SUPREME COURT OF QUEENSLAND

CITATION:	*Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd & Ors* [2019] QSC 163
PARTIES:	**AURIZON NETWORK PTY LTD ACN 132 181 116** (Plaintiff) **v** **GLENCORE COAL QUEENSLAND PTY LIMITED ACN 098 156 702** (First Defendant) AND **CALEDON COAL PTY LIMITED ACN 120 967 839 (IN LIQ)** (Second Defendant) AND **YARRABEE COAL COMPANY PTY LTD ACN 010 849 402** (Third Defendant) AND **WESFARMERS CURRAGH PTY LTD ACN 009 362 565** (Fourth Defendant) AND **WASHPOOL COAL PTY LTD ACN 139 976 819** (Fifth Defendant) AND **COLTON COAL PTY LTD ACN 140 768 636** (Sixth Defendant)
FILE NO/S:	BS No 2880 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial - Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	10, 11, 12, 13, 14, 17, 18 and 19 September 2018

JUDGE: Jackson J

ORDER: **The order of the court is that:**

1. **It is declared that each of the notices given by the defendants under clause 6.1(c) of the contracts made between the plaintiff and the defendants styled the "Wiggins Island Project Deed (2011)" is invalid and of no operative contractual effect.**
2. **The defendants' counterclaims are dismissed.**
3. **The parties are directed to provide submissions in writing on the question of costs within 21 days.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – CUSTOM AND USAGE – INCORPORATION INTO CONTRACT – CONSISTENCY WITH EXPRESS TERMS – where ordinary meaning of text is clear - where defendants submit that legal meaning of text cannot be affected by extrinsic facts - whether the ambiguity requirement is a gateway that must be passed through before admission of evidence of extrinsic facts in every dispute relating to the construction of a contractual term in a formal written contract – whether ambiguity gateway does not apply where something has clearly gone wrong with the text on its ordinary meaning.

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – CUSTOM AND USAGE – INCORPORATION INTO CONTRACT – CONSISTENCY WITH EXPRESS TERMS – where ordinary meaning of text is clear - where defendants submit that legal meaning of text cannot be affected by surprising operation or commercial inconvenience or disadvantage to the plaintiff - whether the operation of the text on its ordinary meaning amounts to a commercial absurdity – whether the court may depart from ordinary meaning in order to avoid a commercial absurdity – whether the construction contended for is sufficiently clear

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where ordinary meaning of text is clear - where defendants submit that term cannot be implied because of failure to satisfy requirements for implication of a term implied in fact – whether the implied term contended for is sufficiently clear

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where each defendant notified the plaintiff and each Other Customer under cl 6.1(c) of the WIRP Deed that every relevant Customer's Segment for the defendant was to cease being a Customer's Segment – where notice had effect of

reducing each defendants' liability to pay the WIRP Fee to nil – where notice had effect of shifting the burden of the WIRP Fee for the Customer's Proportion for the Segment onto any remaining Segment Customer for the Segment – whether there is an implied term in the WIRP Deed that a Customer is obliged to act in good faith towards and deal fairly with the plaintiff in respect of giving notice under cl 6.1(c).

The Queensland Competition Authority Act 1997 (Qld), s 84, s 100, s 101, s 133, s 136, s 158, s 250.

Adams v Lambert (2006) 228 CLR 409, cited
Agricultural & Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570, cited

Air New Zealand Ltd v Nippon Credit Bank Ltd [1997] 1 NZLR 218, cited

Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349, cited

Allgood v Blake (1873) 8 Ex 160, cited
Amcor Ltd v Construction, Forestry, Mining and Energy Union (2005) 222 CLR 241, cited
AMP v 400 St Kilda Rd [1991] 2 VR 417, cited

Apple and Pear Australia Ltd v Pink Lady America LLC (2016) 343 ALR 112, cited

Australian Broadcasting Corporation v Australasian Performing Rights Association Ltd (1973) 129 CLR 99, cited
Bank of New Zealand v Simpson [1900] A.C. 18, cited
Bartlett v Australia & New Zealand Banking Group Ltd (2016) 92 NSWLR 639, cited

Bayside Council v Corp Constructions Pty Ltd [2017] NSWCA 120, cited
Boyes v Cook (1880) 14 ChD 53, cited
Burger King Corporation v Hungry Jack's Pty Ltd (2001) 69 NSWLR 558, cited

Burns Philp Hardware Ltd v Howard Chia Pty Ltd (1987) 8 NSWLR 642, cited

Byrnes v Kendle (2008) 243 CLR 253, cited
Cherry v Steele-Park (2017) 96 NSWLR 548, cited

Coast Corp Pacific Pty Ltd v Stockland Development Pty Ltd [2018]

QSC 305, cited

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337, cited
Commonwealth Bank of Australia v Barker (2014) 253 CLR 169, cited

Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297, cited
Cushman & Wakefield (NSW) Pty Ltd v Farrell [2017] NSWCA 24, cited

Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd (2016) 261 CLR 544, cited

Electricity Generation Corp v Woodside Energy Ltd (2014) 251 CLR 640, cited

Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL [2005] VSCA 228, cited

Farrelly v Phillips (2017) 128 SASR 502, cited
Fitzgerald v Masters (1956) 95 CLR 420, cited
Franklins Pty Ltd v Metcash Trading Ltd (2009) 76 NSWLR 603, cited

Gemmell Power Farming Co Ltd v Nies (1935) 35 SR (NSW), 469,

Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd (1972) 128 CLR 529, cited

Goss v Lord Nugent (1833) 5 B & D 57; 110 ER 713, cited
Grant v Grant (1861) 5 CP 727, cited
Grey v Pearson (1859) 6 HLC 61, 106; 10 ER 1216, cited
Hart v MacDonald (1910) 10 CLR 417, cited

Helicopter Sales (Aust) Pty Ltd v Rotor-Work Pty Ltd (1974) 132 CLR 1, cited

Horsfall v Braye (1908) 7 CLR 629, cited
Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151, cited

Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church (Archdiocese of Sydney) (1993) 31 NSWLR 91, cited

Inglis v John Buttery & Co (1878) 3 App Cas 552, cited
International Air Transport Association v Ansett Australia Holdings Ltd (2008) 234 CLR 151, cited
Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd [2006] QCA 126, cited

Jackson v Swift Australian Company Pty Ltd [1968] 1 Qd R 1, cited

Jireh International Pty Ltd v Western Exports Services Inc [2011] NSWCA 137, cited

John v Price Waterhouse [2002] EWCA Civ 899, cited

LG Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235, cited

Mainteck Services Pty Ltd v Stein Heurtey SA (2014) 89 NSWLR 633, cited

Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd (2015) 237 FCR 534, cited

McGrath v Sturesteps (2011) 81 NSWLR 690, cited

McVeigh v National Australia Bank Ltd (2000) 278 ALR 429, cited

Meehan v Jones (1982) 149 CLR 571, cited

Mills v Mills (1938) 60 CLR 150, cited

Miwa Pty Ltd v Siantan Properties Pte Ltd [2011] NSWCA 297, cited

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd & Anor (2015) 256 CLR 104, cited

Netglory Pty Ltd v Caratti [2013] WASC 364, cited

Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451, cited

Paciocco v ANZ Banking Group Ltd (2015) 236 FCR 199, cited

Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537, cited

Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council [2010] NSWCA 64, cited

