

## Resources and Native Title

January, 07

---

### Fortescue Metals and Access to "Services"

#### Background to Act

Part 111A of the Trade Practices Act (the **Act**) provides for access to certain monopolistic infrastructure such as railway networks. It is based on the idea that efficiency and public interest are best served by overriding the owners exclusive rights. The need for a legislated access regime has come about as a result of the Hilmer Report which anticipated governmental privatisation programs whereby electricity infrastructure, railway lines and airports have all now been sold into private ownership. However the regime extends well beyond these one-time government assets.

#### The Act's Access Regime

A person may make an application for a declaration of a "service" and the National Competition Council (**NCC**) must make a decision whether to recommend the declaration of the "service" or not. It must be satisfied of certain factors including the national significance of the facility which provides the "service" and that access will promote competition in an upstream or downstream market. The effect of a declaration is that third parties can then negotiate rates with the infrastructure owner or seek to have them imposed by arbitration.

The term "service" is defined in the Act as a service provided by means of a facility and specifically includes the use of an infrastructure facility such as a road or railway line. However, "service" does not include the "use of a production process." Neither "facility" nor "production process" are defined in the Act. In general terms from reading the Hilmer Report it seems access was to be provided to such things as pipelines, transmission lines and railways but not to factories, refineries and manufacturing plants.

#### Fortescue Case

BHP as operator of several joint ventures in the Pilbara operates the Goldsworthy railway line and the Mt Newman railway line which cross over each other not far out of Port Hedland. The NCC had previously found that the Goldsworthy line was part of a "production process" and was therefore exempted from the access regime. However the Mt Newman line was subject to it and the NCC recommended to the Minister that it be declared but the Minister made no decision and, under the Act, this amounted to not declaring it.

This Alert is intended as an alert only. It does not purport to be a comprehensive advice. Readers should seek professional advice before acting in relation to these matters.

## Resources and Native Title

January, 07

---

In the most recent proceedings BHP sought a declaration that the Mt Newman line was not a “service”. Fortescue sought a declaration that the Goldsworthy line was a “service”. The small size of Fortescue’s tenements makes building its own railway uneconomic and hence it wants access to part of both lines.

With a railway line being specifically mentioned in the definition as the type of facility the use of which amounts to a “service” and hence open to an access claim, what was there to argue about? BHP argued that its railway lines were part of a “production process” and that therefore they were not capable of being declared a “service”. BHP argued that the railway line should be exempt from Part 111A because it was an integral and essential part of the overall process used to export iron ore.

BHP was supported by the Hammersley Case several years earlier in which a single judge of the Federal Court concluded that the whole method of operation called “batching” including blending at mine, transporting a variety of blends for further stockpiling and blending again at the port for export meant that each step was part of the production process of a marketable commodity including the transport along the railway line. BHP’s overall methods of operation did not vary from those in the Hammersley Case in any significant way.

However the judge in this case refused to follow the Hammersley Case because in his view it was “plainly wrong”. He concluded that looking at the overall way Hammersley conducted its operations diverted attention from the very thing to which access is sought, the railway line and associated infrastructure. The railway line does not make or create anything. The fact it was an integral part of Hammersley’s “batch” system of production does not affect the character of the railway line itself. The facility to which access was being sought did not constitute the “use of a production process”.

### Implications of the Case

Fortescue, if it gains access, may well interfere with BHP’s operations, that is, BHP’s overall production process. However the Part 111A access regime is a two stage process and the fact that the railway line is declared a “service” does not mean that Fortescue automatically gets access. It simply gets Fortescue to the next stage where the Commission can be called upon to determine the terms of access or whether access shall take place at all based on a consideration of all sorts of common-sense factors including the interference to BHP’s operations.

## Resources and Native Title

January, 07

---

The decision has ramifications for other infrastructure such as pipelines of all sorts and electricity transmission lines.

It may be that in future owners of those infrastructure assets who wish to exclude other users may, instead of focussing on the meaning of a “production process” as a means of escaping the definition of “service”, need to focus on matters which might preclude an access determination in relation to a declared “service”, such as:

- does it prevent an existing user obtaining a sufficient amount of the service to meet its actual or reasonably anticipated requirements?
- does it interfere with the safe and reliable operation of the facility?

It is expected that BHP will appeal against the decision to the Full Federal Court.

### **Contacts:**

For further information, please contact:

Jon Gregerson  
8235 7406  
[jon.gregerson@finlaysons.com.au](mailto:jon.gregerson@finlaysons.com.au)

George McKenzie  
8235 7452  
[george.mckenzie@finlaysons.com.au](mailto:george.mckenzie@finlaysons.com.au)

Julia Dnistrianski  
8235 7814  
[julia.dnistrianski@finlaysons.com.au](mailto:julia.dnistrianski@finlaysons.com.au)