: FC[6], Schedule A to Keane CJ's reasons. Those announcements, largely, repeated the point that there were agreements in place to build, finance and transfer the infrastructure.

19. ASIC's pleaded case against FMG as contained in its Further Re-Amended Second Substituted Statement of Claim (ASC) alleged that it had engaged in misleading or deceptive conduct in contravention of s.1041H on the following basis:

    (a) the legal effect of the framework agreements, if any, was that the parties had agreed to negotiate on certain identified matters, but the Chinese contractors were not by the framework agreements obliged to build, transfer or finance the relevant infrastructure (see ASC 20, 61 and 65);

    (b) for each agreement, the 16 relevant disclosures made by FMG between August 2004 and February 2005 represented, or alternatively created an impression, that it had entered into a binding contract obliging the Chinese contractors to build, finance or transfer the relevant infrastructure (see e.g. ASC 27, 32, 38);

    (c) the representations, or impressions created, were misleading in the circumstances (see e.g. ASC 33, 39, 45). ASIC also identified a large number of individual representations in the announcements that were allegedly false: see ASC 24-122.

20. ASIC expressly alleged that in making the disclosures FMG represented or created the impression that it had a genuine and reasonable basis for making the relevant statements, but that it did not have such a basis because it knew the terms of the agreements and knew the matters requiring further agreement between the parties (see e.g. ASC 27(b) and 28(d)).

21. Gilmour J held that the statements made by FMG as to the agreements and their effect were statements which represented FMG's honest belief, and that such belief was reasonably held: J[54], [59], [686]. He dismissed ASIC's claim. He did not need to decide FMG's contention that the impugned statements about the agreements and their effect were correct: J[54].

22. On ASIC's appeal the Full Court held that the agreements were not binding agreements for the Chinese companies to carry out the works attributed to them under those agreements, that satisfaction of a test of honest and reasonable belief was not sufficient, that FMG had not had an honest and reasonable belief, that accordingly there had been a contravention of s.1041H and that in consequence, the failure to correct the contravention was itself a contravention of s.674(2). The Full Court made the orders of 18 February and 20 May 2011.

PART VI. ARGUMENT

23. **Application of s.1041H: Introduction.** The respects in which ASIC contended that the various statements were misleading or deceptive or likely to be so are set out in Schedules 1 to 10 to its Supplementary Notice of Appeal in the Full Court. As is apparent from those Schedules the vast majority of ASIC's contentions turn on the proposition that the

framework agreements were not legally binding agreements to build, transfer and finance the infrastructure to which each refers. The Full Court erred in acceding to this contention.

24. The Full Court also erred in its view that, assuming that the agreements were not in fact binding agreements, it was not sufficient that they were statements of opinions and belief, and that FMG had an honest belief on reasonable grounds that they were correct.

25. These Submissions deal with the issues in paragraphs 23 and 24 in that order.

26. **Binding agreements to build, finance, transfer etc.** The Full Court erred in accepting ASIC's contention that the agreements were not binding agreements to build, finance, transfer etc.. Its approach was too narrow and did not give sufficient weight to the fact that the framework agreements were intended to be immediately binding, but expressly contemplated that there would be further, more detailed agreements.

27. "Binding contract" or "binding agreement" means an agreement which would be enforceable in litigation between the parties to it,[5] and the enforceability and the meaning of the agreements is to be considered as it would be in such litigation. The CREC Agreement is used by way of example.[6]

28. It was clear from cl.7 of the CREC Agreement that it was a case where the parties intended to make an immediately[7] binding agreement, but one which was to be followed by a fuller and more detailed agreement not different in intent.[8] The Full Court's decision does not sufficiently recognize that agreements of this kind are immediately binding.

29. In particular the Full Court noted (FC [122]) but did not give effect to the principle that, if it is apparent that the parties intended their agreement to be binding, courts will seek to give effect to that intention. See *Meehan v Jones* (1982) 149 CLR 571, per Mason J at 589.2; *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 634E per McHugh JA (Kirby P and Glass JA agreeing).[9] That approach has been referred to in many other cases.[10]

30. Gilmour J was correct in his consideration of this aspect at J[346]-[352]. As he noted at J[343], ASIC accepted that the contracts were intended to be legally binding. Such a concession was properly made. It could not be clearer that the parties to the CREC agreement intended it to be binding. See:

    (a) cl 7 – "This document represents an agreement in itself...". That is the language of contract.

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[5] This was accepted by the Full Court: FC[26]

[6] As was done in the courts below: J[281]-[352], FC[125]

[7] I.E. "immediately" on the approval pursuant to cl.5.

[8] This is sometimes described, for brevity, as the fourth category of cases in the *Masters v Cameron* (1954) 91 CLR 353 line of cases

[9] In *GR* Securities at 643 McHugh JA said:

> "However, the decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in the light of the surrounding circumstances. *If the terms of a document indicate that the parties intended to be bound immediately, effect must be given to that intention irrespective of the subject matter, magnitude or complexity of the transaction.* (Emphasis added)."

[10] See for example *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand* [2002] 2 NZLR 433 at 445, [58]; 448, [66]; *Anaconda* at 132-133, [120]; *G Scammell and Nephew Ltd v Ouston* [1941] AC 251 at 268; *Attorney-General v Barker Bros Ltd* [1976] 2 NZLR 495 at 498.49 – 499.10. *Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd* [2009] QCA 60 at [23] *Australian Goldfields NL v North Australian Diamonds NL* (2009) 72 ACSR 132 at 136 [7], Giles JA in *Tasman Capital Pty Ltd v Sinclair* [2008] NSWCA 248 at [29].

(b) cl 5 – "This agreement will become binding...". This is language at the heart of contract.

(c) cl 6 – A type of "severability" clause. Note particularly the words "will not impact on the effectiveness of the other clauses". Underlying those words is the notion that the "effect" of the "other clauses" is contractual.

(d) It is called an agreement in Recital B. Recital B uses the terms "offer" and "acceptance". These terms are quintessentially those of contract.

The reasons of the Full Court, however, reflect a reluctance to give effect to the very clearly stated contractual intention. It would be a curious result of cl.7 that the fuller agreement contemplated is simply a fuller agreement to negotiate: compare J[290].

31. The Full Court's view that the agreements were uncertain as to subject matter[11] should not be accepted. FMG contends that they were binding agreements. The subject matter of each agreement was identified by the terms of Recital A, and by some of the substantive provisions. Any failure to agree on any aspect by the parties could be resolved by applying standards of reasonableness, by determinations pursuant to cl 1.2 and cl 2.2.2, or by a combination of both.

32. The "Works" are defined in Recital A as "the Build and Transfer of the railway ... for the Pilbara Iron Ore and Infrastructure Project". It was understood that the railway was one of the three constituent parts of that Project: see Recital C. It seems absolutely clear that the parties were aware of what was contemplated in the three aspects of the Project – mine, railway, port – at the time of the agreements.

33. In this regard there are findings at J[134] that in China in January 2004 FMG "delivered a detailed presentation of its Project to CREC" and at J[136] that on the same trip, FMG "made a presentation with respect to harbour and dredging works to CHEC". See too the observation at J[137] in relation to the later April 2004 meeting.

34. The events which took place at the visit by CREC officers to FMG in August 2004 also support the view that the nature of the "railway... for the Pilbara Iron Ore and Infrastructure Project" was well known to the CREC officers. It is plain that at the meeting which took place in Australia from 3-6 August 2004, the officers of CREC were perfectly aware of what was contemplated as the *Works* in Recital A.

35. The Agenda for those days includes Update Presentation, Worley Presentation, CREC Presentation, Q&A, PIF Presentation and Data Room. On 5 August there is provision for discussion of Financials and "Negotiations for the day". Heyting's evidence was that the CREC officers saw "a multitude of documents" in Australia prior to signing the agreement. The judge's findings, at J[145]-J[148], about what took place during that visit are important. A copy of the PIF Presentation was sent by email to CREC on 10 August 2004.

36. Of course various matters remained to be determined. The route of the railway, for example, depended on obtaining the necessary statutory approval. It also depended on determining the order in which mining operations should take place in FMG's mines.[12] The fact that circumstances might dictate or make desirable some changes in relation to aspects of the railway did not mean that the agreement was uncertain. Nor does the fact that there might be differences of view as to the *precise* ambit of the expression used in Recital A. Any

[11] FC[124], [128], [130], [135], [161], [148], [173]-[176], [227]-[228].

[12] It was no objection to there being a binding agreement that the works to be carried out were of some magnitude or complexity: see McHugh JA in *GR Securities* (1986) 40 NSWLR 631 at 634; *Moffatt* (2009) QCA 60 at [23]. It was also no objection that an agreement may not *itself* resolve all matters which may arise in the future. See Ipp J in *Anaconda* (2000) 22 WAR 101 at 110, [25].

difference would fall for resolution in a court.[13] In any such proceedings evidence would be admissible to identify the subject matter of the agreement.[14]

37. The Full Court (FC[157]-[159]) adopted too narrow a view as to the use of recitals, involving too great a demarcation between recitals and the operative parts of an agreement. The judge stated the principles correctly at J[282]. Contracts are to be looked at as a whole. Each part reflects on another. Recitals are not excised from the contract for the purposes of interpreting it. Sometimes recitals can contain operative provisions. See the discussion by Mason J in *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 72.5-73.5 and the summary of principles as to the use of recitals in the reasons of Campbell JA in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 264 ALR 15 at 102, [379]-[390]. Allsop P at 28, [29] and Giles JA at 29, [42] agreed relevantly with Campbell JA.

38. The recitals in the agreement were important. They acknowledged the agreement of the parties that CREC had agreed to carry out and complete building the railway and transfer it to FMG. They are also definitional. Recital A identifies the "Works", a term used in cll 1.1, 1.2, 2.1, 2.2, 3.1 and 4.

