CASE NOTE ON *ASIC V FORTESCUE METALS GROUP AND FORREST:* MISLEADING CONDUCT, CONTINUOUS DISCLOSURE AND DIRECTORS' DUTIES

CHLOE DONJERKOVICH*

I INTRODUCTION

The Full Court of the Federal Court's unanimous decision delivered on 18 February 2011 in *Australian Securities and Investments Commission v Fortescue Metals Group Ltd and Andrew Forrest* ('*ASIC v FMG*')[1] is most note-worthy.[2] It provides valuable insights into the court's interpretation of various provisions of the *Corporations Act 2001* (Cth) ('the Act'), pertaining to misleading or deceptive conduct, the continuous disclosure obligations imposed upon a listed disclosing entity and directors' duties of due care and diligence.[3] The case arose from proceedings taken by *Australian Securities and Investments Commission* ('ASIC') against *Fortescue Metals Group Ltd* ('FMG') and Andrew Forrest ('Forrest'), who was at material times FMG's Chairman and Chief Executive Officer.

II FACTUAL BACKGROUND

The case arose from events occurring in 2004-2005, relating to FMG's project for mining and exporting iron ore in Western Australia, known as the 'Pilbara Infrastructure Project' ('the project'). The project was

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* Fourth year LLB/BCom student, University of Notre Dame Australia.

1 (2011) 190 FCR 364.

2 The case attracted considerable media attention not only due to the nature of the proceedings but also owing to the personalities involved. The first defendant, FMG, is a large iron ore mining company in Australia. The second defendant, Andrew Forrest, is a well known West Australian mining magnate, who holds substantial shares in FMG and at material times was the Chairman and Chief Executive Officer of FMG. The plaintiff, ASIC, which initiated the proceedings is the Australian corporate regulator and watchdog.

3 It should however be noted that the High Court has on 29 September 2011, granted FMG and Forrest special leave to appeal the Full Court's decision to the High Court of Australia: *Fortescue Metals Group Ltd v Australian Securities & Investments Commission; Forrest v Australian Securities & Investments Commission* [2011] HCA Transcript 271 (29 September 2011) (French CJ and Heydon J). This forthcoming appeal to the High Court will provide opportunity for further analysis and review of important matters raised in this case, including the ground rules for market disclosure and directors' duties. See also below n 67.

intended to consist of a mine in the Pilbara region, a port at Port Hedland and a railway to connect the mine to the port. Consequent upon FMG and Forrest entering into negotiations in early 2004 with three Chinese companies (collectively 'the Chinese companies'), FMG executed three substantially similar framework agreements with each of these Chinese companies for construction of the project (collectively 'the framework agreements').

Upon entering into the framework agreements, between the period August and November 2004, FMG made a series of announcements to the Australian Stock Exchange ('ASX') and media releases (collectively 'the statements'), in purported compliance with the continuous disclosure requirements of the Act and the ASX Listing Rules. Significantly, the statements represented or were seen as representing that the framework agreements created enforceable obligations for the Chinese companies to build, finance and transfer the infrastructure for the project.[4]

Following the making of the statements, FMG's share price increased from $0.59 to $1.93.[5] In March 2005, the Australian Financial Review newspaper published an article which contained a number of negative assertions about the project, including that the framework agreements did not impose any legally binding obligations upon the Chinese companies. This article attracted widespread interest and media commentary and FMG's share price fell following its publication.[6] A year later, ASIC commenced proceedings against FMG and Forrest, alleging contraventions of various provisions of the Act.

III Case Against FMG And Forrest

In the case against FMG, ASIC alleged that in making statements to the effect that the framework agreements were binding agreements with the Chinese companies to build, finance and transfer the infrastructure for the project, (when according to ASIC these agreements were only at most agreements to agree), FMG engaged in misleading or deceptive conduct and thereby contravened s 1041H of the Act[7] and s 52 of the *Trade Practices Act 1974* (Cth) ('TPA').[8] ASIC also alleged that FMG contravened

4 *ASIC v FMG* (2011) 190 FCR 364, 370 [5].

5 Ibid 370 [7].

6 Ibid 370 [8].

7 Section 1041H (1) of the Act: Misleading or Deceptive Conduct: 'A person must not ... 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'.

8 ASIC relied upon s 52 TPA in order to cover the possibility that it might be held that a particular statement was not made 'in relation to a financial product or a financial service': *ASIC v FMG* (2011) 190 FCR 370, 382 [33].

the continuous disclosure obligation pursuant to s 674(2) of the Act[9] in failing to correct the statements. ASIC sought the following relief against FMG - declarations of contravention of s 1041H and s 674(2) of the Act; a related pecuniary penalty in regards to s 674(2); and a compensation order.