Pierce Bell Sales Pty Ltd v Frazer (1973) 130 CLR 575, cited

Pink Floyd Music Ltd v EMI Records Ltd [2010] EWCA Civ 1429, cited

Platinum United II Pty Ltd v Secured Mortgage Management Ltd (in liq) [2011] QCA 162, cited

PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service (1995) 184 CLR 301, cited

Prenn v Simmonds [1971] 1 WLR 1381, cited

Purves v Smith [1944] ALR 269, cited

Queensland Power Co Ltd v Downer Edi Mining Pty Ltd [2010] 1 Qd R 180, cited

Reardon Smith v Hansen-Tangen [1976] 1 WLR 989, cited

Reliance Rail Pty Ltd v Permanent Custodians Ltd (2017) 122

ACSR 317, cited

Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234, cited

Retirement Services Australia (RSA) Pty Ltd v 3143 Victoria St Doncaster Pty Ltd (2012) 37 VR 486, cited

Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 240 CLR 45, cited

Schwartz v Hadid [2013] NSWCA 89, cited

Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596, cited

Service Station Association Ltd v Berg Bennett & Associates Pty Ltd (1993) 45 FCR 84, cited

Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq) [2019] NSWCA 11, cited
Specialist Diagnostic Services Pty Ltd v Healthscope Ltd (2012) 41 VR 1, cited

Stratton Finance Pty Ltd v Webb (2014) 314 ALR 166, cited

Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd (2014) 48 WAR 261, cited

The Eastern Extension Australasia and China Telegraph Co Ltd v Commonwealth (1908) 6 CLR 647, cited
The River Wear Commissioners v Adamson (1877) 2 App Cas 743, cited
Toll (FGCT)Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165, cited
Tredegar v Harwood [1929] AC 72, cited

Trump International Golf Club Scotland Ltd v Scottish Ministers [2015] UKSC 74, cited
United Group Rail Services Ltd v Rail Corporation New South Wales (2009) 74 NSWLR 618, cited

COUNSEL: D Clothier QC, M Lyons and E Doyle-Markwick for the Plaintiff
J McKenna QC, S Cooper and S Hooper for the First Defendant
D Turner for the Second Defendant
D O'Sullivan QC, J O'Regan and A Stumer for the Third to Sixth Defendants

SOLICITORS: Quinn Emanuel Urquhart & Sullivan for the Plaintiff
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Clayton Utz for the Second Defendant

Norton Rose Fulbright for the Third to Sixth Defendants

JACKSON J:

[1] The questions in dispute in this proceeding concern the operation of six contracts made between the plaintiff on the one part and one of the defendants on the other part, each styled the "Wiggins Island Rail Project Deed (2011)" ("WIRP Deed"). In total, there were eight such contracts, all based on a standard form, although it will be necessary to explain some differences among the rights and obligations as between the plaintiff and individual defendants. The other two WIRP Deeds were entered into between the plaintiff on the one part and Cockatoo Coal Pty Ltd ("Cockatoo") and Springsure Creek Coal Pty Ltd ("Springsure"). Under each of the WIRP Deeds, the plaintiff is styled "QR Network" and the other party is styled "Customer".

[2] The plaintiff seeks to establish the liability of each defendant for amounts payable under the WIRP Deed month by month for what is termed the "WIRP Fee". The dispute arises because each defendant gave notice to the plaintiff under a provision of their WIRP Deed that, if valid, would have the effect of reducing that defendant's liability to pay the WIRP Fee to nil. The plaintiff contends that none of the defendants was entitled to give the notice.

[3] The underlying subject matter of the WIRP Deeds was the funding and construction by the plaintiff of works to upgrade the capacity of the plaintiff's rail infrastructure network for the transport of coal from the mines of the defendants to a new coal ship loading terminal, named the Wiggins Island Coal Export Terminal ("WICET"). For practical purposes, "capacity" of the rail network is measured by reference to a number of train services for a standard coal train of 8,210 tonnes of coal for a designated route over a designated time period.

[4] Overall, it was intended to increase that capacity to provide for an increase in train services to carry 27 million tonnes of coal per annum from the Customers' mines to WICET. The anticipated expenditure for the necessary works was estimated at $905M. The expected timeframe for completion of the works was approximately four years. However, each Customer's use of the increase in capacity was not expected to be equal, for two reasons.

[5] First, not all Customers would access or use all parts of the required works for the overall upgrade, termed the "Extension". That access or use depended, to varying extents, on the location of the Customer's mine or proposed mine. Two examples will illustrate the point. All of the Customers intended to ship coal through WICET. Every shipper through WICET must have access to and use the railway loop for unloading coal from trains at WICET. The railway loop was termed "Segment #1 – Balloon Loop" under each of the WIRP Deeds. On the other hand, only the first defendant and Springsure proposed to have access to and to use the upgrade proposed for the Bauhinia Branch Line termed "Segment #5-Bauhinia North".

[6] Under each of the WIRP Deeds, the scope of the works to be funded and constructed by the plaintiff was identified in Schedule 3, by reference to particular sections of railway track, that were termed Segments #1, #2, #3, #5 and #8. Each Customer was identified as a Customer in respect of each Segment it proposed to access or use for the additional capacity. Each such Segment was termed a "Customer's Segment" for that Customer. Where another Customer

also intended to access or use the same Segment, that Customer was termed an "Intended Other Customer" for the (common) Segment.

[7] Second, the WIRP Deeds distinguished among the Customers by reference to the quantity of the capacity to be allocated to each Customer, termed the "Customer's Capacity" and also calculated as a percentage, termed a "Customer's Proportion", for each relevant Segment. With one exception, each Customer's Capacity is measured in the number of train services per annum for the Segment, based on the standard sized coal train. The Customer's Proportion is the percentage proportion of the total increase in capacity for all Customers for the Segment.

[8] So, for the Segment #1 – Balloon Loop, that was intended to be accessed or used by all Customers, the first defendant's Customer Proportion was 39.8 percent, whereas for Segment #5 – Bauhinia North, that was intended to be accessed or used only by the first defendant and Springsure, the first defendant's Customer Proportion was 67.8 percent.

[9] It will be necessary to deal with the provisions of the WIRP Deeds in further detail later. However, enough of the background has been stated to identify the three questions that will determine the outcome of the proceeding.

[10] Clause 6 of each WIRP Deed provides for variations to the scope of the works to be carried out for a Segment. If there is a variation to the scope of the works and it is also proposed to change the Segment Customers for a Segment, cl 6.1(b) applies. But if it is proposed to change the Segment Customers without any variation to the scope of works for a Segment, cl 6.1(c) provides as follows:

> "Prior to the First Milestone Target Date, the Customer may notify QR Network and each Other Customer that a Segment is to cease being a Customer's Segment provided that:
>
> (i) the Customer is not the only Segment Customer for the Customer's Segment at the time such notice is given; and
>
> (ii) after the Segment would, but for this clause 6.1(c)(ii), cease being a Customer's Segment in accordance with this clause 6.1(c), there is at least one remaining Segment Customer for the Segment,
>
> in which case, as at the date such notice is given to QR Network:
>
> (i) item 1 of schedule 2 will be taken to be varied to specify that the Segment is not a Customer's Segment;
>
> (ii) for the avoidance of doubt:
>
> (A) the Segment will cease being a Customer's Segment;
>
> (B) the Customer will cease being a Segment Customer for the Segment; and
>
> (C) the Customer will cease having a Customer' s Proportion for the Segment; and
>
> (iii) this Deed will not otherwise be varied."