39. Provisions such as those in Recitals A and B can be used in construing other parts of the agreement: see Campbell JA's proposition (1) in *Franklins* (2009) 264 ALR 15 at 102, [380]. Here Recital A identifies the "Works". Recital B, read with Recital A, should be regarded as a promise by CREC to carry out "the Build and Transfer of the railway". Recital B goes beyond merely setting out the objects of the parties: see Campbell JA's proposition (5). In proceedings between the parties, the terms of Recitals A and B could be relied on as an admission, or as estoppels preventing a party from asserting the contrary: see Campbell JA's proposition (4).

40. As well as discussions with CREC, FMG also had discussions with CHEC and CMCC in relation to the Project. There had been a meeting between FMG and the three companies on 9 April 2004. That CHEC and CMCC knew what was contemplated by respectively the "port related works ... for the Pilbara Iron Ore and Infrastructure Project", and the "mine and the process plant ... for the Pilbara Iron Ore and Infrastructure Project", should also be inferred from their insistence that the agreements with them were required to be on terms similar to those in the CREC Agreement.[15] This is particularly so in the light of the findings at J[405], bearing in mind that the 5 November 2004 media release set out specifically what the project was, and what part each Chinese contracting company was to play in it.

41. It would be extraordinary, it is submitted, in litigation between the parties to the three agreements, to allow a party to resile from the statements in Recitals A and B. Any differences in view about the content in practice of "the railway", or "the port related works" or "the mine and process plant" respectively would be resolved by the court. The terms of cl 4 also demonstrate an understanding of the nature of the *"Works"* and of the roles of the parties.

42. The other provisions of the agreements reflect the fact that they were binding agreements to build, finance and transfer, the relevant infrastructure.

43. Thus much of the scope of the work in the CREC agreement is identified by cl.2. Clause 2.2.1 says that the parties are agreed that the further agreement is to include in the "scope of work" three matters: detailed engineering design (to Australian Standards), project

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[13] See the observations of Barwick CJ in *Upper Hunter County District Council* (1968) 118 CLR 429 at 436 and of Gibbs CJ in *Meehan v Jones* (1982) 149 CLR 571 at 578.

[14] See e.g. *Butt v Long* (1953) 88 CLR 476 at 487, 490; *GR Securities* (1986) 40 NSWLR at 631.

[15] Heyting, statement at [83], [84], [89]). See also, J[169].

management and scheduling of "the Works", and procurement, construction and commissioning of "the Works". The matters referred to in cl 2.2.1 *must* be included in the further agreement. The clause also refers specifically on two occasions to the "Works", a reference back to the use of the term in Recital A. It is also a reference back to the more detailed statement in cl 2.1 of what is included in the Works.[16] The clause, in its first dot point, refers to Australian Standards, i.e. it requires the "Detailed engineering design" to be to the appropriate Australian Standard.[17] Clause 2.2.2 is discussed below together with cl.1.2.

44. Clause 3 requires that the matters specified in it be included in the General Conditions of Contract referred to in cl 1.1. The security provided for by the first dot point of cl.3 is to be the value of the Works. To arrive at that figure requires a determination of the "value of the Works". FMG is to pay 10% of the value of the Works to CREC in exchange for a bank guarantee of the same value from CREC. These events are to take place at a very early point: see the term "down payment" and also the provision for return of the guarantee in the second sentence in the second dot point. The "Remaining payment terms" in cl 3 all require a determination of the value of the Works. The General Conditions of Contract must include provision for the issue of a Certificate of Practical Completion. The General Conditions of Contract must also include "Standard liquidated damages and performance bond clauses".

45. Determination of appropriate provisions governing the issue of a Certificate of Practical Completion, "Standard liquidated damages" provisions, and "performance bond clauses" are all matters capable of resolution, if necessary, by a court. The court could receive evidence of what were appropriate provisions in relation to the works the subject of the agreement. It could decide the disputed issues on the basis of what was reasonable.

46. The last dot point in cl.3, dealing with a warranty period, appears to recognize that there may not ultimately be agreement on a warranty period, or on the value of the contemplated bank guarantee. That does not mean that the agreement as a whole is unenforceable. Clause 6 is against that view, and in any event all that this part of cl 3 requires is that the matters referred to in the last dot point are to be included in the General Conditions of Contract.

47. Clause 3 makes it absolutely clear that CREC is financing the railway. That is so because:

    (a) Prior to issue of a Certificate of Practical Completion, CREC bears all the costs of design, management, procurement, construction and commissioning of the Works.

    (b) It is entitled to security from FMG "to the value of the Works": cl 3.1, first dot point. Provision of security is a normal aspect of financing. The giving of security to a party financing a project does not mean that the secured party is not financing the project.

    (c) All that FMG pays prior to a Certificate of Practical Completion is 10% of the value of the Works but that is matched by the guarantee by CREC, which is only to be returned when 10% of the Works have been completed. The reference in the second dot point of cl.3.1 to agreement of the parties is one to which the principle, that each party is required to do all that is necessary to enable the other party to have the benefit of the agreement,[18] would apply.

48. ASIC's claim that the agreement does not say that CREC was financing the railway, should be rejected. The reality was that CREC was to bear the cost of constructing the railway. The

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[16] And, in the case of rolling stock, what is not.

[17] Australian Standards are referred to also in cl 4

[18] *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607, *GR Securities* 40 NSWLR 631 at 635.

only money contributed by FMG was the 10%, but that was itself secured. In the ordinary language of commerce, CREC was financing the railway.

49. Clause 4 is also of some importance. The first sentence provides a time framework. The target delivery date for the first shipment of ore "is last quarter 2006". As noted above this statement makes it apparent that both parties knew what was envisaged in the Project referred to in Recitals A, B and C. The reference in the first sentence to "relevant Australian Standards and work practices inherent in this Project" also makes it apparent that those matters are to be applied in the performance of the framework agreement. In the event of dispute about what were relevant Australian Standards or relevant Australian work practices inherent in the Project, evidence could be called to identify those Standards or work practices. The second sentence of cl 4 is an obligation arising immediately upon the agreement becoming binding. It demonstrates that CREC should be regarded as perfectly aware of what constituted "the Works". What else could reasonably be inferred from the words "such that it will allow CREC to competently expedite its role in the provision of the Works"? The reference to "sufficient engineering support" should also be read with the fact that the mandatory words of cl 2.2.1 included reference to "Detailed engineering design".

50. It is in the light of the matters specifically dealt with by cll 2, 3, 4, 6 and 7 that one goes to cl 1, headed "FRAMEWORK". The General Conditions of Contract referred to in cl 1.1 must make provision for the issue of a Certificate of Practical Completion, standard liquidated damages provisions and standard performance bond clauses. The General Conditions of Contract must also be "suitable for a Build and Transfer type contract". All these matters could be determined, if necessary, by a court upon evidence and by reference to the standard of reasonableness and appropriateness to such an agreement.

51. "The Scope of Work to be included in the Contract", as referred to in the second dot point in cl 1.1, is already significantly determined by the mandatory provision of cl 2.2.1. The area for agreement under this part of cl 1.1 would be to add to that scope of work or, by agreement, reduce it.

52. The subject matter of the third dot point in cl 1.1 – "List of nominated Australian and Chinese joint venture partners" –does not bear on the binding nature of the agreements. All that it provides is that FMG and CREC will jointly develop and agree on a list of such persons/bodies with whom they would be prepared to enter into a joint venture or to have as subcontractors. There is nothing which requires them to agree on anything more than the *identity* of such persons/bodies. If they are unable to agree on some or all (inability to agree on all is, of course, very unlikely) of such persons/bodies, this would not affect the binding nature of the agreement. The second sentence of cl 6 would apply in any event.

53. The fourth dot point in cl 1.1 is "definitive engineering design (to Australian Standards)". The parties' agreement must be to relevant Australian Standards. There may be a failure to agree on an aspect of such design. That could be resolved by evidence using criteria of appropriateness to the task undertaken, reasonableness and relevant Australian Standards.

54. So too could the matters referred to in the fifth dot point of cl 1.1 – "Scheduling of the *Works*". Clause 2.2.1, it may be noted, requires that scheduling of the *Works* be included in the contract. Clause 4 provides a target delivery date for the first shipment of ore and any schedule would need to conform to that date. The nature of the work to be carried out is set out in cl 2 and the location in which it was to be carried out would be determined by, amongst other matters, the route made available by the enactment facilitating the building of the railway and other infrastructure.

55. Scheduling the *Works* is something which one would expect competent engineers, experienced in railway construction, familiar with relevant matters, including those referred

to in the first sentence of cl 4, to determine. And, if necessary, for a court to determine any area of dispute upon evidence of that kind.

56. The sixth dot point in cl 1.1 is "Determination of the Value of *Works*". Arriving at that amount gives the figure for the amount of the security, the number of dollars which makes up 10%, and the amount of each of the later payments.[19]

57. Leaving aside altogether the application of cl 1.2, the value of the *Works* could be determined, in the event of disagreement, by persons experienced in costing the cost of such railway works and applying an appropriate profit element to it. The fact that the agreement itself did not go into detail about the computation of value does not render the agreement uncertain.

58. The CREC agreement, however, also contains cl 1.2. It recognizes that there may be a failure ultimately to agree on matters referred to in cl 1.1. It provides for the manner of resolution of that issue.

59. In the case of the scheduling and value of the *Works,* cl 1.2 provides that there is to be an "Independent review of the schedule and value of the *Works*". That review must be independent, although to be "undertaken by FMG". In practical terms that means that FMG is the person entitled to appoint those who are to carry out the "independent review". The purpose of the independent review is that any difference of view between the parties on the schedule and value of the *Works* would be resolved by the decision on the independent review. The judge recognized this: J[279], [318]-[319],[322].

60. A contract otherwise lacking certainty may be rendered certain by there being a person appointed by the contract to determine the otherwise uncertain matter: *Godecke v Kirwan* (1973) 129 CLR 629: per Walsh J (with whom Mason J agreed) at 642.5, per Gibbs J. at 645.[20]

61. Turning to "Technical peer review" in cl.1.2, the ability of FMG to appoint a person or body to carry out a review of this kind indicates that the purpose of a technical peer review in the agreement is to resolve issues which may arise between the parties with respect to the matters set out in first four dot points of cl 1.1.