In the case against Forrest personally, ASIC alleged that in having negotiated and authorised or approved the statements made to the ASX, Forrest was 'involved' in FMG's contraventions of s 1041H and s 674(2) of the Act, and thereby contravened s 674(2A).[10] In other words, accessorial liability was alleged against Forrest for FMG's breach of its continuous disclosure obligation. In addition, ASIC alleged that by allowing FMG to contravene s 674(2) of the Act, which exposed FMG to pecuniary penalties, Forrest breached his director's duties of due care and diligence owed to FMG pursuant to s 180(1) of the Act.[11] ASIC sought the following relief against Forrest: declarations of contravention of s 674(2A) and s 180(1) of the Act; related pecuniary penalty in regards to s 674(2A); compensation order; and an order pursuant to s 206C or s 206E of the Act[12] which would disqualify Forrest from managing a corporation.

At the first hearing before a single judge, the Federal Court found in favour of FMG and Forrest, and thereby dismissed ASIC's claim. On appeal, however, the three judges in the Full Federal Court unanimously overturned the trial judge's decision.

IV Decision At First Instance

The trial judge in the Federal Court, Justice Gilmour, rejected ASIC's case against both FMG and Forrest, on 23 December 2009.[13]

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9 Section 674(2) of the Act: Continuous Disclosure – Obligation of entity to provide information to market operator: 'If: a) this subsection applies to a listed disclosing entity; and b) the entity has information that those provisions require the entity to notify 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.'

10 Section 674 (2A) of the Act: 'A person who is involved in a listed disclosing entity's contravention of subsection (2) contravenes this subsection.'

11 Section 180 (1) of the Act: Care and diligence – directors and other officers: 'A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they: a) were a director or officer of a corporation in the corporation's circumstances; and b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.'

12 Section 206(C) of the Act: Court Power of Disqualification – Contravention of Civil Penalty Provision; s 206(E) of the Act: Court Power of Disqualification – Repeated Contraventions of Act.

13 The trial judge's decision is reported in *Australian Securities and Investments Commission v Fortescue Metals Group Ltd [No 5]* [2009] FCA 1586 (Gilmour J).

In holding that FMG did not contravene s 1041H of the Act, the trial judge based his decision upon the finding that the statements were merely expressions or statements of opinion, and not statements of fact and further, that these opinions were honestly held by FMG and Forrest at the time of their making.[14] As a consequence of these findings, the trial judge held that FMG did not have any information which would suggest that the statements were incorrect and FMG was thus not obliged to disclose any such information for the purposes of the continuous disclosure obligation under s 674(2).[15] Accordingly, the trial judge held that FMG also did not contravene s 674(2) of the Act.

As a consequence of ASIC's case against FMG having failed as indicated above, the trial judge found that the case against Forrest for alleged accessorial liability under s 674(2A) pertaining to FMG's purported contravention of the continuous disclosure provisions, and for alleged breach of his director's duties of due care and diligence under s 180(1) must also necessarily fail.[16]

V Decision By Full Federal Court

In its appeal against the trial judge's decision, ASIC argued that the trial judge erred in finding that the statements were mere statements of opinion and in also finding that these opinions were genuinely and reasonably held by FMG and Forrest.[17] ASIC further argued that the trial judge erred in finding that the framework agreements were binding agreements for construction of the infrastructure for the project, when these framework agreements did not contain agreed terms as to its subject matter (ie, the works to be carried out), the price and schedule for the works, and also when these framework agreements provided for further negotiations with a view to agreement of such terms.[18]

In response to ASIC's appeal, FMG argued that even if the statements were properly characterised as statements of fact rather than opinion, they were not misleading or deceptive because the framework agreements were accurately described as agreements to build, finance and transfer the infrastructure for the project.[19] FMG argued further that clause 1.2 of the framework agreements provided a mechanism for the subject matter (ie, the works to be carried out), the price and the schedule of the works

14 Ibid [54], [59], [355], [393]-[394], [686], [903].
15 Ibid [466]-[467].
16 Ibid [56], [68], [468], [884]. See also *ASIC v FMG* (2011) 190 FCR 364, 371, [13], 388-395 [53]-73].
17 *ASIC v FMG* (2011) 190 FCR 364, 371 [15].
18 Ibid.
19 Ibid 399 [93].

