

ALERT

18 OCTOBER 2012

High Court rules in favour of Fortescue Metals Group Ltd and Andrew Forrest

Background

In March 2006, ASIC commenced proceedings in the Federal Court of Australia against Fortescue Metals Group Ltd (Fortescue) and Andrew Forrest (chairman, CEO and substantial shareholder of Fortescue: Forrest), impugning Fortescue's announcements to the media and the broader market regarding a series of 'Framework Agreements' between Fortescue and three state-owned Chinese corporations (Announcements).

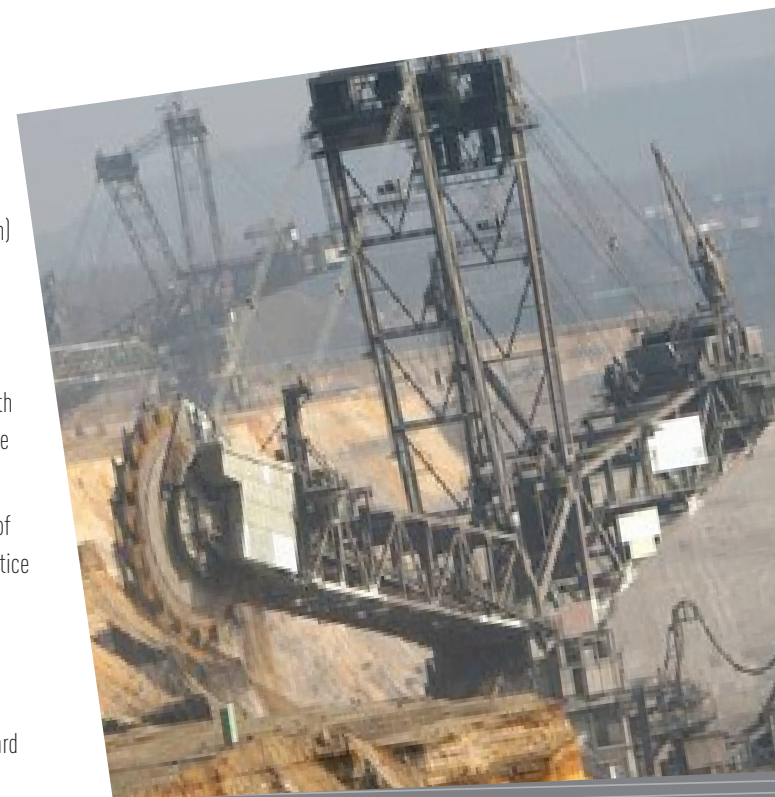
The Framework Agreements concerned building and financing services that were to be provided in connection with Fortescue's Pilbara Iron Ore and Infrastructure Project. The Announcements described each of the Framework Agreements as constituting a 'binding contract'. However, the terms of the agreements lacked certainty and were therefore unlikely to be legally enforceable. At trial, Justice Gilmour dismissed ASIC's claims but on appeal to the Full Court of the Federal Court, ASIC was successful in obtaining orders that:

- Fortescue engaged in misleading or deceptive conduct in contravention of section 1041H of the Corporations Act 2001 (Cth) (Act);
- Fortescue had breached the continuous disclosure requirements contained in section 674 of the Act; and
- Forrest failed to exercise his powers and discharge his duties with reasonable care and diligence, and infringed section 180(1) of the Act.

Fortescue and Forrest appealed against the decision of the Full Court of the Federal Court and sought reinstatement of the orders made by Justice Gilmour at first instance.

The High Court decision

The issues that were live on appeal were further narrowed by the High Court's summary dismissal of ASIC's contention that Fortescue, its Board



and Forrest had acted dishonestly in making the Announcements. The court focused its inquiry on whether Fortescue's use of the term 'binding contract' in the Announcements was misleading or deceptive or likely to mislead or deceive. The court conducted a close analysis of the meaning of the term 'binding contract' as understood with reference to the intended audience. The intended audience was defined as 'investors ... and, perhaps some wider section of the commercial or business community'.

The court held that, notwithstanding the literal meaning of the term 'binding contract', the term did not necessarily convey that an agreement would be legally enforceable. Their Honours stated that a person should not, in certain circumstances, be required to assess the validity of the contract (ie valid formation) or whether it would be 'practicable to force performance' (according to the enforcement measures of the governing jurisdiction) prior to making a statement to the public that a contract

was 'binding'. Consistent with the fact-dependent nature of claims concerning misleading or deceptive conduct, the court's approach relied upon the following two key issues of fact:

- (a) the Announcements accurately summarised the content of the Framework Agreements; and
- (b) the Announcements conveyed that the parties had intended each of the Framework Agreements to constitute a 'binding contract'. Its debts;

The court also relied on its finding in respect of a preliminary issue: whether or not the intended audience would have reasonably believed that any disagreement between the parties would be determined in accordance with Australian law. The court rejected ASIC's submission that the term 'binding contract' implied that the Framework Agreements would be governed by the laws of Australia. The contracts involved foreign state-owned entities, were executed in China and did not contain a 'choice of forum' clause. Their Honours stated at [45]:

'[t]he intended audience for the impugned statements would have recognised from the very content of the statements that the agreements to which they referred had important international features'.

ASIC also contended that Forrest's attempts to alter the terms of the Framework Agreements indicated that the agreements were not intended to be binding. The court rejected this argument and held that post-contractual negotiations did not amount to a repudiation of a prior agreement and it was legitimate commercial conduct to continue to attempt to 'strike a better bargain'.

The High Court upheld the appeal and found that Fortescue had not

engaged in misleading or deceptive conduct in contravention of section 1041 of the Act. The claims that Fortescue and Forrest had breached section 674 (continuous disclosure) and section 180(1) (directors duties) of the Act respectively, were contingent on a breach of section 1041 of the Act and were dismissed accordingly.

Implications

The court was critical of ASIC's pleadings and stated that allegations regarding an absence of a 'genuine or reasonable basis for the belief' did not establish any of the necessary elements of a claim of misleading or deceptive conduct and should be pleaded in separate and concurrent claims in tort (ie deceit and negligent misrepresentation).

While the court emphasised the limited transferability of the principles relied upon in the present matter (given the broad and arguably imprecise nature of statutory misleading or deceptive conduct provisions), companies that release information to the media or the ASX should be mindful that:

- the term 'binding contract' may be misleading or deceptive if used to describe an unenforceable agreement in a communication with an intended audience who is 'unsophisticated' with regard to matters concerning business and financial investment;
- terms with a specific legal or technical meaning may be misleading or deceptive depending on the imputed knowledge and characteristics of the intended audience; and
- announcements that contain the term 'binding contract' must accurately summarise the terms of the relevant agreement(s) and should be supported by evidence that the parties intended the agreement(s) to be binding.



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The ASX issued a 'Review of ASX Listing Rules Guidance Note 8', which deals with continuous disclosure obligations, for public consultation on 17 October 2012. In its review the ASX noted the recent decisions concerning James Hardie and Fortescue Metals Group. The contents of the revised Guidance Note and an outline of the proposed amendments to ASX Listing Rules 3.1-3.1B will be the subject of an additional alert.

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