62. "Technical peer review" in cl 1.2 means more than facilitating the parties' own process of developing and agreeing complicated technical matters for inclusion by them, if and when they agree, in their own contract. The view of the Full Court (FC[173], [174]) does not sit well with the time constraints imposed by cl 4 (and cl 5), and with the need to arrive at a "Determination of the Value of *Works*" at an early point. Those constraints meant that the matters in at least the first two dot points in cl 1.1 also had to be resolved expeditiously. The manner of resolving those issues, it is submitted, was not by having a "Technical peer review" which would result in a non-binding expression of view, but rather by having a determination of the issue:

    (a) which is carried out by suitably qualified people;

    (b) who have sufficient qualifications and experience to be regarded as peers; and

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[19] The value of the *Works* thus had to be determined at an early point, before the down payment. The agreement contemplated that the price would be fixed before construction started.

[20] In *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520 at 536F the Privy Council per Lord Wilberforce, citing *inter alia Godecke v Kirwan,* said:

> "... in modern times, the courts are readier to find an obligation which can be enforced, even though apparent certainty may be lacking as regards some term such as the price, provided that some means or standard by which that term can be fixed can be found."

To similar effect are the observations in *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] Lloyd's Rep 205 (14, Tab 128) at 210 per Sir Robin Cooke.

(c) which is carried out on a "review", i.e. a consideration of the issue on which there is no agreement.

63. The Full Court (at FC[173], [174]) treated technical peer review as a concept in isolation from its position in the agreement. This was an incorrect approach. FMG would also add that the passage quoted at FC[173] is not inconsistent with a technical peer review being utilised as a method to resolve differences between contracting parties.

64. The burden of establishing that the three agreements were not Build and Transfer agreements rested on ASIC. The only evidence it adduced to show that Build and Transfer contracts were of a particular category different from that in the three agreements was that of Heyting in his statement, at [10], [12]-[13]. It is possible that the BOO or BOOT contracts referred to by him would have some similarities to a Build and Transfer contract, but why did ASIC not adduce evidence relating to a Build and Transfer contract, if it contended that there was an established concept of Build and Transfer agreements into which the agreements did not fall?

65. In reality there was a considerable body of evidence, including evidence from Heyting himself, that FMG had entered into a "build and transfer" agreement or "BT contract". See Heyting's email of 24 August 2004 to Worley, and the matters referred to at J[155], [160], [51], [153], [177], [397], [401]-[402] and J[413] and [418].

66. Further, as is apparent from J[50], [153], [397], [398], [400], the Chinese contractors did not dispute the characterisation of the agreements as Build and Transfer agreements.

67. The views of the Full Court on cl.1.2 give little effect to FMG's right to initiate the processes and CREC's obligation to co-operate in that regard. Those matters suggest that the provisions of cl 1.2 were intended by the parties as a means for resolving differences of view between them. If it were necessary also to find a "standard" by which they were to resolve such disputes, it is also present, for the reasons adverted to earlier.

68. The views of the function of cl 1.2 advanced above reflect the "Framework" heading to cl 1. The framework of the agreement is that the parties are to jointly develop and agree upon the matters listed in cl 1.1. The ambit for disagreement in relation to matters in cl 1.1 is reduced by the mandatory provisions of cl 1.2 and 3, by the reference to "suitable" General Conditions of Contract and "Australian Standards" in cl 1.1 and by the time constraints imposed by cll 4 and 5. The framework of the agreement is then that, if necessary, areas of disagreement are resolved by the application of cl 1.2.[21]

69. As noted earlier there is also cl.2.2.2. There is a question whether "Technical review" in cl 2.2.2 is synonymous with "Technical peer review" in cl 1.2. That may or may not be so. Clause 2.2.2 does not include "peer", but the better view is probably that the term in cl 2.2.2 is likely to mean review by peer review in the sense used in cl 1.2. This, however, is purely a question of construction of cl.2.2.2. It does not go to whether there is an enforceable agreement.

70. It is submitted that there *were* binding agreements to build, transfer and finance between FMG and each of the Chinese companies. In deciding that issue, the Court should apply what Mason J described in *Meehan v Jones* at 589 as the "traditional doctrine that courts should be astute to adopt a construction which will preserve the validity of the contract".

71. ASIC also asserts that the three agreements could not properly be described as build and transfer agreements. Underlying the contention is the suggestion that a "Build and Transfer agreement" was necessarily one which was a substantial (in length) and detailed document.

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[21] And, as Heyting said in his oral evidence: "We had to come up with a mechanism to determine the price and the schedule."

72. The Full Court also said that "substantial evidence" pointed to the conclusion that the trial judge's view of the parties' objective intention was incorrect: FC[136].

73. It relied on Forrest's email of 27 October 2004 to Heyting and Huston: FC[136]. The email does not cast doubt on the enforceability of the CREC agreement. Instead Forrest refers to Bai from CREC being under pressure to sign a "detailed contract", in addition to the already binding CREC "framework agreement".

74. Negotiating, or identifying matters for further agreement, does not negate the framework agreement: *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* (2000) 22 WAR 101 at 118 [15], *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 619.9R-620.8L.

75. The Full Court relied on negotiations with respect to the "Advanced Framework Agreement": FC[137]-[151]. The Full Court said that the parties were not *ad idem* on the value of the works, how it would be funded and the scope of the work because there were negotiations about these matters in the drafts of the Advance Framework Agreement. Yet CREC recognised the enforceable effect of the CREC agreement in Recital A of its draft: FC[139].

76. Importantly, the fact of these negotiations does not nullify the effect of the CREC framework agreement. They are post-contractual behaviour. They cannot be used to assist the proper construction of the CREC framework agreement.

77. Even though subsequent conduct might be used to determine whether a contract was made at all, that is not the issue here. The dispute is about whether the framework agreements obliged the Chinese parties to build, finance and transfer the infrastructure or whether they were enforceable agreements to agree. That issue is determined by construing the agreements not by considering post-contractual behaviour.

78. In any event, the post contractual behaviour is entirely consistent with the agreements being binding agreements to build etc. The parties were negotiating the terms of the fuller agreement, failing which FMG had the deadlock breaking mechanisms in the framework agreements.

79. The Full Court said that the ongoing negotiations about the issue of the extent of Chinese equity in the project emphasised that the agreements were preliminary: FC[152]. Those negotiations did not negate the binding nature of they agreements because the 3 agreements did not deal with equity at all; they were agreements for the contractors to build, finance and transfer.

80. **Binding agreements to build etc. Summary.** Annexure B lists the statements impugned by ASIC, as set out in the Schedules to its Supplementary Notice of Appeal in the Full Court. Annexure B also contains, in short form, FMG's responses to each of those contentions.

81. **Honest and reasonable belief**. Even though the Full Court, contrary to the above, held that there were not binding agreements to build etc. the infrastructure, it should yet have held that FMG genuinely and reasonably believed that was the position, and did not contravene s 1041H.

82. A statement about a matter may for example be reasonably received as an expression of honest belief (eg *Inn Leisure Industries Pty Ltd v D F McCloy Pty Ltd* (1991) 28 FCR 151 at 166-7) or as an honest statement with a reasonable or rational basis (eg *Tobacco Institute v AFCO* (1992) 38 FCR 1 at 25-7, 45-8) or as a statement warranting the truth (eg *SWF Hoists and Industrial Equipment Pty Ltd v SGIC* (1990) ATPR 41-045 at 51,606-08). The statement has to be considered in all of the relevant circumstances: *Butcher v Lachlan Elder Realty P/L* (2004) 218 CLR 592 at 604 [37]; *Campbell v Backoffice Investments Pty Ltd*

(2009) 238 CLR 304 at 321 [32], 341 [102]; *Miller & Associates Insurance Broking P/L v BMW Australia Finance Ltd* (2010) 241 CLR 357 at 368 [14]-[15], 384 [91].

83. As the Court recognised in *Butcher v Lachlan* (2004) 218 CLR 592, even an unqualified statement may not be misleading if untrue if a reasonable recipient would not have understood it as warranting the truth.[22]

84. If the statement was made to the public or a section of the public, the issue may also be whether a reasonable member of that class of people was misled by the statement: *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 85 [102]-[103]; *Butcher v Lachlan* at 604 [36].

10 85. In *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 88, it was held that a statement of opinion "identifiable as such" conveys no more than an opinion is held and "perhaps that there is a basis for the opinion". A statement of opinion will be "identifiable" as such even when no express qualification accompanies the statement, if the statement is intrinsically a matter for opinion.[23]

86. A statement of opinion may be found, in the whole circumstances, also to contain an implied representation that there is a reasonable or rational basis for the opinion: eg *Bateman v Slatyer* (1987) 71 ALR 553 at 559; *RAIA Insurance Brokers Ltd v FAI General Insurance Co Ltd* (1993) 41 FCR 164 at 165-7, 172-5.

87. General law discussions with apparent hard and fast rules about the supposed way in which
20 statements (in different contexts) about the terms or effect of a legal document would be received are not definitive: *RAIA* at 166. The issue should be determined contextually without pre-conception: eg *Demagogue P/L v Ramensky* (1992) 39 FCR 31 at 37-41. Statements as to the *contents* of a legal document may sometimes be treated as a statement of fact, but the trial judge was correct (J[684]) in saying "As an objective matter, an assertion as to the meaning and legal effect of an agreement is necessarily the product of an opinion formulated to that effect."

88. Further, the judge was correct and correctly applied the law when he concluded that a reasonable reader would have expected FMG to have a genuine and reasonable basis for its announcements: J[685]. Considering the issue objectively and in all of the circumstances, a
30 reasonable reader would have treated the announcements in that way, and not as statements asserting a categorical fact about the agreements.

89. Accepting the announcements were made by a public company on serious occasions may only necessitate that they would have been treated by the reader as having a reasonable basis and not as asserting a categorical fact. In this case any implied representation would have been that FMG had a reasonable basis for the announcements of mixed opinion and fact, and was not as to a categorical fact.