to be determined by a third party, in the event that the parties could not reach agreement of these matters under clause 1.1 and that therefore, the framework agreements were sufficiently certain to constitute a binding agreement to build, finance and transfer the infrastructure for the project.[20]

In response to the appeal and in the event that FMG was found to have contravened the Act, Forrest sought to rely on defences provided under the Act, specifically, s 674(2B)[21] which relates to having taken reasonable steps to ensure compliance by FMG of its disclosure obligation, as well as s 180(2)[22] which relates to the 'business judgment rule'.[23]

Upon hearing arguments from both parties, the Full Federal Court unanimously upheld ASIC's appeal and overturned the trial judge's decision. The leading judgment in the Full Court was delivered by Chief Justice Keane, to which Emmett and Finkelstein JJ agreed. The Full Court's consideration and resolution of the issues raised in the appeal are examined below.

A *Whether the Statements were Misleading or Deceptive – s 1041H*

In order to determine if the statements were misleading or deceptive, the Full Court had to consider the following issues: the nature of the statements - whether they were statements of fact or merely opinion; and

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20 Ibid 399 [93], 419 [163], 421 [176]. Clause 1.1 of the framework agreements expressly obliged the parties to 'jointly develop and agree on' a range of matters including the scope of works to be included in the project, their value and the scheduling of these works. Clause 1.2 of the framework agreements expressly obliged the Chinese companies to co-operate with FMG in respect of FMG's undertaking of technical peer review and independent review of the schedule and value of the works.

21 Section 674(2B) of the Act: Due Diligence Defence: '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.'

22 Section 180(2) of the Act: Business judgment rule: 'A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they: a) make the judgment in good faith for a proper purpose; and b) do not have a material personal interest in the subject matter of the judgment; and c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and d) rationally believe that the judgment is in the best interests of the corporation. The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.' See also, s 180(3): 'business judgment': In this section: ***business judgment*** means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

23 *ASIC v FMG* (2011) 190 FCR 364, 400 [98].

the nature and effect of the framework agreements - whether they were legally binding or merely agreements to agree.

1 *Whether the Statements were Facts or Merely Opinion*

Chief Justice Keane pointed out that the issue as to whether the statements should be characterised as statements of opinion or of fact depended upon

> whether an ordinary and reasonable person, being a member of the investing public, would have regarded FMG's statements to the ASX and the public as asserting that the framework agreements obliged the Chinese companies to build, finance or transfer the relevant infrastructure as opposed to assertions of FMG's belief that the framework agreements could be regarded as having that effect.[24]

Keane CJ also referred to general law and observed that 'authority does not support the proposition that a statement about the existence or effect of a term of an agreement must necessarily be understood as a statement of opinion'.[25]

Upon consideration of the facts, Keane CJ reached the conclusion that while some of the statements contained 'assertions of evaluation or judgment'[26] (for example, the likely effect of the framework agreements upon the future of the project), there were statements which indicated that 'binding agreements had been made to build, finance and transfer the infrastructure'[27] and that these statements would have been understood by ordinary and reasonable members of the investing public as conveying facts, rather than opinion.[28]

2 *Nature and Effect of Framework Agreements – Whether Enforceable Obligation (to Build, Finance and Transfer Infrastructure for Project) or Merely Agreement to Agree*

The parties' arguments in the appeal on this issue were summarised as follows:

> ASIC argues that although the framework agreements were binding, so far as they went, they did not evidence a common intention that the Chinese contractors should be immediately bound *to build the infrastructure for the Project*. It is submitted

24 *ASIC v FMG* (2011) 190 FCR 364, 400 [99].
25 Ibid 400 [100].
26 Ibid 407 [117].
27 Ibid.
28 Ibid. According to Keane CJ, the statements 'would have been understood as conveying the historical fact that agreements containing terms accurately summarised in the announcements had been made between the parties'.