[11] It can be seen that there are two express restrictions on the Customer's right or power under cl 6.1(c) to notify the plaintiff and each Other Customer that a Segment is to cease being a Customer's Segment. First, the power is limited to the period prior to the First Milestone Target Date. Second, at least one Segment Customer for the relevant Customer's Segment must remain. It is not in contest that if a Customer gives a valid notice under cl 6.1(c), the effect is to throw that Customer's Proportion for the Segment onto any remaining Segment Customers for that Segment.

[12] Collectively, the defendants' case is that, prior to the First Milestone Target Date, each defendant notified the plaintiff and each Other Customer that every relevant Customer's Segment for that defendant was to cease being a Customer's Segment, with the effect of throwing the burden of the WIRP Fee for the Customer's Proportion for the Segment onto any remaining Segment Customers for the Segment. The collective effect was to throw the whole of the burden onto Springsure, as the remaining Customer for all the Customer Segments (except Segment #3 - Moura East and Segment #8 – Moura West where Cockatoo was always the only Customer), in a superficially bizarre game of musical chairs. The defendants' case is that each of them was entitled to do so under cl 6.1(c), irrespective of the fact that they were accessing and using or intended in future to access and use every one of the Segments that was a Customer Segment for that defendant before giving the notice.

[13] The plaintiff contends that the notices were invalid on three grounds. First, on the proper construction of cl 6.1(c), a notice may not be given for a Customer Segment that is necessary to enable the plaintiff to provide what are termed the "Aggregate Access Rights" for the relevant defendant, or there is an implied term of the WIRP Deed to the same effect. Second, there is an implied term of the WIRP Deed that the Customer has a duty to act in good faith towards and deal fairly with the plaintiff in respect of giving notice under cl 6.1(c) that was breached. Third, the "Port Facilities (Initial) Available Date", as defined in the WIRP Deeds, and thereby the First Milestone Target Date in cl 6.1(c), occurred by 30 September 2015, ending any entitlement to give notice under cl 6.1(c) before the notices were given.

[14] For the reasons that follow, I have reached the conclusion that the plaintiff's case must succeed on the second ground, because the defendants breached an implied term of the contracts to act in good faith towards and deal fairly with the plaintiff in respect of giving notice under cl 6.1(c). Accordingly, it is unnecessary to decide either the construction or implied term alternative arguments of the first ground or whether the Port Facilities (Initial) Available Date occurred prior to 30 September 2015. However, against the possibility of error on the implied term of good faith and fair dealing ground, I will also make the necessary findings to resolve the other two grounds.

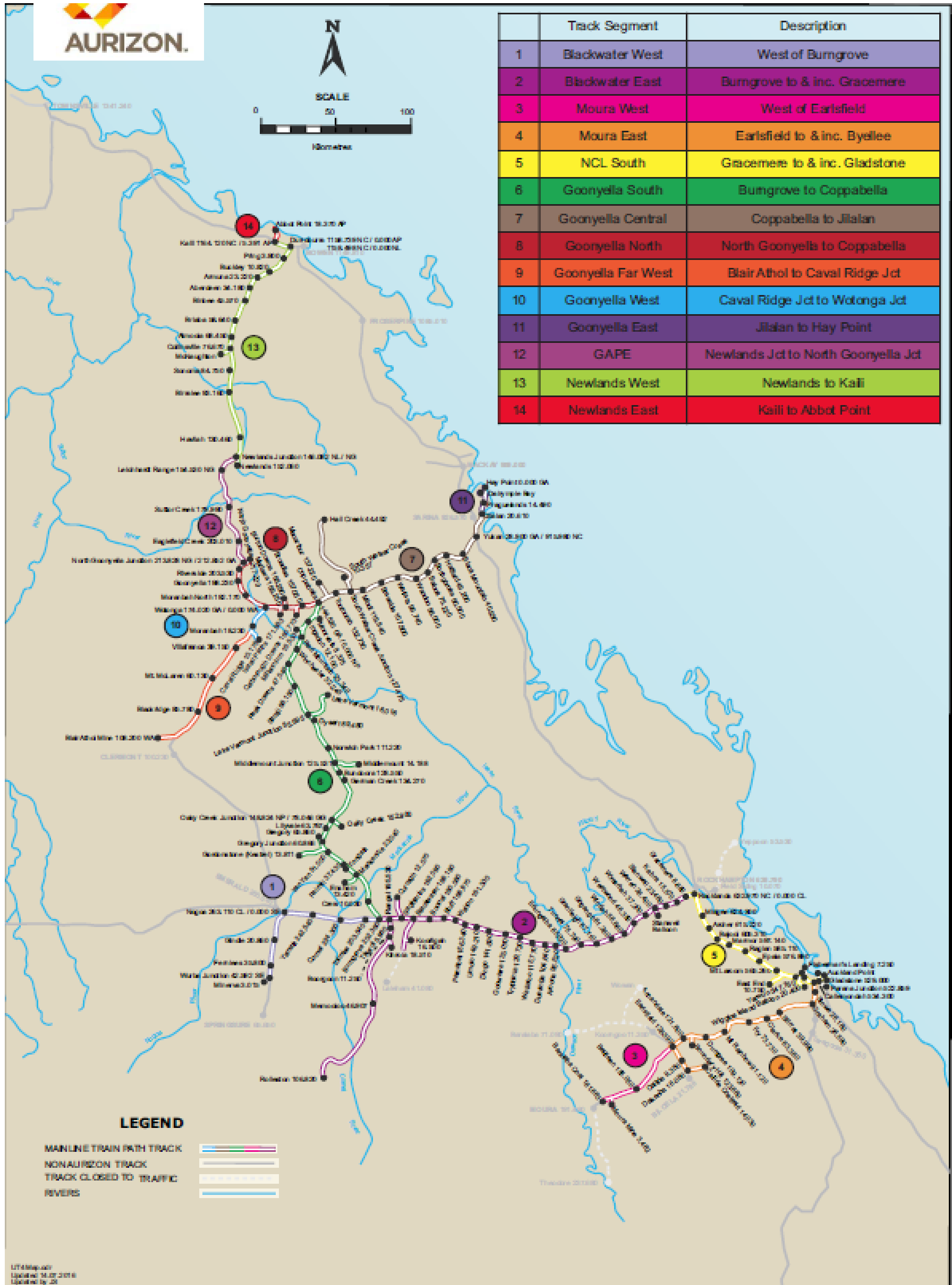
Central Queensland Coal Network

[15] The plaintiff is a subsidiary of Aurizon Holdings Limited, a listed company that is Australia's largest rail freight operator. The plaintiff is the lessee of the land for the rail corridor and operator of the network and associated rail infrastructure known as the Central Queensland Coal Network ("the Network"), which is Australia's largest export coal rail network. The Network is used to transport coal to a number of shipping terminals located on the Queensland coast. It is conveniently described as "below rail" or "track" infrastructure, reflecting that the plaintiff does not operate trains or provide train services itself, although

another Aurizon group company does. Other train operators also operate on the Network to transport coal from a mine to a shipping terminal. Although there are some privately owned railway lines or spurs that connect to the Network, in substance, it operates as a monopoly of necessary rail infrastructure to transport coal from a mine to a shipping terminal in central Queensland.