90. For example, a reasonable recipient would have understood the announcements as conveying that FMG believed that the Chinese entities had agreed to fund 90% of the construction costs of the infrastructure. This would have been received as information of a "break through"
40 because at that time one of the real issues for FMG was its ability to raise finance to proceed

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[22] Thus, it was there held that a suburban real estate agent does not warrant the correctness of a survey diagram and does not mislead if there are inaccuracies in it.

[23] As French J explained in *Inn Leisure Industries* 28 FCR at 167, "A representation of law may be made in different ways which send different messages to the recipient. It may do no more than convey what is, on the face of it, the untutored opinion of the representor. As such, it would be unlikely, if wrong, to constitute misleading or deceptive conduct. If the represented opinion were not in fact held by the representor, then that would be a misrepresentation of fact and able to be characterised as misleading or deceptive conduct."

with the Project. Also, where completion of the PFS, the pre-feasibility study, and the commencement of the DFS had been announced, a reasonable recipient would have understood that FMG believed that the Chinese entities had committed to build *etc* the infrastructure even though all the detail of the Project had not yet been finalised. The announcements would have been understood as indicating FMG's belief that the Chinese entities had committed their financial might to the Project even before the Project's feasibility had been finally determined.

91. The Full Court's decision on this issue, commences at FC[99]. It commenced on a wrong footing. FMG was *not* asserting a belief that the framework agreements "could arguably be regarded as having" the effect of obliging the Chinese contractors to build, finance and transfer the relevant infrastructure. Rather it was asserting that it believed that the three agreements had the effect of obliging the Chinese Contractors to build, finance and transfer *etc*, and that that belief was a reasonable one.[24]

92. The Full Court's consideration of the matter by reference to "distribution of risk of loss" – FC [114]-[116] – means that a court will approach the application of s.1041H by reference to a predisposition against the maker of the statement. The true question is simply whether in the circumstances the statement was misleading or deceptive, or likely to be so.

93. The announcements were not likely to mislead or deceive – FC[116], [215] - because in context they would have been understood by a reasonable recipient as conveying that FMG reasonably believed that the Chinese entities had committed to build *etc* the infrastructure.

94. As the trial judge found, FMG honestly and reasonably believed that the agreements were binding agreements to build *etc* the infrastructure: J[54], [59], [353]-[465]. The onus was on ASIC to prove that FMG had contravened s 1041H and ASIC failed to do so. The Full Court incorrectly held that FMG had misled *etc*, by incorrectly characterising the announcements as statements of historical fact, rather than by evaluating the evidence as a whole.

95. Gilmour J.'s findings that FMG and Forrest held an honest and reasonable belief, on the other hand, were based upon a comprehensive evaluation of the evidence. He considered the business records of FMG and the evidence of several of the lay witnesses called by ASIC, who were predisposed against FMG.

96. As noted earlier, in early 2004, FMG had meetings in China with parties including CREC: J[134], [138], [146]. CREC said that it had the intention and the capacity "to bring their own finance" to the project, that it had been in contact with CHEC and CMCC and that both companies were waiting for CREC to take the lead into FMG's project. CREC appeared anxious to do the project, with a view to giving itself standing in a first world country: J[137]–[138]. See too J[145].

97. Following execution of the agreements, the Chinese contractors acted as if they "shared FMG's view" (J[396]) as to the obligations contained in the framework agreement. On 19 August 2004, FMG and CREC in China signed the joint statement binding the parties to the CREC framework agreement: J[149]. CREC made it clear that the FMG project was a significant one, and that it dove-tailed nicely with its strategic development: J[149]. CREC said it was "fully confident about its capacity to build a heavy axle load railway in the Pilbara. Photographs were taken. The signing ceremony was a high level, serious, and, by Chinese custom, solemn occasion: J[149]. Qin accompanied Forrest downstairs from the

[24] This was apparent from the use of the word "binding" before "contract". The use of that word would have been suggestive to a reasonable recipient that FMG was announcing its reasonable and honest view of the agreements that had been made.

exhibition hall to have more photographs taken together to, as Qin put it, "solidify the marriage": J[50], [149], [405].

98. The position was the same with the CMCC and CHEC framework agreements. A formal ceremony was held on 5 November 2004, for the signing of the joint statements necessary to make the agreements binding in accordance with their express provisions. The ceremony was held at the Australian embassy in Beijing. A formal programme was prepared, announcing numerous eminent speakers and the presence of various Chinese officials, including NDRC. Photographs were taken: J[176], [405]. It is clear that the occasion was one of formality for a serious matter.

99. FMG provided each of the Chinese counterparties with a copy of the proposed media releases which contained prominent language that the Chinese entities had entered into a binding build and finance contract (or similar terminology) in respect of each component of the infrastructure. The judge correctly inferred that CREC had approved the material wording used in the media release to describe the framework agreement: J[50], [155], [398], [400]. In respect of the other 2 agreements, the judge found that CHEC and CMCC were aware of the terms of the proposed media release (which FMG had freely distributed at the signing ceremony), and as they did not object, it was inferred that they were satisfied with FMG's characterisation of the agreements: J[177], [181].

100. CREC's conduct, in the period following the 19 August 2004 signing ceremony, was consistent with there being a concluded agreement of the relevant kind. Thus in a memorandum of understanding signed with Barclay Mowlem on 1 September 2004, CREC acknowledged that it "has entered into an agreement with FMG on 19 August 2004 for the build and transfer of the (construction of new railway infrastructure) Project": J[155]. Also on 7 September 2004, CREC raised objection to FMG making direct contact with the Chinese railway equipment suppliers due to the existence of the framework agreement.

101. On 13 October 2004 Zhang from CREC wrote to Heyting at FMG and gave assurances that CREC would implement the project with Barclay Mowlem. CREC was intent on performing the agreement: J[403].

102. As the judge said at J[414], had it been the case that Forrest on behalf of FMG was saying one thing publicly about the obligations of the framework agreements and believed something different privately, then one would have expected that to emerge from a consideration of the internal documents of various kinds within FMG. No such difference is evidenced, and to the contrary, the documents reinforce the view as expressed in the public statements.

103. FMG's board minutes of 27 August 2004 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". The judge found that the minute evidenced the board's consideration that the agreement was binding, and was not expressed to be conditional J[415]-[416].

104. FMG's external communications similarly reflected the belief. On 2 September 2004, Catlow wrote to GE Commercial Finance to pursue the financing of the 10% payment required by the 3 agreements. Similarly, on 10 September 2004, Catlow sent an email to a third party noting the distinction between an MOU (FMG's letter of intent with a Chinese steel mill) and "the binding Framework Agreement we signed with CREC" and attached the documents.

105. In finding an honest and reasonable belief, the judge also relied on the evidence of Heyting and Kirchlechner, two former senior executives of FMG, who were called by ASIC. The only reason for ASIC to call these witnesses was to seek to expose the divergence between

their own views of the agreements in question and those expressed by Forrest and FMG publicly: J[424]. This failed.

106. The judge found that it was FMG's aim to negotiate the scope and general terms for a build and transfer contract for the railway, not an MOU: J[140]-[142]. Heyting, FMG's project manager and the draftsman of the contract, gave evidence that in preparing the draft framework agreement and to improve its enforceability, he wanted the document to record an offer by one party and an acceptance by the other, knowing these to be essential elements of a contract: J[142], [429]. Heyting gave evidence that CREC had made an oral offer to execute the relevant works, and that this was reflected in the recitals: J[143]–[144], [429]. CREC remained anxious "to do" the project according to Heyting: J[146].

107. In numerous correspondence and reports written by Heyting during the period August to November 2004, he referred to one or other of the 3 agreements as BT contracts or the like. The judge's detailed reasons at J[424]-[449] refer to a volume of evidence on this issue

108. Kirchlechner, in cross-examination, agreed that the opening paragraph of FMG's 23 August Media Release, referring to CREC's execution of a binding agreement to build and finance the railway, accorded with his understanding of what had occurred at the joint statement signing ceremony in Beijing: J[427].

109. As the judge discussed at J[463], [464] documents entered into by FMG contemporaneously with the CREC agreement showed a clear understanding of the difference between agreements immediately binding, and agreements to negotiate a later, legally binding agreement.

110. During November 2004, CREC provided its own draft of a fuller agreement, entitled "Build and Transfer Framework Deed". As noted at J[458], CREC proffered recitals stating among other matters, that "A. 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 (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')." This this was powerful evidence that CREC regarded the CREC framework agreement as a binding build and transfer agreement for the railway: J[459].

111. Further, as the judge found, Peter Huston, an experienced lawyer, had become FMG's in-house lawyer in early October 2004 and had been specifically charged by Forrest with the responsibility of overseeing FMG's agreements for enforceability: J[370]-[373], [389]. Huston was involved in preparing the 8 November 2004 letter to the ASX and its earlier draft: J[374], [379], [389]. He also attended a meeting with the ASX in respect of the 5 November 2004 ASX release, and the further release to be made by FMG. The judge's findings that Huston had reviewed the framework agreements and the 5 November 2004 letter, and acted in a manner consistent with the position that the framework agreements were legally enforceable build and transfer contracts, were entirely appropriate.

112. Finally, as noted by the judge at J[153], at no point before the publication in the *AFR* on 24 March 2005 did CREC or any other Chinese entity or person state that the disclosures made by FMG that the framework agreements were legally binding, were in any way inaccurate.

113. As the judge found, the assertion by the Chinese parties reported in the *AFR* article that the framework agreements did not impose on them any legally binding obligations was "a stratagem" and a "blunt commercial tactic" to obtain majority control of FMG: J[52], [775]. It did not represent their true view as to the legal effect of the framework agreements: J[764].

114. Even after the publication in the *AFR*, CREC provided a letter to FMG on 29 June 2005 confirming its intention "to meet the obligation of the existing Build & Transfer Agreement dated 6 August 2004 for FMG Project" and its intention to undertake the design and

engineering works with FMG in July 2005: J[795]. The judge also referred at J[412] to a meeting involving FMG and CMCC on 7 September 2005 where CMCC's chairman insisted that the agreements "were in fact binding".