> by ASIC that the binding effect of the agreements was limited to an intention to negotiate towards a final agreement. FMG argues that the agreements did bind the Chinese Contractors to build and finance the infrastructure for the Project.[29]

In considering this issue, Keane CJ referred to the following propositions in law - that a 'mere agreement to agree is not legally enforceable;'[30] that the parties' intention to be contractually bound must be assessed objectively;[31] and that 'it is no business of the courts to foist upon the parties a bargain which they have not made',[32] particularly in situations when the parties have not agreed upon the content of essential terms, or have not provided a mechanism to fix the content of essential terms (for example, by third party mechanism), or have not agreed upon application of an objective standard to measure their obligations.[33]

Upon acknowledging that an objective view was required in considering the nature and effect of the framework agreements, Keane CJ stated that whatever may have been the subjective intentions of the parties, the 'crucial question'[34] is whether 'on an objective view of the agreement',[35] the parties made a 'contract to build the infrastructure.'[36] Keane CJ then referred to the fact that under the framework agreements, three essential matters, namely, the works that formed the subject matter of the agreement, the price and the scheduling of these works, were 'explicitly left to be agreed between the parties.'[37] Consequently, Keane CJ reached the conclusion that the express terms of the framework agreements contemplated that 'the parties will seek to reach agreement on these matters.'[38] In the circumstances, Keane CJ held that the framework agreements failed to express a 'common intention that the Chinese contractors were bound to build the infrastructure for the Project.'[39]

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29 Ibid 407 [120] (Keane CJ).
30 Ibid 407 [121].
31 Ibid 409 [126].
32 Ibid 408 [123].
33 Ibid 408 [123].
34 Ibid 409 [126].
35 Ibid 409 [126]. Keane CJ stated further that however compelling the evidence of each side's willingness to enter into a binding contract may be, 'the only operative statement of the content of the agreement which they had actually made is to be found in the text of each of the framework agreements': at 411 [135]. He noted that the conduct of the parties did not suggest that they had agreed upon anything more than what was stated in the framework agreements. He made the further point that if it was thought that the objective approach taken was unduly strict, there was also substantial evidence in support of a subjective approach: at 411 [135].
36 Ibid 409 [126].
37 Ibid 411 [135].
38 Ibid 411 [135].
39 Ibid 411 [130].

In recognising the difficulty posed by the absence of agreement between the parties on essential terms as indicated above, FMG argued that the subject matter of each of the framework agreements was sufficiently described in the Project Feasibility Report ('PFR') and that the issues as to the price and scheduling of the works were intended to be resolved by third party determination under the mechanism in clause 1.2, in the event that the parties failed to reach agreement on these issues through the process contemplated by clause 1.1 of the framework agreements.[40] Thus, the question to be resolved by the court was:

> [W]hether the intention of the parties was to reserve the questions as to subject matter and price to further agreement between them [under clause 1.1], or whether they provided by clause 1.2 ... that these questions should be resolved by a third party should they be unable to reach agreement.[41]

In rejecting FMG's argument, Keane CJ found that clause 1.2 was 'intended to facilitate the process contemplated by clause 1.1 rather than to provide a mechanism for the resolution of a failure in that process'.[42] His Honour also observed that the parties 'would surely have used explicit language'[43] to convey such intention if they had intended to commit the determination of the terms of 'this huge project'[44] to the decision of a third party.

Keane CJ also identified other incidents which emphasised the lack of formation of contract and the preliminary character of the framework agreements, such as, correspondence between FMG and the Chinese contractors which showed that the actual scope of the work to be done was vague,[45] and the fact that there were 'ongoing negotiations about the issue of the extent of Chinese equity'[46] in the project.

Keane CJ proceeded further to consider the issue of whether agreements which contemplated the execution of a further agreement can still be considered to be binding. On this point, Keane CJ applied the analysis of the High Court in *Masters v Cameron*,[47] which identified the following three classes of situations that parties can fall under if they have reached agreement upon contractual terms, but at the same time propose to enter into a formal contract:

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40 Ibid 419 [163]. See above n 20 in relation to clauses 1.1 and 1.2 of the framework agreements.
41 Ibid 408 [125].
42 Ibid 421 [174].
43 Ibid 421 [174].
44 Ibid 421 [174].
45 Ibid 416 [151].
46 Ibid 416 [152].
47 (1954) 91 CLR 353.

(1) Where the parties have reached finality upon all the terms of their bargain and *intend to be immediately bound* to the performance of those terms, but propose to have the terms re-stated in a form which will be fuller or more precise, but *not different in effect*;

(2) Where the parties have *completely agreed upon all the terms* of their bargain and intend no departure from, or addition to, that which their agreed terms express or imply, but nonetheless have made performance of one or more of the terms conditional upon the execution of a formal document; and

(3) Where the intention of the parties is *not to make a concluded bargain* at all, unless and until they execute a formal contract.[48]