[16] The overall Network services approximately 40 coal mines in central Queensland that are producers of either metallurgical or thermal coal. Coal is transported over the Network from various mines to five shipping terminals at three ports. From north to south, the terminals now are Abbot Point Coal Terminal, Dalrymple Bay Coal Terminal, Hay Point Coal Terminal, WICET and RG Tanna Coal Terminal. Set out below is a map of the relevant area, showing the location of the mines and the Network.

[17] Another map showing the Network, identifying sections of track as different segments, appears below:



[18] It is not necessary to describe all of the features of the second map. However, two points should be noticed. The reference to “Track Segments” on this map does not correspond to the Segments that were agreed for the upgrade of relevant parts of the Network under the WIRP Deeds. The latter will be further identified and described below. Second, the Network can be

broken down into a number of systems. Each system is a section of track that services one or more of the shipping terminals. The different systems are treated separately for regulatory purposes. A connecting system is a section of track that joins one system to another. There are four major systems and one connecting system. They are:

(a) Newlands – the Newlands system links mines to the Port of Abbot Point;

(b) Goonyella – the Goonyella system links mines to the Dalrymple Bay Coal Terminal and the Hay Point Coal Terminal at the Port of Hay Point;

(c) Blackwater – the Blackwater system links mines to Stanwell Power Station, Gladstone Power Station and the coal terminals at the Port of Gladstone;

(d) Moura – the Moura system links mines to the RG Tanna Coal Terminal at Gladstone;

(e) GAP – this is the connecting system that connects the Goonyella system to the Newlands system.

[19] The users of the Network are coal producers with mines in the Central Queensland Coal region (until now mines in the Bowen Basin coal reserves) and railway operators who service those producers. At the time of the execution of the WIRP Deeds, all defendants, except the fifth and sixth defendants, had existing access arrangements with the plaintiff, so as to use the Network to transport coal from their existing mines to shipping terminals. However, those arrangements did not include the increased capacity for the Network that was proposed under the WIRP Deeds. Further, Springsure was not party to any existing access arrangement with the plaintiff before the WIRP Deeds were executed, but Cockatoo was.

[20] A third map set out below depicts the relevant region of the Network for what became the Wiggins Island Rail Project, abbreviated to “WIRP” in many of the documents, more closely, showing the location of the Segments and the mines:

[21] That map shows the approximate locations of:

(a) the Rolleston Mine operated by the first defendant, which has a loading facility at Rolleston on the Bauhinia branch line on the Blackwater system;

(b) the proposed Springsure/Arcturus Mine, being developed by Springsure, proposed to have a loading facility connection to the Bauhinia Branch Line of the Blackwater system;

(c) the proposed Washpool Mine being developed by the fifth defendant, proposed to have a loading facility connection to the Blackwater system near Blackwater;

(d) the Curragh Mine, operated by the fourth defendant, with a loading facility at Curragh on a northern branch of the Blackwater system;

(e) the Yarrabee Mine operated by the third defendant, with a loading facility on the Blackwater system at Boonal;

(f) the Cook and Minyango Mines operated by the second defendant, with a loading facility on a southern spur line of the Blackwater system at Koorilgah;

(g) the Baralaba Mine operated by Cockatoo Coal Pty Ltd, with a loading facility on the Moura system near Moura; and

(h) the proposed Colton Mine, being developed by the sixth defendant, proposed to have a loading facility connection near the North Coast line, near Maryborough.

Queensland Competition Authority Act and the Access Undertaking

[22] It is not in dispute that the statutory context is relevant to any question of construction of the WIRP Deeds.[1]

[23] *The Queensland Competition Authority Act* 1997 (Qld) ("the Act") makes provision for the declaration by the Minister for the Act of a service.[2] The Network is a "declared service" because it is a "coal system".[3]

[24] For a declared service, Divisions 4 and 5 of Part 5 of the Act impose obligations upon an access provider to negotiate in good faith with an access seeker to provide appropriate access to the declared service.[4] Reasonable efforts must also be made to satisfy the reasonable requirements of the access seeker.[5] Division 7 of Part 5 provides for an access undertaking to

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1 Compare *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129, [36]; *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241, 255 [41] and 261 [64].

2 *The Queensland Competition Authority Act* 1997 (Qld), s 84.

3 *The Queensland Competition Authority Act* 1997 (Qld), s 250.

4 *The Queensland Competition Authority Act* 1997 (Qld), s 100(1).

5 *The Queensland Competition Authority Act* 1997 (Qld), s 101(1).

be given by an access provider for a declared service, either voluntarily[6] or if so required by the Queensland Competition Authority ("QCA").[7]

[25] Once an access undertaking is approved by the QCA, an order may be made directing the responsible person to comply with a term of the access undertaking that has been breached and to compensate anyone who has suffered loss or damage because of the breach.[8] Those powers follow from the obligation of the owner or operator of the declared service to comply with the access undertaking.[9]

[26] It is also not in dispute that the WIRP Deeds refer to an "Access Undertaking" made by the plaintiff and that the Access Undertaking is relevant to any question of construction of the WIRP Deeds, as a document referred to in them.[10]

[27] On 1 October 2010, the QCA approved an Access Undertaking for the Network styled "QR Networks 2010 Access Undertaking", otherwise referred to in the evidence as "UT3" so as to distinguish it from access undertakings that operated in time before or after UT3. For simplicity, in these reasons, I will refer to it as the "Access Undertaking" and to its relevant provisions in the present tense even though it is now superseded.

[28] The Access Undertaking creates a standard access regime for the plaintiff to provide access to users of the Network. "Access" means the non-exclusive utilisation of a specified section of rail infrastructure for the purposes of operating train services.

[29] It is not necessary to detail fully the provisions of the Access Undertaking that regulate the plaintiff's entitlement to obtain revenue from the operation of the Network.

[30] *Inter alia*, Part 5 provides for access agreements as follows:

(a) a grant of access will be underpinned by an access agreement that will be developed and finalised as part of the negotiation process;[11]

(b) unless otherwise agreed between the plaintiff and an access seeker, the access agreement must be consistent with the terms of a standard access agreement if the train services are of the same type specified in that standard access agreement;[12]

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6 *The Queensland Competition Authority Act* 1997 (Qld), s 136.

7 *The Queensland Competition Authority Act* 1997 (Qld), s 133.

8 *The Queensland Competition Authority Act* 1997 (Qld), s 158A.

9 *The Queensland Competition Authority Act* 1997 (Qld), s 150A.

10 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [46].

11 Clause 5.1(a).

12 Clause 5.1(d)(i).

(c) standard pricing principles are to be used to develop access charges to be included in an access agreement.[13]

[31] The standard pricing principles are divided into different categories or sections and are to be applied in an order of precedence from highest to lowest.[14] The plaintiff is not to differentiate access charges between access seekers within a relevant market except as provided for. The access charges are to be determined in accordance with the reference tariff and may only vary from the reference tariff in limited circumstances.[15] The standard pricing principles are to be consistent with Part 5 of the Act and the principles set out in s 168A that the price should:

> "… generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved…"

[32] The calculation of the reference tariffs to be used to determine access charges under the Access Undertaking follows a methodology that begins with the determination of the maximum allowable revenue ("MAR"),[16] that is intended to achieve full recovery of the efficient costs of the service, including a rate of return on the value of assets commensurate with the regulatory and commercial risks involved.[17] Within that context, the MAR is intended to operate as a revenue cap and is the product of underlying factors. One of those factors is termed the regulatory asset base ("RAB"), defined to mean the asset value for the Central Queensland Coal region, accepted by the QCA for the purpose of developing reference tariffs for coal carrying train services.[18] The RAB is provided for in Schedule A of the Access Undertaking and is to be maintained for the purposes of cl 6.2.4(c) which provides that it is the value of the assets to be used in cl 6.2.4(a) to determine the MAR.