115. Therefore, the business records of FMG, along with the evidence of the witnesses at trial, fully support the judge's findings that FMG and Forrest held an honest and reasonable believe that the framework agreements contained binding obligations on the Chinese contractors to build, finance and transfer the relevant infrastructure.

116. The Full Court did not consider all of the evidence but referred very selectively to aspects of it. It relied only on three matters in making adverse findings concerning the beliefs of FMG and Forrest, namely, Forrest's 27 October 2004 email: FC[136]; the Advanced Framework Agreements: FC[137]-[152]; and (in the context only of the case against Forrest) his comment at the press conference of 23 August 2004 as to the price of the railway being "confidential, but ... competitive" FC[194]. There was no principled basis on which Gilmour J.'s view on honest and reasonable belief should have been set aside.

117. **Section 674(2).** The Full Court held that once it appeared that FMG's statements contravened s.1041H, FMG, having made misleading statements to the ASX, was obliged by s.674(2) to correct the position: FC[181], [189]. That approach was erroneous. It fails to have regard to the specific elements of s 674(2).

118. Section 674 imposed an obligation on FMG, a listed disclosing entity, to comply with the continuous disclosure obligations contained in the ASX Listing Rules. In particular, s 674(2)(b) imposed an obligation on FMG to notify ASX if it had information that "those provisions" (ie the ASX Listing Rules) required FMG to notify ASX.

119. Listing Rule 3.1 provides that once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of its securities, the entity must immediately tell ASX that information.

120. Listing Rule 19.12 defines "aware" for this purpose. It provides that an entity becomes aware of information if a director or executive officer has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as such a director or officer.

121. The material price sensitive information ASIC which claimed FMG had to disclose was information that the 3 agreements were not enforceable to oblige each of them to build, finance and transfer the infrastructure.

122. The judge found as a fact that ASIC had not proven its case that FMG, through its directors and officers, were aware or ought reasonably have had information that the three agreements were not enforceable to build, finance and transfer the infrastructure: J[465]-[467]. To reach that conclusion, the judge considered the evidence as a whole and in detail, as explained and summarised above.

123. The Full Court did not conduct any close analysis of the judge's findings. Rather, it appears to have inadvertently disregarded the issue of the need to show "awareness" as a step in the conclusion that s 674(2) was contravened.

124. Unlike s 1041H, an extra element needs to be shown under s 674(2). FMG, through its officers, had to actually possess or reasonably should have possessed information that the 3 agreements were not enforceable.

125. The Full Court attempted to reach its conclusion that s 674(2) had been contravened by asserting that FMG did have possession of information about the *contents* of the 3 agreements: FC[185].

126. A person who has information about the contents of a legal document, but with, for example, an incorrect yet reasonable belief about its legal effect, cannot be said to be in possession of information about the true status of the contents of the document. Put another way, if a person knows of the contents of a legal document and reasonably but erroneously believes it has a particular legal effect, the person cannot be said to be "aware" of the materiality of the contents of the legal document unless the person knows or should know that its belief is erroneous.

127. Because FMG, through its officers, reasonably and honestly believed that the framework agreements were enforceable agreements to construct the infrastructure, the fact that they knew of the contents of the framework agreements as well, would not have made the contents material for disclosure. Unless FMG knew or should have known that the 3 agreements did not bind the Chinese entities to construct the infrastructure, the Full Court could not have concluded that FMG was aware of material information, regardless of its awareness of the *contents* of the agreements.

128. Where FMG reasonably believed the 3 agreements were enforceable, based on the judge's positive findings, knowledge by it of the contents of the 3 agreements could not have obliged it to notify ASX of the contents of the 3 documents. FMG was thus not in possession of information to make it aware of the price sensitive nature of the contents when it reasonably believed the documents were enforceable agreements to build the infrastructure.

129. The Full Court erred in concluding that FMG contravened s 674(2) without addressing the issue and incorrectly assuming that FMG was aware that the 3 agreements were unenforceable.

130. As explained above, the conclusions at FC[194] cannot stand because the Full Court failed to address Gilmour J.'s comprehensive analysis of the facts.

PART VII: LEGISLATION

131. Relevant legislation is attached.

PART VIII: ORDERS SOUGHT

132. FMG seeks the following orders:

(1) Appeal allowed with costs.

(2) Set aside orders 1, 2.1, 2.2, 2.4, 3 and 4 of the Full Court of the Federal Court of Australia made on 18 February 2011 and as varied on 20 May 2011 and, in place thereof, order that the appeal to that Court be dismissed with costs.

Dated 27 October 2011

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ANNEXURE A

APPLICABLE STATUTORY PROVISIONS

(A) Relevant provisions as at the relevant point in time

The relevant announcements were made between 23 August 2004 and 28 February 2005. That is the time in question for the purposes of the appeal for all relevant provisions of the *Corporations Act 2001* (Cth) and the ASX Listing Rules. The statutory provisions set out below are still on force, in the form reproduced below, at the date of making these submissions.

(i) *Corporations Act 2001* (Cth)

Chapter 6CA – Continuous disclosure

Chapter 6CA—Continuous disclosure

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)).

675 Continuous disclosure—other disclosing entities

(1) This section applies to:

(a) a listed disclosing entity if:

(i) there is only one listing market in relation to the entity and the listing rules of that market do not contain provisions of a kind referred to in subsection 674(1); or

(ii) there is more than one listing market in relation to the entity and none of those markets have listing rules that

contain provisions of a kind referred to in subsection 674(1); or

(b) an unlisted disclosing entity.

(2) If the disclosing entity becomes aware of information:

(a) that is not generally available; and

(b) 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; and

(c) either:

(i) if those securities are not managed investment products—the information is not required to be included in a supplementary disclosure document or a replacement disclosure document in relation to the entity; or

(ii) if those securities are managed investment products—the information has not been included in a Product Disclosure Statement, a Supplementary Product Disclosure Statement, or a Replacement Product Disclosure Statement, a copy of which has been lodged with ASIC; and

(d) regulations made for the purposes of this paragraph do not provide that disclosure under this section is not required in the circumstances;

the disclosing entity must, as soon as practicable, lodge a document with ASIC containing the information.

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.

Note 4: Subsection (2) has an extended operation in relation to disclosing entities that have made recognised offers of securities under Chapter 8 (see section 1200K).

(2A) A person who is involved in a 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 disclosing entity complied with its obligations under subsection (2); and

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

(3) For the purposes of the application of this section to a disclosing entity that is an undertaking to which interests in a registered scheme relate:

(a) the entity is aware of information if, and only if, the responsible entity is aware of the information; and

(b) the obligation of the entity to lodge a document under subsection (2) is an obligation of the responsible entity.

676 Sections 674 and 675—when information is generally available

(1) This section has effect for the purposes of sections 674 and 675.

(2) Information is generally available if:

(a) it consists of readily observable matter; or

(b) without limiting the generality of paragraph (a), both of the following subparagraphs apply:

(i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information; and

(ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.

(3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:

(a) information referred to in paragraph (2)(a);

(b) information made known as mentioned in subparagraph (2)(b)(i).

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.

678 Application of *Criminal Code* to offences based on subsection 674(2), 674(5) or 675(2)

The *Criminal Code* applies to an offence based on subsection 674(2), 674(5) or 675(2).

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: For the meaning of ***offence based on*** a provision, see the definition in section 9.

Section 1041 H – Misleading or deceptive conduct

(b) known by the person to be dishonest according to the standards of ordinary people.

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 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.

1041I Civil action for loss or damage for contravention of sections 1041E to 1041H

(1) A person who suffers loss or damage by conduct of another person that was engaged in in contravention of section 1041E, 1041F, 1041G or 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

Part 9.4B—Civil consequences of contravening civil penalty provisions

1317DA Definitions

In this Act:

corporation/scheme civil penalty provision means a provision referred to in subsection 1317E(1), other than in paragraphs 1317E(1)(ja) to (jg).

financial services civil penalty provision means a provision referred to in any of paragraphs 1317E(1)(ja) and (jaa) to (jg).

1317E Declarations of contravention

(1) If a Court is satisfied that a person has contravened 1 of the following provisions, it must make a declaration of contravention:

(a) subsections 180(1) and 181(1) and (2), 182(1) and (2), 183(1) and (2) (officers' duties);

(b) subsection 209(2) (related parties rules);

(c) subsections 254L(2), 256D(3), 259F(2) and 260D(2) (share capital transactions);

(d) subsection 344(1) (requirements for financial reports);

(e) subsection 588G(2) (insolvent trading);

(f) subsection 601FC(5) (duties of responsible entity)

(g) subsection 601FD(3) (duties of officers of responsible entity)

(h) subsection 601FE(3) (duties of employees of responsible entity)

(i) subsection 601FG(2) (acquisition of interest in scheme by responsible entity)

(j) subsection 601JD(3) (duties of members)

(jaaa) subsection 601UAA(2) (duties of officers of licensed trustee company);

(jaab) subsection 601UAB(2) (duties of employees of licensed trustee company);

(ja) subsection 674(2), 674(2A), 675(2) or 675(2A) (continuous disclosure);

(jaaa) subsection 798H(1) (complying with market integrity rules);
(jaa) subsection 985E(1) (issuing or increasing limit of margin lending facility without having made assessment etc.);
(jab) subsection 985H(1) (failure to assess a margin lending facility as unsuitable);
(jac) subsection 985J(1) (failure to give assessment to retail client if requested before issue of facility or increase in limit);
(jad) subsection 985J(2) (failure to give assessment to retail client if requested after issue of facility or increase in limit);
(jae) subsection 985J(4) (demanding payment to give assessment to retail client);
(jaf) subsection 985K(1) (issuing or increasing limit of margin lending facility if unsuitable);
(jag) section 985L (making issue of margin lending facility conditional on retail client agreeing to receive communications through agent);
(jah) subsection 985M(1) (failure to notify of margin call where there is no agent);
(jai) subsection 985M(2) (failure to notify of margin call where there is an agent);
(jb) section 1041A (market manipulation);
(jc) subsection 1041B(1) (false trading and market rigging—creating a false or misleading appearance of active trading etc.);
(jd) subsection 1041C(1) (false trading and market rigging—artificially maintaining etc. market price);
(je) section 1041D (dissemination of information about illegal transactions);
(jf) subsection 1043A(1) (insider trading);
(jg) subsection 1043A(2) (insider trading);
(k) subclause 29(6) of Schedule 4.