Keane CJ acknowledged that the first two classes of agreements were legally binding as there was finality of terms and contractual intention to be bound. In the absence of contractual intention to be bound, the third class of agreement was not intended to have, and consequently does not have, any legally binding effect and was thus only 'an agreement to agree'. Keane CJ further acknowledged that the reasons why parties choose to fall within the third class of agreements, included not only those who desired to reserve a right to withdraw at any time before execution of the formal contract, but also those who having dealt with major matters of their bargain, contemplated that other matters may have to be included or regulated when a formal contract was subsequently entered into.[49]

Having identified and explained the different classes of agreements, Keane CJ held that the framework agreements entered into between FMG and the Chinese companies fell within the third class of agreements, not only because they anticipated the execution of a further agreement, but also because they did not manifest an existing consensus upon the subject matter of the works, its price, nor its schedule for performance.[50] These were essential matters to be agreed upon before an enforceable contract to build and transfer the infrastructure for the project could come into existence.[51]

Having determined that the framework agreements fell within the third class of agreements and were thus not legally binding, Keane CJ stated that it was 'unnecessary to decide whether the framework agreements should be categorised as agreements to agree or simply void for uncertainty'[52] because on 'neither view can they be accurately described as binding agreements to build, finance and transfer the infrastructure for

48 See, *ASIC v FMG* (2011) 190 FCR 364, 400, 418 [160] (emphasis in italics added).
49 Ibid.
50 Ibid 419 [161].
51 Ibid.
52 Ibid 422 [177].

the project.'[53] Thus, it can be said that the framework agreements were at best agreements to agree, and at worst void for uncertainty.[54]

Although Finkelstein J agreed with Keane CJ's decision on this issue, he made some observations concerning the possible application of the obligation of good faith in the context of agreements to agree.[55] According to Finkelstein J, an obligation of good faith could, in certain circumstances, operate to complete the contract but it 'cannot make a fatally incomplete contract valid and enforceable'[56] and in his view this case was 'a good example'.[57] He observed that what made the framework agreements 'fatally incomplete', was the fact that the projects contemplated by the framework agreements were complex multi-million dollar projects, but yet 'almost nothing was agreed about the nature and extent of those projects.'[58] His Honour remarked further that as this was a complex case it would be necessary to impose many additional terms, including implied terms, to make effective an obligation to negotiate in good faith, the result of which would be 'an agreement imposed by the court, not one reached by the consensus of the parties'.[59]

On the above issue, the Full Court concluded that the framework agreements were merely agreements to agree and therefore, they did not legally bind the Chinese companies to build and transfer the infrastructure for the project.

3 *That the Statements were Misleading – Contravention of s 1041H*

Keane CJ observed that the issue as to whether the statements were misleading or deceptive arose under statute and that it was settled that a statement could be misleading or deceptive even where there was 'no intention on the part of the maker to mislead or deceive'.[60] He added that the authorities show that the issue which arises under s 1041H of the Act and s 52 of the TPA is 'what ordinary and reasonable members of the investing public would have understood from FMG's announcements.'[61]

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53 Ibid.

54 See Damian Reichel and John Keeves, *The Fortescue Decision in the Full Federal Court – Misleading Announcements and Continuous Disclosure* (March 2011) Johnson Winter and Slattery Lawyers <http://www.jws.com.au/media/download/Fortescue%20March%202011.pdf>.

55 *ASIC v FMG* (2011) 190 FCR 364, 431 [218].

56 Ibid 432 [225].

57 Ibid 432 [226].

58 Ibid.

59 Ibid 433 [229].

60 Ibid 401 [102]. It should be noted that Keane CJ acknowledged here that it was common ground between the parties that 'the authorities relating to the interpretation of s 52 of the TPA assist an understanding of s 1041H of the Act.'

61 Ibid 403 [106].

The Full Court held that the statements were 'apt to mislead those to whom it [was] published'[62] as they 'convey[ed] unequivocally that the Chinese companies had assumed legally enforceable obligations to build the infrastructure for the [p]roject in terms which include[d] deferred payment by FMG'.[63]

In rejecting the trial judge's approach and findings, Keane CJ pointed out that it would be contrary to the authorities to 'reverse the distribution of risk of loss resulting from error',[64] effected by s 52 of the TPA and s 1041H of the Act by holding that a statement reasonably regarded by those to whom it is addressed as one of fact is not misleading 'merely because it reflects an opinion honestly and reasonably held by the maker of the statement'.[65] Keane CJ added that the trial judge's approach artificially limited the investing public's protection under the Act by giving effect to a distinction not drawn by legislation and also not warranted by the facts in the case at hand.[66]

B *Whether Continuous Disclosure Obligation Breached - s 674(2)*

ASIC formulated its argument in relation to the alleged breaches of the continuous disclosure obligation under s 674(2) of the Act in three ways.[67] Firstly, ASIC argued that FMG failed to disclose the terms of the framework agreements or their legal effect, and that this failure to disclose was likely to influence investors in deciding whether to acquire or dispose of shares in FMG. Secondly, ASIC argued that the content of the statements was incorrect and was also likely to influence investors' decisions. Lastly, ASIC contended that FMG failed to subsequently correct the misstatements and that this failure was also likely to influence investors' decisions.