[33] "[P]rudent capital expenditure… accepted by the QCA in accordance with clause 2 [of Schedule A]" is to be included in the RAB.[19] Clause 2.2 requires the QCA to assess prudency of capital expenditure by reference to its prudency in scope, standard of works and cost in accordance with cl 3. A factor in assessing "prudency" is whether the expenditure is reasonably required to comply with the access agreements.[20]

[34] As foreshadowed above, the Access Undertaking provides for the plaintiff to obtain revenue by way of access charges[21] payable under an access agreement[22] for access, meaning, *inter alia*,

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[13] Clause 6.1.1, clause 6.5.1 and Part 12.

[14] Clause 6.1.1.

[15] Clause 6.1.2(b).

[16] Clause 6.2.4.

[17] Clause 6.3.2.

[18] Part 12, definition "Regulatory Asset Base".

[19] Clause 1.2(d) of Schedule A.

[20] Clause 3.3.2(c)(ii) of Schedule A.

[21] Part 12, definition "Access Charge".

the non-exclusive use of a specified section of rail infrastructure for the purposes of operating train services.[23] Those access charges (and some other items) represent a regulated return of and return on invested capital and operating expenditure. The regulated return is set by reference to a weighted average cost of capital ("WACC") determined by the QCA as part of the approval process of the Access Undertaking.[24] The return of capital is effected by allowing revenue, within the MAR, which matches the approved depreciation of the RAB. The return on capital is effected by applying an appropriate WACC, representing the percentage assessed as the average rate of return which those investing capital in an enterprise of this kind would reasonably require having regard to its relative risks.

[35] The MAR is used as a base from which, by distributing the required revenue across the projected usage of train services for the year, a reference tariff for each train service can be calculated. The reference tariffs are then used as the basis for setting the access charges payable under an access agreement. The aim of the approach is to produce an annual revenue for the plaintiff that provides the intended regulated return, as the MAR is fixed prospectively for any year. As well, there is a mechanism for the retrospective review of the level of actual revenue received. If those revenues are below the MAR, an adjustment is effected in the following year to rectify the position and vice versa. The plaintiff is permitted to require 100 percent take or pay arrangements under access agreements.

[36] The Access Undertaking also sets out a negotiation framework by which an access seeker can apply for access and have it considered by the plaintiff. To an extent, the parties are free to negotiate the terms of an access agreement. However, unless otherwise agreed, an access agreement must be consistent with the terms of the standard access agreement for the relevant train services at the same time.[25]

[37] There are two approved forms of standard access agreement: one for access holders; another for train operators for access holders.

[38] Part 7 of the Access Undertaking deals with capacity management. It provides for the plaintiff to schedule and provide capacity related information in accordance with network management principles and for the plaintiff to make system rules.[26] Scheduling is to be done having regard to specified scheduling constraints to manage traffic.[27] An allocation of capacity, having regard to the network management principles and service specification and train scheduling by the allocation of access rights, is to be given to the first access seeker[28] and competing applications or requests for mutually exclusive access rights are to be dealt with by

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22 Part 12, definition "Access Agreement".

23 Part 12, definition "Access".

24 Part 12, definitions "Approved WACC" and "Varied WACC".

25 Clause 5.1(d).

26 Clause 7.1.

27 Clause 7.2.

28 Clause 7.3.1.

creating a queue based on the time when the plaintiff receives each access application.[29] These provisions recognise the finite capacity of the Network and the possibility or likelihood of competition between access seekers to obtain a share or greater share of the available capacity.

[39] The Access Undertaking also provides for increases in the available capacity by the plaintiff making an extension of all or part of the Network. An extension is defined to be an enhancement, expansion, augmentation, duplication or replacement of all or part of the network.[30] It is a general principle that extensions undertaken by the plaintiff must be designed to create sufficient capacity to accommodate provision of all access rights being sought by access seekers that submit an expression of interest under the relevant process.[31] Another general principle is that, where an extension produces available capacity, negotiation for access rights in respect of that capacity will occur in accordance with the other provisions of the Access Undertaking, including the negotiation framework and queueing mechanisms.[32] Where the plaintiff believes an extension is reasonably required to meet demand for access rights within a coal supply chain, it is to make a request for proposals.[33] It is provided that an extension might either be funded by the plaintiff or be user funded.[34] Subject to certain limits, the plaintiff is to undertake and fund all extensions.[35] One limit is engaged if the extension is a significant investment,[36] a term defined to mean investment in a major expansion projected to cost in excess of $300M.[37] A major expansion is defined to mean an expansion for the purpose of creating or providing additional capacity substantially as a result of or in connection with a single major external development[38] and a major external development is defined to include a development into a new loading or unloading facility, which increases or facilitates an increase in the demand for access for coal carrying services.[39]

[40] It follows that WICET constituted a major external development and the proposal to expand the Network for the purposes of creating or providing additional capacity to meet the demand for access for coal carrying train services for WICET was a major expansion and a significant investment.

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29 Clause 7.3.4.

30 Part 12, definition “Extension”.

31 Clause 7.5.1(a).

32 Clause 7.5.1(c).

33 Clause 7.5.2(a)(i).

34 Clause 7.5.2.

35 Clause 7.5.4(a).

36 Clause 7.5.4(a)(iv)(B).

37 Part 12, definition “Significant Investment”.

38 Part 12, definition “Major Expansion”.

39 Part 12, definition “Major External Development”.

[41] The WIRP was not, therefore, an expansion that the plaintiff was required to fund or undertake under the Access Undertaking.

[42] In addition to providing for access charges and reference tariffs within the pricing limits under an access agreement[40] as previously mentioned,[41] the Access Undertaking provides for the plaintiff to require an access seeker to agree to additional terms before being granted access rights, called "access conditions", to the extent that is reasonably required in order to mitigate the plaintiff's exposure to the financial risks associated with providing access for the access seeker's proposed train services.[42]

[43] A number of circumstances are identified as those where access conditions are deemed to be reasonably required,[43] including where the plaintiff demonstrates that it cannot provide the access sought unless it invests in a significant investment and the QCA approves the access conditions through the specified process.[44] An access condition that would result in the plaintiff earning revenue in addition to the ongoing access charges is required to be negotiated by a separate agreement.[45] The process of approval of access conditions requires the plaintiff to issue a report to all relevant access seeker customers and the QCA which details the access conditions the plaintiff is seeking,[46] the additional risks the plaintiff is exposed to which it is seeking to mitigate through the access conditions, how the access conditions mitigate those risks[47] and other matters.

[44] After the plaintiff provides an access conditions report, the plaintiff and the access seekers are permitted to negotiate on the terms of the access conditions for a limited period.[48] If the plaintiff and all access seekers agree to the terms of the access conditions it is provided that the QCA will approve the access conditions unless it is satisfied that it would be contrary to the public interest, including the public interest in having competition in markets, or is reasonably expected to disadvantage future access seekers or others, or that the plaintiff has failed to provide access seekers with the report, or that it would contravene a provision of the Access Undertaking or the Act.[49]

[45] As will subsequently appear, the terms of the WIRP Deeds constituted access conditions for the purposes of the Access Undertaking and under them it is provided that each of the

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40 Clauses 6.1, 6.2, 6.3 and 6.4.