These provisions are the *civil penalty provisions*.

Note: Once a declaration has been made ASIC can then seek a pecuniary penalty order (section 1317G) or (in the case of a corporation/scheme civil penalty provision) a disqualification order (section 206C).

(2) A declaration of contravention must specify the following:
(a) the Court that made the declaration;
(b) the civil penalty provision that was contravened;

(c) the person who contravened the provision;
(d) the conduct that constituted the contravention;
(e) if the contravention is of a corporation/scheme civil penalty provision—the corporation or registered scheme to which the conduct related.

1317F Declaration of contravention is conclusive evidence

A declaration of contravention is conclusive evidence of the matters referred to in subsection 1317E(2).

Chapter 3

Continuous disclosure

Table of contents

The main headings in this chapter	Rules
Immediate notice of material information	3.1
Exception to rule 3.1	3.1A
False market	3.1B
Notice of specific information	3.2 - 3.19
Compliance with timetable	3.20
Timetable	Appendix 3A
New issue announcement, application for quotation of additional securities and agreement	Appendix 3B
Announcement of buy-back (*except* minimum holding buy-back)	Appendix 3C
Changes relating to buy-back (*except* minimum holding buy-back)	Appendix 3D
Daily share buy-back notice (*except* minimum holding buy-back and selective buy-back)	Appendix 3E
Final share buy-back notice (*except* minimum holding buy-back)	Appendix 3F

Explanatory note

This chapter sets out the continuous disclosure requirements that an entity must satisfy. Continuous disclosure is the timely advising of information to keep the market informed of events and developments as they occur. Information for release to the market must be given to ASX's +company announcements office.

Entities should note chapter 4, which deals with periodic disclosure, and chapter 5, which deals with additional reporting requirements for +mining entities and others. Chapter 15 sets out where the draft and final documents must be lodged.

ASX has issued Guidance Note 8 – Continuous Disclosure: Listing Rule 3.1.

+ See chapter 19 for defined terms.

Immediate notice of material information

General rule

3.1 Once an entity is or becomes +aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's +securities, the entity must immediately tell ASX that information.

Introduced 1/7/96. Origin: Listing Rule 3A(1). Amended 1/7/2000, 1/1/2003.

Note: Section 677 of the Corporations Act defines material effect on price or value. As at 11 March 2002 it said for the purpose 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 securities if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell, the first mentioned securities.

"Information" may include information necessary to prevent or correct a false market, see listing rule 3.1B.

A confidentiality agreement must not prevent an entity from complying with its obligations under the Listing Rules, and in particular its obligation to give ASX information for release to the market where required by the rules.

Examples: The following information would require disclosure if material under this rule:

- a change in the entity's financial forecast or expectation.
- the appointment of a receiver, manager, liquidator or administrator in respect of any loan, trade credit, trade debt, borrowing or securities held by it or any of its child entities.
- a transaction for which the consideration payable or receivable is a significant proportion of the written down value of the entity's consolidated assets. Normally, an amount of 5% or more would be significant, but a smaller amount may be significant in a particular case.
- a change in the control of the responsible entity of a trust.
- a proposed change in the general character or nature of a trust.
- a recommendation or declaration of a dividend or distribution.
- a recommendation or decision that a dividend or distribution will not be declared.
- under subscriptions or over subscriptions to an issue.
- a copy of a document containing market sensitive information that the entity lodges with an overseas stock exchange or other regulator which is available to the public. The copy given to ASX must be in English.
- an agreement or option to acquire an interest in a mining tenement, including the number of tenements, a summary of previous exploration activity and expenditure, where the tenements are situated, the identity of the vendor and the consideration for the tenements. Cross reference: Appendix 5B, which requires this information quarterly, regardless of disclosure because of its materiality.
- information about the beneficial ownership of securities obtained under Part 6C.2 of the Corporations Act.
- giving or receiving a notice of intention to make a takeover.
- an agreement between the entity (or a related party or subsidiary) and a director (or a related party of the director).
- a copy of any financial documents that the entity lodges with an overseas stock exchange or other regulator which is available to the public. The copy given to ASX must be in English.
- a change in accounting policy adopted by the entity.
- any rating applied by a rating agency to an entity, or securities of an entity, and any change to such a rating.
- a proposal to change the entity's auditor.

Cross-reference: Listing rules 3.1A, 3.1B, 5.18, 15.7, 18.7A, 19.2, Guidance Note 8 - Continuous Disclosure: Listing Rule 3.1.

Exception to rule 3.1

3.1A Listing rule 3.1 does not apply to particular information while all of the following are satisfied.

+ See chapter 19 for defined terms.

3.1A.1 A reasonable person would not expect the information to be disclosed.

3.1A.2 The information is confidential and ASX has not formed the view that the information has ceased to be confidential.

3.1A.3 One or more of the following applies.

- It would be a breach of a law to disclose the information.
- The information concerns an incomplete proposal or negotiation.
- The information comprises matters of supposition or is insufficiently definite to warrant disclosure.
- The information is generated for the internal management purposes of the entity.
- The information is a trade secret.

Introduced 1/1/2003.

Note: "Confidential" means confidential as a matter of fact. An entity may give information to third parties in the ordinary course of its business and activities and continue to satisfy rule 3.1A.2, provided the entity retains control over the use and disclosure of the information. Examples include information given to the following:

- the entity's advisers for the purposes of obtaining advice;
- other service providers such as share registries and printers;
- a party with whom the entity is negotiating, for the purposes of the negotiation;
- a regulatory authority or ASX in the course of an application or submission.

ASX would be likely to consider that information has ceased to be confidential if the information, or part of it, becomes known either selectively or generally, whether inadvertently or deliberately. If information becomes known by others in circumstances where the entity does not retain control of its use and disclosure, rule 3.1A.2 is not satisfied, regardless of whether the entity or a third party disclosed the information.

Example: Where there is rumour circulating or media comment about the information and the rumour or comment is reasonably specific, this will generally indicate that confidentiality has been lost.

Cross-reference: Listing rules 3.1, 3.1B, 18.8A; Guidance Note 8 - Continuous Disclosure: Listing Rule 3.1.

False market

3.1B If ASX considers that there is or is likely to be a false market in an entity's +securities and asks the entity to give it information to correct or prevent a false market, the entity must give ASX the information needed to correct or prevent the false market.

Introduced 1/1/2003.

Note: The obligation to give information under this rule arises even if the exception under rule 3.1A applies. ASX would consider that there is or is likely to be a false market in the entity's securities in the following circumstances:

- The entity has information that has not been released to the market, for example because all of the limbs of the exception from listing rule 3.1 in listing rules 3.1A.1, 3.1A.2 and 3.1A3 are satisfied; and
- There is reasonably specific rumour or media comment in relation to the entity that has not been confirmed or clarified by an announcement by the entity to the market; and
- There is evidence that the rumour or comment is having, or ASX forms the view that the rumour or comment is likely to have, an impact on the price of the entity's securities.

ASX may make enquiries of an entity under rule 18.7 to satisfy itself whether there is a false market.

Cross-reference: Listing rules 3.1, 3.1A, 18.7A; Guidance Note 8 - Continuous Disclosure: Listing Rule 3.1.

+ See chapter 19 for defined terms.

Notice of specific information

Entity making a takeover bid

3.2 If an entity, or one of its +child entities, extends the offer period under a takeover bid, the entity must immediately tell ASX the following information.

3.2.1 The percentage of +securities in the bid class in which the bidder and the bidder's associates had a relevant interest when the first of the offers was made.

3.2.2 The percentage of +securities in the bid class in which the bidder and the bidder's associates have a relevant interest at the date of the extension.

Introduced 1/7/96. Origin: Listing Rule 3R(7). Amended 13/3/2000.

Note: At 13/3/2000, section 9 of the Corporations Act says that the bid class of securities for a takeover bid is the class of securities to which the securities being bid for belong.

The relevant interpretation of "associate" for the purposes of this rule is the interpretation in section 12 of the Corporations Act.

Cross reference: Listing rules 17.4, 17.11, 17.14, Section 14 ASTC Settlement Rules.

3.3 If an entity, or one of its +child entities, is making a takeover bid, the entity must tell ASX the following information. It must do so at least half an hour before the commencement of trading on the +business day following the end of the offer period for the takeover bid.

Introduced 1/7/96. Origin: Listing Rule 3R(8). Amended 1/7/97, 13/3/2000.

3.3.1 The percentage of +securities in the bid class in which the bidder and the bidder's associates have a relevant interest.

Introduced 1/7/96. Origin: Listing Rule 3R(8)(a). Amended 13/3/2000.

3.3.2 Whether compulsory acquisition will proceed.

Introduced 1/7/96. Origin: Listing Rule 3R(8)(b).

Note: At 13/3/2000, section 9 of the Corporations Act says that the bid class of securities for a takeover bid is the class of securities to which the securities being bid for belong.

The relevant interpretation of "associate" for the purposes of this rule is the interpretation in section 12 of the Corporations Act.

Cross reference: Listing rules 17.4, 17.11, 17.14, Section 14 ASTC Settlement Rules.

3.4 Within 10 +business days after the end of the offer period for a takeover bid, an entity must give ASX the following information.

3.4.1 If the entity (or one of its +child entities) made the takeover bid and the consideration was +equity securities in the entity, a distribution schedule as set out in rule 4.10.7; and the names of, and percentages held by, the 20 largest holders as set out in rule 4.10.9.

Introduced 1/7/96. Origin: Listing Rule 3R(8A). Amended 1/7/97, 13/3/2000.

+ See chapter 19 for defined terms.