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62 Ibid 401 [102].

63 Ibid 406 [117].

64 Ibid 406 [115]. Keane CJ indicated earlier that the authorities reveal that s 52 of the TPA and s 1041H of the Act allocate the risk of loss by reason of error in a statement made in certain prescribed circumstances, not to the audience, but to the maker of the statement: at 406 [114].

65 Ibid 406 [115].

66 Ibid 406 [116].

67 See above n 9 on s 674(2) of the Act. In Australia continuous disclosure obligations are imposed by Listing Rule 3.1 of the ASX and Ch 6CA of the Act which provides for statutory enforcement of the said Listing Rule. The continuous disclosure regime aims to promote fairness in the market and prevent distortions in the price of securities. As Finkelstein J put it, 'one of the important objectives of Ch 6CA is to ensure that there is a fully informed and therefore efficient market for listed securities': *ASIC v FMG* (2011) 190 FCR 364, 434 [232]. Under the provisions (subject to certain exceptions), a listed entity is required to disclose immediately any information concerning the entity that a reasonable person would expect to have a material effect on the price or value of the entity's securities. See generally, Merav Bloch, James Weatherhead and Jon Webster, 'The Development and Enforcement of Australia's Continuous Disclosure Regime' (2011) 29 *Company and Securities Law Journal* 253.

Keane CJ put it simply, that 'once the misleading statements had been made by FMG, s 674 required that they be corrected'.[68] His Honour found that such information showing that FMG misled the market about having secured binding contracts for the construction and finance of the project, would have influenced investors in deciding whether to acquire or dispose of FMG's shares.[69] Keane CJ emphasised that publication of corrective information was necessary, not because s 674(2) imposed an obligation to correct information already provided to the ASX, but because such information would, or would be likely, to influence investors in deciding whether to acquire or dispose of shares in FMG.[70] His Honour also pointed out that it was not necessary for the statements to have had a 'material positive effect on the price of shares in FMG'[71] for corrective disclosure to be required. Regard was given to the fact that the 'likely influence test' provided by s 677 of the Act is 'not a high threshold.'[72] As such, there was no requirement to inquire as to whether or not FMG's share price had in fact been significantly affected by the misleading statements.[73] Keane CJ made clear that '[w]hat happened in the market, in terms of movements in share price, *may* assist the Court in applying the "likely influence test"'[74] but that it was by no means necessary.

C *Argument that No Loss Suffered by Investors*

Chief Justice Keane reflected that it was 'a curiosity of this case'[75] that there was no evidence that any member of the investing public was misled by, or suffered loss as a result of FMG's contraventions of the Act

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68 *ASIC v FMG* (2011) 190 FCR 364, 422 [181]. Keane CJ stated that it was unnecessary for the court to resolve the other questions raised by the parties' arguments in relation to s 674 once it was decided that misleading statements had been made by FMG and that s 674 required that the statements be corrected.

69 Ibid 424 [184]. Keane CJ also observed that it can be 'fanciful' to suggest otherwise: at 425 [189]. He added that the misleading statements were apt to create an understanding on the part of common investors that FMG had secured the construction of the infrastructure for the project on terms as to deferred payment and that therefore there could be no suggestion that the corrective information which FMG was obliged to provide was not material under s 677 of the Act: at 425 [189].

70 Ibid.

71 Ibid 423-4 [183].

72 Ibid 424 [188]. Section 677 of the Act: Material Effect on Price: '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.'

73 See also, Brown, Kailee, Beau Deleuil and Danielle Eaton, *ASIC v FMG: Important Clarity on Continuous Disclosure Obligations* (8 March 2011) Mallesons Stephen Jaques <http://www.mallesons.com/MarketInsights/marketAlerts/2011/@ASIC_v_FMG/Pages/default.aspx>

74 *ASIC v FMG* (2011) 190 FCR 364, 425 [188] (emphasis in italics added).