41 Clause 6.5.1.

42 Clause 6.5.2(a).

43 Clause 6.5.2(b).

44 Clause 6.5.2(b)(iii).

45 Clause 6.5.2(d)(2).

46 Clause 6.5.4(a)(iii).

47 Clause 6.5.4(a)(iv).

48 Clause 6.5.4(c).

49 Clause 6.5.4(e).

defendants and the Other Customers is to become an access holder under an access agreement on standard terms in relation to the additional access rights to be allocated to them as access seekers by reasons of the enhancement constituting the significant investment to create the additional capacity required for WICET.

[46] In simple terms, the WIRP Deed for each defendant and Other Customer is intended to regulate the plaintiff's agreement to fund and construct the Expansion in order to create the proposed additional capacity and access rights in consideration for which the relevant defendant agrees to pay both access charges and the WIRP Fee and any Optimisation Fee. Absent the WIRP Deeds, there was no obligation for the plaintiff to fund, construct or meet any particular dates for the proposed additional capacity and access rights to meet the demand upon the Network created by WICET. The structure of the WIRP Deeds, prima facie, conformed to the structure of an access agreement and access conditions that were permissible under the terms of the Access Undertaking.

Proposed extension

[47] In or about 2008, companies including most of the defendants, or related corporations, developed a proposal to establish the new coal export terminal that has become WICET. The terminal was intended to increase the volume of coal which could be shipped through the Port of Gladstone. The developer was a corporate group ultimately held by the defendants and other Customers under the WIRP Deeds or related corporations. Various extensions and enhancements to the existing rail infrastructure comprising the Network were required, in accordance with the railway paths between the locations of relevant mines or prospective mines and WICET. The regional map set out above shows those locations.

[48] On 16 April 2010, the plaintiff issued a Request for Proposals in accordance with the Access Undertaking, requesting potential access seekers for WICET to express their interest in obtaining further rail capacity and to identify the extent of the capacity sought.

[49] On 7 July 2010, a group of coal producers that included the defendants applied to the ACCC for authority to negotiate rights of access collectively with the plaintiff. At that time, the first, second, third and fourth defendants had established mines and existing access agreements with the plaintiff for the transport of coal from those mines using the Network. In contrast, neither the fifth defendant, sixth defendant nor Springsure had an existing mine or access agreement.

[50] On 19 July 2010, the plaintiff advised the prospective Customers that they had been shortlisted for participation in Stage 1 of the proposed WIRP expansion of the Network.

[51] On 19 August 2010, Mr Freeman introduced himself to the plaintiff as a representative of the coal producers for the purpose of the negotiations.

[52] In December 2010, the ACCC approved the application to collectively negotiate with the plaintiff. Thereafter, the negotiations proceeded mostly on that basis.

[53] On 11 or 12 May 2011, the plaintiff issued an Access Conditions Report to the QCA and prospective Customers under the Access Undertaking in respect of the proposed Access Conditions relating to the proposed WIRP extension.

[54] The report identified that the proposed WIRP extension was a significant investment as defined in Part 12 of the Access Undertaking, involving the construction of infrastructure and anticipated costs of approximately $900M, a Customer group of eight users, a term of 20 years for the Access Conditions agreements proposed, a significant and directorial role for the Customer group in the design, construction, procurement procedures, cost determination and delivery of the infrastructure, and consequential additional risks for the plaintiff, termed the construction risk, market volume risk, stranding risk, optimisation risk, financing risk, site remediation risk and performance risk.

[55] The report stated that it was made to address the requirements of the Access Undertaking and set out an overview of the proposed contractual arrangements and Access Conditions. They included that a Customer would make payments to the plaintiff in addition to the access revenue to be received through the standard reference tariffs and access terms and conditions, that the payments were to mitigate the significant additional risks to the plaintiff associated with the costs, duration and magnitude of the WIRP Project and that the payments proposed would be incentive based and linked to the plaintiff's performance in relation to the timing, cost and delivery of the relevant additional capacity.[50]

[56] Between 9 June 2011 and 10 August 2011, negotiation of the WIRP Deeds continued. It will be necessary to deal with limited parts of those negotiations later in the reasons.

[57] On 10 August 2011, negotiations between the plaintiff and Springsure that did not include the defendants or Cockatoo were carried on in relation to a separate contract styled the Springsure Side Deed. On 5 September 2011, the plaintiff and Springsure executed the Springsure Side Deed.

[58] On 5 September 2011, the WIRP Deeds were entered into.

Admissibility of evidence of extrinsic facts

[59] None of the parties challenges the accepted principles of construction of written commercial contracts that the court of construction is to determine the meaning of the terms objectively, by what a reasonable business person in the position of the parties would have understood them to mean, having regard to the relevant and admissible surrounding circumstances, object and purpose of the transaction.[51]

[60] There is, however, a significant dispute as to the admissibility of extrinsic facts in aid of the construction of the WIRP Deeds. Argument focussed on three points. First, the defendants generally object to the admissibility of any evidence of the negotiations. Second, the

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[50] Clause 2.2.

[51] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544, 551, [16]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116-117 [46]-[50], 131-132 [108] and 134 [119]; *Electricity Generation Corporation Woodside Energy Ltd* (2014) 251 CLR 640, 656-657 [35]; *Byrnes v Kendle* (2008) 243 CLR 253, 284 [98]; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, 160 [8], 174 [53]; *Toll (FGCT)Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179 [40]; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 461-462 [22].

defendants object to the admissibility of evidence of the pleaded fact that at the time of entry into the WIRP Deeds, the Customers were of materially varying experience in mining and exporting coals and varying financial means.[52] Third, the defendants object to the admissibility of evidence of the pleaded fact that at the time of entry into the WIRP Deeds, there was a prospect that a Customer's Segment under a WIRP Deed may cease to be necessary to enable the plaintiff to provide the Aggregate Access Rights under the WIRP Deed for the Customer.[53]

[61] The defendants advance a number of bases for their objections. Summarising, the first defendant submits that ambiguity is a prerequisite to admissibility of extrinsic evidence and cl 6.1(c) is not ambiguous. Second, it submits that the scope of the admissible facts that may be considered by way of extrinsic evidence, in order to resolve a relevant ambiguity, does not include any fact constituted by the pre-contractual exchanges or negotiations between the parties. Third, it submits that an unsatisfied condition of admissibility of evidence of any otherwise relevant extrinsic fact is that the fact was known to all relevant parties at the time of making the contract. Fourth, it submits that the admissibility of evidence of any relevant extrinsic fact is subject to contractual exclusion.

[62] Some of these questions engage difficulties that are familiar to contract lawyers. Two of them are whether an ambiguity in the meaning of a contractual term to be construed must be ascertained before any extrinsic evidence is admissible and whether extrinsic evidence is admissible to raise the ambiguity. Another lies in drawing the line between admissible evidence of extrinsic facts that are raised in negotiations and inadmissible evidence of prior negotiations that would tend to reveal or prove the parties' subjective intentions.

[63] The existence and scope of the ambiguity requirement is still a matter of judicial controversy and, on one view, remains to be resolved by the High Court in an appropriate case. However, an important assumption that underlay the defendants' submissions in the present case is that the ambiguity requirement is a gateway that must be passed through in every case of disputed construction of a contractual term, including the present case. Against that assumed requirement, the defendants submit that if the ordinary meaning of the text of the term is clear, there can be no question that the legal meaning of the term is affected by extrinsic facts.