3.4.2 If the entity was subject to the takeover bid and compulsory acquisition will not proceed, a distribution schedule as set out in rule 4.10.7; and the names of, and percentages held by, the 20 largest holders as set out in rule 4.10.9.

Introduced 1/7/96. Origin: Listing Rule 3R(8A). Amended 13/3/2000.

3.5 Introduced 1/7/96. Origin: Listing Rule 3V(11)(a)(ii). Amended 1/7/98. Deleted 1/9/99. Refer rule 3.8A.

3.6 Introduced 1/7/96. Origin: Listing Rule 3V(11)(b). Deleted 1/9/99. Refer rule 3.8A.

3.7 Introduced 1/7/96. Origin: Listing Rule 3V(11)(a)(i). Deleted 1/9/99. Refer rule 3.8A.

3.8 Introduced 1/7/96. Origin: Listing Rules 3V(8)(a), (b). Deleted 1/9/99. Refer rule 3.8A.

Company making a buy-back

3.8A A company must complete the following documents and give them to ASX at the times set out below.

Document	Type of buy-back					When document must be given to ASX
	Minimum holding	Employee share scheme	On-market	Equal access scheme	Selective	
Appendix 3C Announcement of buy-back	—	D_4	D_4	D_4	D_4	In the case of an on-market buy back, immediately the company decides that it wants to buy back shares. Example: On 1 February a company decides that it wants to buy back shares in March. The Appendix 3C must be given to ASX on 1 February. In the case of any other buy-back, immediately the company decides to buy back shares.
Appendix 3D Change relating to buy-back	—	D_4	D_4	D_4	D_4	Immediately any change is made to information the company has given to ASX in Appendix 3C or Appendix 3D.
Appendix 3E Daily notification	—	D_4	D_4	D_4	—	At least half an hour before the commencement of trading on the business day after any day on which shares are bought back.

+ See chapter 19 for defined terms.

Definitions

19.12 The following expressions have the meanings set out below.

Introduced 1/7/96. Origin: Definitions.

Expressions	meanings
aware	an entity becomes aware of information if a director or executive officer (in the case of a trust, a director or executive officer of the responsible entity) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as a director or executive officer of that entity. Introduced 1/7/96. Origin: Listing Rule 3A(1). Amended 1/7/98, 30/9/2001.
bonus issue	a +pro rata issue of +securities to holders of +ordinary securities for which no consideration is payable by them.
business day	Monday to Friday inclusive, except New Year's Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, and any other day that ASX declares is not a business day.
cash formula	*In the case of +ordinary securities,* N = (CP / IPO) x E N = the number of shares or units *not* subject to escrow. CP = the total cash paid for the +ordinary securities that would otherwise be subject to escrow, divided by the number of +securities issued to the +person.

+ See chapter 19 for defined terms.

ANNEXURE B

SCHEDULE 1 – 23 AUGUST 2004 ASX LETTER AND MEDIA RELEASE

Letter

1 FMG entered into a binding contract with CREC to build and finance the railway component of the project. ACCURATE.

2 The contract was a "Build and Transfer" contract covering the railway from FMG's iron ore tenements in the Chichester Ranges to the export hub in Port Hedland. ACCURATE.

3 The contract covered all earthworks, culverts, bridges, rail, sleeper and rolling stock requirements with the exception of locomotives which would continue to be sourced internationally and may form an addition to the contract. ACCURATE.

Media Release

1 The project would cost a total of A $1.85 billion. AN OBVIOUS ESTIMATION, NOT SHOWN TO BE INACCURATE.

2 China's largest construction group, CREC had executed a binding agreement to build and finance the railway component of FMG's project which was a "Build and Transfer" contract. ACCURATE.

3 According to ~~the~~ Forrest, "Build and Transfer" contracts were common in the international engineering and construction industry and under such contracts the contractor designs to customer specifications (AS 9000), builds, commissions and then transfers the facility to the customer once agreed performance specifications have been met, an achievement known as "Practical Completion". NOT SHOWN TO BE WRONG.

4 The contract with CREC underwrote the project's independent rail line from FMG's mine site at its massive Chichester Ranges iron ore deposits in the Pilbara to Port Hedland. ACCURATE. PLAINLY ALSO INVOLVES AN OPINION WHICH MIGHT REASONABLY BE HELD.

5 CREC would also source and finance the bulk of the rolling stock for FMG's project providing the platform for the rapid advance of the project. ACCURATE.

6 The contract covered all earthworks, culverts, bridges, rail, sleeper and rolling stock requirements for the new railway line. ACCURATE.

7 According to Catlow, the contract provided for vital new infrastructure to be built; finalising the contract with CREC paved the way to finance the rest of the project in a plain vanilla manner. ACCURATE.

8 CREC had already commenced discussions in Perth and Beijing with Australian and international engineering and construction groups (operating in Australia) with a view to including minority joint ventures in the contract. ACCURATE.

9 According to Forrest, the contract was the catalyst FMG had been working on to propel the project into real-time construction, project financing and project commencement stages. ACCURATE.

10 Under the terms of the contract, CREC would take full risk under a fixed price agreement on the rail project which FMG proposed to be held separate to FMG in an entity called The Pilbara Infrastructure Pty Ltd ("TPI"). ACCURATE. IT WAS THE FURTHER AGREEMENT CONTEMPLATED BY THE CREC AGREEMENT WHICH WAS SHOWN TO CONTAIN THE FIXED PRICE.

11 According to Forrest, the contract kept FMG's aspirations for first iron ore deliveries in the 2006-2007 financial year "on track". ACCURATE. SEE CLAUSE 4 OF THE CREC AGREEMENT.

SCHEDULE 2 – 23 AUGUST 2004 - PRESS CONFERENCE

1 The build transfer agreement with CREC was analogous in nature to purchasing a car from a manufacturer. THIS WAS AN APPROPRIATE ANALOGY. THE ANSWER BY FORREST SHOULD BE READ IN THE LIGHT OF THE WHOLE OF THE INTERVIEW.

2 FMG and CREC had agreed that FMG would pay for the railway facility once it had been practically completed by CREC and transferred to FMG. ACCURATE. SEE CLAUSE 3 OF THE AGREEMENT.

3 FMG and CREC had entered into a binding agreement by which FMG had agreed to purchase the railway facility once all performance specifications had been met. ACCURATE.

These statements were made in the context of Forrest making additional remarks as follows:

1 "The price of the railway line and rolling stock is confidential but we are pleased to say it is competitive". NOT PLEADED. THE OTHER PARTS OF THE INTERVIEW MADE IT CLEAR THAT AN ACTUAL PRICE HAD NOT YET BEEN ARRIVED AT. THE MECHANISMS OF THE AGREEMENT SUPPORT THE VIEW THAT THE PRICE WOULD BE ONE WHICH WAS "COMPETITIVE".

2 When asked what hurdles still need to be overcome before FMG can actually start construction on the railway line, Forrest responded that FMG was "*completing environmental approvals*" and was "*at an advanced stage on that, expected to have environmental approvals through in the first quarter of the next calendar year, first to second quarter and then that will be the final condition ...*" NOT PLEADED. IN ANY EVENT, ACCURATE.

SCHEDULE 3 – FMG ANNUAL FINANCIAL REPORT – 27 AUGUST 2004

1 FMG had executed a binding Build and Transfer contract with CREC on 19 August 2004 for a significant proportion of the expenditure planned for the railway line between FMG's proposed ship loading facility at Port Hedland and FMG's various proposed mine sites along the Chichester Ranges. ACCURATE.

2 CREC had signed a binding contract with FMG to build and finance the railway component of the project on 19 August 2004. ACCURATE.

SCHEDULE 4 – BUSINESS SUNDAY INTERVIEW – 17 OCTOBER 2004

1 The Chinese had signed a binding agreement to help FMG build a fundamental artery, the railway line. ACCURATE.

2 FMG doesn't pay for the railway line until it's operating to at least 90% of its design specifications. A FAIR STATEMENT OF THE PERCEIVED EFFECT OF CLAUSE 3 OF THE AGREEMENT.

SCHEDULE 5 – FMG ANNUAL REPORT – 25 OCTOBER 2004

1 The Chairman and Chief Executive Officer's message from Forrest stated that "your company has secured a "binding contract" with one of Asia's largest construction groups, the China Railway Engineering Company (CREC) ... This contract is designed to deliver the construction on a "Build and Transfer" basis of our independent rail network held by our subsidiary, the Pilbara Infrastructure "TPI" linking our flagship Chichester Ranges ore bodies in the Pilbara with the export point at Port Hedland." ACCURATE.

2 FMG had signed a Build and Transfer Agreement with CREC referred to as the "CREC Agreement" which provided a financing package for the railway component of the project. ACCURATE.

3 FMG had entered into a binding contract with CREC designed to deliver the construction on a Build and Transfer basis of FMG's independent railway network. ACCURATE.

4 The most important development in infrastructure operations had been the recent signing of a Build and Transfer agreement with China's largest railway construction company, CREC. ACCURATE.

5 The CREC agreement also provides a financing package for the rail component. The agreement with CREC represented a definitive milestone for the financing of the overall project as the bedding down of this facility with its very attractive payment terms, creating flexibility to look at other financing structures for the balance of the project. ACCURATE.

SCHEDULE 6 – FMG QUARTERLY REPORT – 29 OCTOBER 2004

1 A binding "Ddesign and eConstruct aAgreement" had been executed with CREC for the railway between FMG's mine and port. ACCURATE.

2 The "dDesign and eConstruct aAgreement" with CREC was inclusive of a financial package of some $700 million whereby the construction risk is largely held by CREC as FMG was required to pay only 10% of the cost upfront with the balance of 90% due after practical completion had been achieved. ACCURATE. THE REFERENCE TO "$700 million" IS AN OBVIOUS ESTIMATION NOT SHOWN TO BE INACCURATE.

SCHEDULE 7 – 5 NOVEMBER 2004 ASX LETTER AND MEDIA RELEASE

Letter

1 The project would cost A $1.85 billion. OBVIOUS ESTIMATION. NOT SHOWN TO BE INACCURATE.

2 FMG had executed a binding contract with CHEC pursuant to a design, build and finance arrangement for a ship loading and stockyard facility for the project. ACCURATE.