75 Ibid 427 [201].

and that this prompted questioning as to ASIC's decision to prosecute the case. In a similar vein, Emmett J observed that 'the vigour with which the Commission has prosecuted the proceedings against Fortescue is curious.'[76] However, both judges acknowledged that it was not for the court to 'call into question the exercise of ASIC's discretion to determine which cases it should pursue in the discharge of its regulatory functions.'[77]

Finkelstein J, on the other hand, took the view that it was proper for ASIC to have instituted this action as it would otherwise have been 'subject to just criticism'.[78] He reasoned that the continuous disclosure obligations could be 'sidestepped' by a corporation if its share prices continued to rise after it had misled investors and that this was 'not what Parliament had in mind.[79] Finkelstein J, however, went further to outline the fluctuations in share price and the number of shares traded in FMG during the relevant period and made the observation that it was likely that investors had lost substantial sums of money during the period in question, notwithstanding that there was no evidence of any complaint from investors.[80]

It is apparent from the Full Court's decision that there is no requirement that loss be suffered by investors. This concept is relative to actionable wrongs, where as long as the elements of the wrong under law are made out, there is no requirement to prove damage for compensation to be awarded. There have been concerns voiced by commentators in regard to this. Whilst Forrest has been particularly vocal in his criticism of ASIC's decision to spend 'tens of millions of dollars' pursuing a case where 'no investors lost money'[81] and others have also been sceptical of ASIC's decision to prosecute,[82] the Full Court's decision on this aspect should, however, be accepted as an important step in the right direction towards

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76 Ibid 431 [217].

77 Ibid 427 [201], [217].

78 Ibid 435 [235]. In defending ASIC's decision to prosecute FMG, ASIC's chairman, Tony D'Aloisio said that 'we cannot run law on the basis that if shareholders do not lose, we will not take action': Minsi Chung, *Has ASIC Finally Caught its FMG Quarry?* (25 February 2011) ABC News <http://www.abc.net.au/news/stories/2011/02/25/3149281.htm>.

79 *ASIC v FMG* (2011) 190 FCR 364, 435 [233].

80 Ibid 433-434 [231]-[232].

81 See, ABC, *Fortescue Metals Launches High Court Appeal* (21 February 2011) PM with Mark Colvin <http://www.abc.net.au/pm/content/2011/s3144726.htm>.

82 See, Merav Bloch, James Weatherhead and Jon Webster, 'The Development and Enforcement of Australia's Continuous Disclosure Regime' (2011) 29 *Company and Securities Law Journal* 253, 268, which stated that the' most controversial aspect' of the case was ASIC's decision to bring the action; The Australian, *Andrew Forrest to Fight 'Mean, Vengeful' ASIC in High Court* (21 February 2011) Business <http://www.theaustralian.com.au/business/mining-energy/fortescue-metals-to-appeal-asics-federal-court-ruling/story-e6frg9df-1226009416237>.

protecting the investing public's interests.

D *Case Against Forrest and Defences Relied Upon*

1 *Case Against Forrest for Involvement in FMG's Contravention of Continuous Disclosure Obligation and Forrest's Defence under s 674(2B) that Reasonable Steps were taken to ensure FMG's Compliance*

Accessorial liability under s 674(2A) of the Act was alleged against Forrest for FMG's breach of its continuous disclosure obligation. In having negotiated and authorised or approved the statements made to the ASX, Forrest was alleged to have been 'involved' in FMG's contraventions of s 1041H and s 674(2) and thereby contravened s 674(2A).

Forrest sought to rely on the defence under s 674(2B) of the Act.[83] This defence is open to persons charged with being involved in a listed disclosing entity's contravention of its continuous disclosure obligations. To establish this defence, Forrest was required to demonstrate that he had taken all steps which were reasonable in the circumstances to ensure that FMG complied with its disclosure obligations.

ASIC contended that Forrest was not entitled to rely upon s 674(2B) as a defence, given that there was no evidence that Forrest sought, obtained or acted upon legal advice before authorising the statements made to the ASX.[84] Keane CJ made the following pertinent remarks in relation to the above case against Forrest:

> Forrest's knowing participation in the relevant events leading to FMG's contravention of s 1041H of the Act established that Forrest was involved in FMG's contravention of s 1041H within the meaning of s 79(c) of the Act. Forrest knew of the terms of the framework agreements; and it can reasonably be inferred that he knew of the disparity of these terms and FMG's representations about them. He was also a person involved in FMG's contravention of s 674(2)(c) of the Act by virtue of s 674(2A). Accordingly, he contravened s 674(2A) unless he established the defence under s 674(2B) of the Act.[85]