[64] In my view, the assumption does not apply to a case where the ordinary meaning would lead to some absurdity. That is, the construction of a commercial contract does not involve a gateway of ambiguity in the ordinary meaning of the text of the term to be construed in every case before the construing court can proceed further. A patent textual ambiguity in the term itself, or appearing from the other terms of the contract, is not required in every case, despite the language of some important statements of principle.

[65] It is not necessary to explore all of the relevant history in order to decide this case. The occasions for a trial Judge to expound upon contractual hermeneutics are thankfully few. But it is useful to make some points relevant to this case by reference to case law that antedates by 100 years or more the rigorous application of the requirement of ambiguity relied upon by the defendants, as not historically accurate, before dealing with more modern case law.

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[52] Third Further Amended Statement of Claim, paragraph 10A.

[53] Third Further Amended Statement of Claim, paragraph 10C.

Extrinsic evidence – unresolved disputes

[66] I will term the question whether an ambiguity or susceptibility to more than one meaning must be identified before extrinsic evidence of surrounding circumstances is admissible, the "ambiguity gateway".[54] Some, who I will, for convenience and at the risk of inaccuracy, term "traditionalists", hold that extrinsic evidence is not admissible unless, first, an ambiguity or susceptibility to more than one meaning can be identified in the text of the contract to be construed. Others, who I will for convenience term "modernists", say that "ambiguity" itself is ambiguous and deny that there is any ambiguity gateway. A common context for the debate is a dispute about the extent of what out of the negotiation process can or cannot be used in aid of construction.[55]

[67] Who is right? My tentative answer is that there are weaknesses in both positions. Some of the traditionalists tend to overstate the rigidity of the ambiguity gateway, as if it extends to surrounding circumstances, in general, in all or almost all cases. Some of the modernists may be mistaken in thinking that their views about admissibility of evidence of extrinsic facts are a recent development.

[68] Although there are recent statements at high levels in Australia about the existence or role of the ambiguity gateway, the differences of opinion at intermediate appellate court level are not yet directly answered by the High Court. It is appropriate, therefore, to approach the disputed questions as to the ambiguity gateway, as it relates to this case, as a matter of principle by reference to three questions.

[69] First, should the disputed question be answered by reference only to the modern contract cases, or should attention be paid to the principles of interpretation of instruments more broadly, as was done in former times? Second, do the older cases support the argument that the rule excluding extrinsic evidence where the meaning of the contract is clear on its face operated rigidly to confine construction to the text only? Third, if the modern law is not settled, what might be some of the advantages and disadvantages of the ambiguity gateway?

[70] I take as my starting point that as a matter of precedent, all below the High Court must adhere to the binding statement of principle in *Codelfa Constructions Pty Ltd v State Rail Authority*,[56] including the often analysed passage, sometimes called "Mason J's true rule", as follows:

> "The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of

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[54] The term was first used in Martin K, "Contractual construction: Surrounding circumstances and the ambiguity gateway" (2013) 37 Australian Bar Review 118, that was judicially referred to before publication in *Netglory Pty Ltd v Caratti* [2013] WASC 364, [216] . It was first directly used in a judgment in *Cherry v Steele-Park* (2017) 96 NSWLR 548, 565 [71].

[55] As discussed by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 352.

[56] (1982) 149 CLR 337.

> more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning ."[57]

First question: should there be a broad approach?

[71] In 2015, the UK Supreme Court said the following:

> "There is a modern tendency in the law to break down divisions in the rules on the interpretation of different kinds of document, both private and public, and to look for more general rules on how to ascertain the meaning of words. In particular, there has been a harmonisation of the interpretation of contracts, unilateral notices, patents and also testamentary documents."[58]

[72] The court went on to describe the process of how a planning consent is to be interpreted. They said it is:

> "…what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense."[59]

[73] This is consistent with the orthodox approach to construing a contract. The difference, if there is one, was suggested to be in the extent of the admissible extrinsic evidence. On that score, the court said:

> "Differences in the nature of documents will influence the extent to which the court may look at the factual background to assist interpretation. Thus third parties may have an interest in a public document, such as a planning permission or a consent under section 36 of the 1989 Act, in contrast with many contracts. As a result, the shared knowledge of the applicant for permission and the drafter of the condition does not have the relevance to the process of interpretation that the shared knowledge of parties to a contract, in which there may be no third party interest, has. There is only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission or a section 36 consent."[60]

Second question: how rigid was the ambiguity gateway under the older cases?

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[57] (1982) 149 CLR 337, 352.

[58] *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74, [33].

[59] [2015] UKSC 74, [34].

[60] [2015] UKSC 74, [33].

[74] Let me start with a typical statement. This is how Professor John Carter refers to the older cases in his 2013 book, *The Construction of Commercial Contracts*:

> "Throughout the 19th century and, indeed, for a good part of the 20th century, literalism held sway. Considerations of certainty, a profound commitment to the virtues of the 'plain' meaning of contracts and a belief that the function of the court in construction is simply to 'read the document' dominated the approach to all contracts. The literal approach to construction was policed by a much more rigid application of the parol evidence rule than is present today. The canons of construction were applied with alacrity, particularly in the Chancery cases."[61]

[75] In 1833, in *Goss v Lord Nugent*,[62] Lord Denman CJ stated the extrinsic evidence rule thus:

> "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract."[63]

[76] That case was not concerned with the limits of or any exceptions to the extrinsic evidence rule.[64] Nevertheless, it is a strong statement of principle. Even so, in my view, Professor Carter overstates the way in which the extrinsic evidence rule worked in former times. I will mention four cases.

[77] First, in 1859 in *Grey v Pearson*,[65] Lord Wensleydale said this:

> "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther."[66]

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[61] J W Carter, *The Construction of Commercial Contracts*, Hart Publishing, Oxford, 2013, [1-25]. There are no cases cited for this passage. However, in an article published in 2014 entitled "Context and Literalism. in Construction" Professor Carter detailed what I suspect are some of the cases for that view: see (2014) 31 JCL 100, fn 4-11

[62] (1833) 5 B & D 57; 110 ER 713.

[63] (1833) 5 B & D 57, 65; 110 ER 713.

[64] It was about the enforceability of a variation of the terms of a contract of sale of land required to be in writing under the Statute of Frauds.

[65] (1859) 6 HLC 61; 10 ER 1216.

[66] (1859) 6 HLC 61, 106; 10 ER 1216.

[78] That passage is a famous statement of the "golden rule" of statutory interpretation, although it was expressed to apply to all written instruments. As set out above, the UK Supreme Court may be turning back towards the broader approach to the principles affecting the construction of instruments embodied in Lord Wensleydale's statement.[67]

[79] That statement had a long lasting effect in the interpretation of statutes – one felt in this country at least until the change in direction in 1980 represented by *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation*.[68] However, although *Grey v Pearson* has been referred to in the High Court in two cases on questions of contractual construction,[69] it has never taken centre stage. In England, it was overtaken soon afterwards by other statements of principle as to the construction of contracts,[70] made in particular by Lord Blackburn, to which I will come in a moment.