3 FMG had executed a binding contract with CMCC pursuant to a design, build and finance arrangement for a mine processing plant for the project. ACCURATE.

4 FMG had signed a binding agreement with CREC in August 2004 whereby the largest component part of the project, being the railway line from Port Hedland to the proposed mine site in the Chichester Ranges was to be delivered under a design, construct and finance structure substantially in the same form as those signed with CHEC and CMCC. ACCURATE.

5 FMG had now established a broad platform for the delivery of the three major component parts of the project on terms and conditions that took full advantage of the expertise and balance sheet strengths of the contracting parties and this had the effect of placing the majority project risk with the construction party. ACCURATE

6 The payment terms for the 90-% balance of the amount payable by FMG under the contracts with CREC, CHEC and CMCC had been structured on a staged basis effectively providing a finance facility for this substantial portion of the total cost of the project. ACCURATE. SEE CLAUSE 3 OF THE AGREEMENTS.

7 FMG, in return for bank guarantees from CREC, CHEC and CMCC, would fund the initial 10% of the cost of the project. ACCURATE. SEE CLAUSE 3 OF THE AGREEMENTS.

8 The Chinese Government owned CREC, CHEC and CMCC and these companies had committed to design, construct and finance the project. ACCURATE.

Media Release

1 The project would be financed and built by three of the largest state owned companies in China. ACCURATE.

2 The project would cost A $1.85 billion. OBVIOUS ESTIMATION. NOT SHOWN TO BE INACCURATE.

3 Binding contracts had been signed on 5 November 2004 which committed Chinese financing and construction support for the project. ACCURATE.

4 The contracts with CHEC and CMCC followed the binding agreement entered by FMG with CREC in August 2004. ACCURATE.

5 Under FMG's contract with CREC, CREC had committed to the financing, design and construction of the heavy haul open-access rail line and associated rolling stock between the Chichester Rangers and Port Hedland. ACCURATE.

6 Under FMG's contract with CMCC, CMCC would provide the financing, design and construction package for the mine and benefication plant at Christmas Creek. ACCURATE.

7 Under FMG's contract with CHEC, CHEC would provide the financing, design and construction for the large scale works covering the dredging, train unloading, ore stacking, blending and ship loading facilities at FMG's selected export outlet at Anderson Point in Port Hedland. ACCURATE.

8 The three contracts with CREC, CHEC and CMCC form a total project construction and financing solution for the project with three of China's largest construction groups. ACCURATE.

9 The project would be financed and built by three of the largest state owned companies; the construction funding significantly enhanced the economic value of the project by de-risking the developmental phase which was often an issue with greenfields project financing. ACCURATE. THESE OPINIONS WERE OBVIOUSLY OPEN.

10 According to Forrest, the commitments by Chinese interests now covered the financing and construction risk for the total project. ACCURATE. THIS OPINION WAS OBVIOUSLY OPEN.

11 According to Forrest, FMG's approach had been to ensure that construction risk was carried by the Chinese contractors and that project payment by FMG only followed practical completion. ACCURATE.

12 FMG's approach had been to ensure that construction risk was carried by the Chinese contractors and that project payment by FMG only followed practical completion. ACCURATE.

13 The three contracts limited FMG's initial financing requirement to less than 10% of the estimated A $1.85 billion total cost of the project with the balance largely covered by prepayment commitments and that these commitments from customers would provide cost effective finance that would not have an equity dilution effect on existing shareholders of FMG. ACCURATE. THE $1.85b. FIGURE WAS STATED TO BE AN ESTIMATE.

14 The involvement of the Chinese corporations in the financial packaging and construction schedules for three elements of the Project indicated the birth of a new Sino-Australian partnership. ACCURATE.

15 FMG was on target for 2007 start-up as the new Australian source of long-term quality iron ore supply to mills in the Asian region. ACCURATE. SEE CLAUSE 4 OF THE AGREEMENTS.

SCHEDULE 8 – 8 NOVEMBER 2004 ASX LETTER

1 There were further developments to the agreements with CHEC and CMCC which were pursuant to a design, build and finance arrangement for the respective component parts of the Project, namely FMG's Port Hedland ship loading and stockyard facility and FMG's mine processing plant. ACCURATE.

2 CHEC and CMCC had entered Memoranda of Understanding in relation to the project with ThyssenKrupp Engineering (Australia) Pty Ltd, an Australian company whose parent company was a world market leader in the fields of mining, materials handling and processing equipment. ACCURATE.

3 CMCC had entered a Memorandum of Understanding in relation to the project with BGC Contracting Pty Ltd, an Australian company with previous experience in large scale resource and mining projects in northern Western Australia. ACCURATE.

4 The agreements with CREC, CHCC and CMCC contemplated the first stage of work covering design and engineering and would allow for the confirmation of a mutually agreed set price for embodiment into formal construction contracts. ACCURATE.

5 The aggregate capital cost of the assets covered by these agreements was estimated to be A $1.7 billion. AN OBVIOUS ESTIMATE.

6 The payment structure within all three agreements required an initial 10% of the contract price to be paid prior to commencement of work and when paid the contractor would issue FMG with the corresponding bank guarantee for the same amount to be released when 10% of the work was completed. ACCURATE.

7 That the balance of the contract price was payable following practical completion under each agreement and allowed FMG up to three years before final payment was due. ACCURATE.

8 One of the most important features of the CREC, CHCC and CMCC agreements was that the majority risk was placed with the contractors. ACCURATE.

9 CREC, CHEC and CMCC would be working with FMG and the Worley Group within a Definitive Feasibility Study to establish a firm price which would then be incorporated into a fixed price contract with each party. ACCURATE.

10 The three agreements contemplated that the first stage of work covering design and engineering would allow for the confirmation of a mutually agreed set price for embodiment into formal construction contracts. ACCURATE.

11 As advised on Friday, 5 November 2004, the staged payment terms for the balance of the contract price in each contract would allow FMG up to three years before final payment would be due, and would allow FMG the opportunity to refinance its obligation to pay the balance of the contract price under longer term arrangements. ACCURATE.

12 FMG believes that one of the most important features of the CREC, CHCC and CMCC agreements was that the majority risk was placed with the contractors. ACCURATE.

13 The agreements with CREC, CHEC and CMCC and the project achievements over the last few days provided a continuing platform for the advancement of component parts of the project in parallel to ensure that the Definitive Feasibility Study process was finalised within the set time frame. ACCURATE.

14 FMG had agreed to provide a charge or similar style interest to each of CREC, CHEC and CMCC over the amount of JORC defined iron ore resource in the ground as security for the value of the works under the contracts with each of CREC, CHEC and CMCC. ACCURATE.

SCHEDULE 9 – FMG QUARTERLY REPORT – 31 JANUARY 2005

1 Design and construct agreements had been signed with the Government of China's largest harbour and metallurgical construction companies, namely CHEC and CMCC following the agreement signed with CREC. ACCURATE.

2 CREC, CHEC and CMCC were now responsible for the design construction and financing of the key project component parts. ACCURATE.

3 The contracts with CHEC ~~A~~and CMCC were under a design, construct and finance structure in substantially the same form as the contract entered between FMG and CREC in August 2004, by which the largest component of the Project, namely the rail line from Port Hedland to the proposed mine site in the Chichester Ranges, was to be delivered under a design, construct and finance structure. ACCURATE.

4 By entering the contracts with CREC, CHEC and CMCC, FMG had established a broad platform for delivering the three major components of the Project on terms and conditions that took full advantage of the expertise and balance sheet strengths of the contracting parties. ACCURATE.

5 The total cost of the project would be A $1.85 billion. AN OBVIOUS ESTIMATE NOT SHOWN TO BE WRONG.

6 The balance of the contract price would be payable by FMG after practical completion of the work on the rail, port and mine capital items. ACCURATE.

7 The majority of the risk of financing the project would be with CREC, CHEC and CMCC. ACCURATE.

8 FMG had agreed to pay 10% of the value of the rail, port and mine capital items on commencement of work.~~;~~ ACCURATE.

9 The payment terms for the 90% balance of the contract price were structured on a staged basis effectively providing a medium term finance facility. ACCURATE.

SCHEDULE 10 – PRESENTATIONS – 24 NOVEMBER 2004, 10 FEBRUARY 2005, RIU EXPLORERS CONFERENCE 22 FEBRUARY 2005, 'BAG OF RUSTY NAILS' – 28 FEBRUARY 2005

1 CREC, CHEC and CMCC had signed binding "Design, Construct and Finance Contracts". ACCURATE.

2 ThyssenKrupp, Barclay Mowlem and ~~BCG~~ BGC had been appointed as first subcontractors. THIS CONTENTION AS PLEADED APPEARS TO TURN ENTIRELY ON WHETHER THE FRAMEWORK AGREEMENTS WERE BINDING AGREEMENTS: SEE ASC PARAGRAPHS 95, 112, 118, 122.

3 CREC, CHEC and CMCC were to assume 100% completion risk. ACCURATE.

4 The Design, Construct and Finance contracts with CREC, CHEC and CMCC created a total project solution, only excluding locomotives and mining pre-production costs. ACCURATE.

5 Payments under the contracts with CREC, CHEC and CMCC were based on a deferred payment schedule. FMG was only required to make payments to CREC, CHEC and CMCC of most of the contract price well after practical completion and after performance criteria are met. ACCURATE.

6 CMCC would be the source of A$ 306 million, "under agreement". THERE *WAS* AN AGREEMENT. THE NUMBER OF DOLLARS WAS AN OBVIOUS ESTIMATION.

7 CREC would be the source of A$ 630 million, "under agreement". THERE *WAS* AN AGREEMENT. THE NUMBER OF DOLLARS WAS AN OBVIOUS ESTIMATION.

8 CHEC would be the source of $A 571 million, "under agreement". THERE *WAS* AN AGREEMENT. THE NUMBER OF DOLLARS WAS AN OBVIOUS ESTIMATION.