Keane CJ found that Forrest was 'unable to point to any steps he took to ensure that the framework agreements were, in law, binding agreements to the effect represented by FMG.'[86] His Honour also noted that ASIC was able to show that Forrest's own communications were inconsistent with a belief on his part that FMG had made a legally binding agreement for construction of the infrastructure for the project.[87] In regards to Forrest's

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83 See above n 21 on s 674(2B).
84 *ASIC v FMG and Forrest* (2011) 190 FCR 364, 385 [46].
85 Ibid 425 [191].
86 Ibid 426 [193].
87 bid 426 [194].

reliance upon the defence under s 674(2B) of the Act, Keane CJ came to the conclusion that Forrest failed to discharge the onus imposed upon him under the said provision.[88]

2 *Case Against Forrest for Breach of Directors' Duties and Forrest's Defence under s 180(2) relating to the Business Judgment Rule*

ASIC also alleged that by allowing FMG to contravene s 674(2), which exposed FMG to pecuniary penalties, Forrest breached his director's duties of due care and diligence owed to FMG pursuant to s 180(1) of the Act. In response to this, Forrest sought to rely upon the defence under s 180(2) known as the 'business judgment rule'.[89]

To satisfy this defence Forrest was required to prove that he made a judgment in good faith and for a proper purpose and also that he did not have a material personal interest in the subject matter of the judgment.[90] As Forrest held shareholdings in FMG he would therefore have to show that this shareholding was not a material personal interest in the subject matter of that judgment.

Keane CJ made a number of pertinent observations here.[91] Firstly, that the absence of evidence from Forrest made it difficult for him to discharge his onus of proving his defence. Secondly, a decision not to disclose the true effect of the framework agreements could not be described as a 'business judgment'. Thirdly, a decision not to make accurate disclosure of the terms of a major contract could also not be accepted as falling within the 'business operations' of a corporation, in view that s 180(3) defines 'business judgment' to mean a judgment to 'take or not take action in respect of a matter relevant to the business operations of the corporation.' Fourthly, such a decision which would be regarded as non-compliance of the Act, should not be construed as affording a ground of exculpation.

In the circumstances, Keane CJ concluded that ASIC's charge of a contravention of s 180 was made out and that Forrest failed to make out his defence under s 180(2) of the Act.

88 Ibid 426 [195]. Keane CJ stated that he was 'unable to accept that Forrest discharged the onus he bore under s 674(2B) of the Act.'

89 See above n 22 on s 180(2) of the Act.

90 *ASIC v FMG* (2011) 190 FCR 364, 427 [197].

91 Ibid 427 [197-199].

VI Conclusion

Subsequent to the Full Court's decision, FMG and Forrest sought leave to appeal and on 29 September 2011, the High Court granted special leave for them to appeal the Full Court's decision to the High Court.[92] The forthcoming appeal to the High Court will provide opportunity for further analysis and review of important matters raised in this case, including the ground rules for market disclosure and directors' duties. It has been commented that it would be helpful to have the High Court's views 'given that the High Court is yet to consider the continuous disclosure provisions of the corporations legislation, despite them being first introduced in 1994'.[93] It should be noted that both FMG and Forrest have a lot at stake resting upon the outcome of their appeal. It is possible for Forrest to be banned from acting as a company director under s 206C or s 206E of the Act, and he could also be liable for a personal fine of up to $4.4 million.[94] Additionally, FMG could be fined up to $6 million.[95] As it currently stands, the Full Court's decision demonstrates that corporations will not be immune from prosecution merely because it has not been shown that shareholders suffered loss. It is also clear that ASIC is taking continuous disclosure obligations under the Act seriously; accordingly, companies and their officers should ensure that they do the same, to avoid contraventions of the Act and any associated penalties.

92 *Fortescue Metals Group Ltd v Australian Securities & Investments Commission; Forrest v Australian Securities & Investments Commission* [2011] HCA Transcript 271 (29 September 2011) (French CJ and Heydon J).

93 Damian Reichel and John Keeves, *The Fortescue Decision in the Full Federal Court – Misleading Announcements and Continuous Disclosure* (March 2011) Johnson Winter and Slattery Lawyers <http://www.jws.com.au/media/download/Fortescue%20March%202011.pdf>.

94 See, Minsi Chung, *Has ASIC Finally Caught its FMG Quarry?* (25 February 2011) ABC News <http://www.abc.net.au/news/stories/2011/02/25/3149281.htm>.

95 Ibid.