[80] There is a second passage in *Grey v Pearson*, which concerned the admissibility of extrinsic evidence. It is as follows:

> "…the only question is, what is the meaning of the words used in that writing. To ascertain which every part of it must be considered with the help of those surrounding circumstances, which are admissible in evidence to explain the words, and put the Court as nearly as possible in the situation of the writer of the instrument, according to the principle laid down in the excellent work of Sir James Wigram on that subject."[71]

[81] That passage is reasonably described as a statement of the "armchair principle", prominent in the case law relating to the interpretation of wills, that is also associated with Lord Blackburn,[72] although it may have been James LJ who first raised the metaphor of the testator's armchair.[73] It underscores the truth that extrinsic evidence of surrounding circumstances has always been admissible to some extent. I note the reference to Sir James Wigram's text, on the admissibility and use of extrinsic evidence,[74] which was influential both then and later.

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67 Justice Kirby was a well-known advocate of similar views: (2003) 24 *Stat LR* 95.

68 (1981) 147 CLR 297.

69 *The Eastern Extension Australasia and China Telegraph Co Ltd v Commonwealth* (1908) 6 CLR 647; *Purves v Smith* [1944] ALR 269.

70 See, for example, the reference to Lord Wensleydale's speech in *Waterpark v Fennell* (1859) 7 HLC 650, 684 (a deed of grant case) by Isaacs J in *Horsfall v Braye* (1908) 7 CLR 629, 657.

71 *Grey v Pearson* (1859) 6 HLC 61, 106; 10 ER 1216.

72 *Allgood v Blake* (1873) 8 Ex 160, 162. See, for example, *Farrelly v Phillips* (2017) 128 SASR 502, 509 [27] and *Theobald on Wills*, 18 ed, 2016, Sweet and Maxwell, [12-029].

73 *Boyes v Cook* (1880) 14 ChD 53, 56.

74 Wigram, An Examination of the Law Respecting the Admission of Extrinsic Evidence in aid of the Interpretation of Wills, Maxwell Stevens & Norton, London, 3rd ed, 1984.

[82] There are two of Lord Blackburn's judgments to mention. The first was in 1870, when his Lordship was still Blackburn J, in *Grant v Grant*,[75] a will case. The relevant passages are too lengthy to set out in full. Two bits will have to do. The first quoted Sir James Wigram's work as follows:

> "The question in expounding a will, he says, is, not what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words. And extrinsic evidence in aid of the exposition of his will must be admissible or inadmissible with reference to its bearing upon the issue which this question raises."[76]

[83] The second related to contracts:

> "The general rule seems to be, that all facts are admissible which tend to shew the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to shew that the writer intended to use words bearing a particular sense are to be rejected."[77]

[84] There are a few reasons to refer to this statement. Lord Blackburn was one of the great Judges of the common law. Second, it was influential in later cases about contractual construction, even though it was a case about a will. Third, the report identifies the two texts that were available at the time that dealt with the subject of extrinsic evidence. One was Sir James Wigram's work. The other was Blackburn J's own work on the subject,[78] which was raised during the course of argument.

[85] The second judgment of Lord Blackburn was in 1877 in *River Wear Commissioners v Adamson*,[79] as follows:

> "In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used."[80]

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[75] (1861) 5 CP 727.

[76] (1861) 5 CP 727, 734.

[77] (1861) 5 CP 727, 728.

[78] Blackburn, "A Treatise on the Effect of the Contract of Sale", Philadelphia, 1847 at 35.

[79] It should not be overlooked that *River Wear* was a case about statutory construction. However, *Inglis v John Buttery & Co* (1878) 3 App Cas 552, 558, 572 and 577 could be substituted here, as a case where the negotiations were sought to be relied on to show the actual intentions.

[80] *The River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 763.

[86] That statement might have been made in any of the modern cases. It is often cited.

[87] The advice of the Privy Council in 1900 in *Bank of New Zealand v Simpson* rounds out these early case references. The Board said:

> "Extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about.
>
> The rule is thus stated in Taylor on Evidence, 8th ed. vol. ii. s. 1194 : " It may be laid down as a broad and distinct rule that *extrinsic evidence* of every *material fact* which will enable the Court to *ascertain the nature and qualities* of the subject-matter of the instrument, or, in other words *to identify the persons and things* to which the instrument refers must of necessity be received."
>
> In *Grant* v. *Grant* (1) Blackburn J. quoted judicially the following passage from his valuable work on Contract of Sale (p. 49):
>
>> 'The general rule seems to be that all facts are admissible which tend to shew the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to shew that the writer intended to use words bearing a particular sense are to be rejected.'"[81]

[88] There are a number of reasons to mention *Simpson*. Obviously, it applied Lord Blackburn's views. Second, it was an appeal from New South Wales. Third, it was otherwise influential in the 20th century in British cases. Fourth, it was referred to and relied upon by Mason J in *Codelfa*.[82]

[89] These cases are only a hand-picked four cases, chosen to illustrate the scope of the extrinsic evidence that was admissible in former times.

Third question: what are some advantages and disadvantages of the ambiguity threshold?

[90] The modernists say that the ambiguity gateway contained in Mason J's true rule in *Codelfa*[83] is a flawed concept. They make the clearly correct argument that there are cases where the existence of an ambiguity can only be ascertained by extrinsic evidence[84] so that it must be illogical to say that ambiguity is to be ascertained on the face of the instrument in all cases. But this point is not new.[85]

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81 [1900] A.C. 182, 187-188.

82 (1982) 149 CLR 337, 349-350.

83 (1982) 149 CLR 337, 352.

84 *Grant v Grant* (1861) 5 CP 727 was such a case.

85 Sir James Wigram analysed it thoroughly: Wigram, "An Examination of the Law Respecting the Admission of Extrinsic Evidence in aid of the Interpretation of Wills", Maxwell Stevens & Norton, London, 3rd ed, 1840 at 170-182.

[91] An allied point made by the modernists, that language, in general, does not have an objective meaning for the purposes of the law is less strong, in my view. The answer to it was made clearly by Professor Robert Stevens in a paper entitled "The Meaning of Words and the Intentions of Persons", given at a conference at the University of New South Wales in 2015, as follows:

> "That words have objective meanings and that the meaning is not determined by our intentions is reflected in the law in many contexts outside of contract law… The objective approach to meaning is followed in the context of wills, trust deeds, statutes and court orders. The law is not departing from our approach in everyday life, but applying it."

[92] Once it is accepted that the task of construction is to ascertain what the words that the parties agree contain their contract mean, not what the parties subjectively intended them to mean, it is difficult to understand the reason for any rush to look outside the ordinary meaning of those words.

[93] Against that background, modern developments are often seen as starting with three speeches by Lord Wilberforce in the 1970s: first in *Prenn v Simmonds,*[86] followed by *LG Schuler AG v Wickman Machine Tool Sales Ltd*[87] and then *Reardon Smith v Hansen-Tangen*.[88]

[94] In *Prenn v Simmonds*, Lord Wilberforce coined the term "matrix of facts" which became a new catch-cry. But despite those who later read more into it, his discussion of the case law that led to the use of that phrase was orthodox. Significantly, *Prenn v Simmonds* did not involve the admission of controversial extrinsic evidence.

[95] The modernists do not have an answer for the fact that if the ambiguity gateway is dropped altogether, questions of the meaning of a contract in writing will routinely attract or require proof and, if necessary, a trial of any disputed facts about the many extrinsic facts one or other of the parties may wish to rely upon. This is contrary to the experience of those who remember summary court procedures to decide the meaning of an instrument, be it a contract, conveyance or will. With all respect to the modernists, my view is that before the law throws away the ambiguity threshold as a gateway to the general admission of extrinsic evidence to inform the meaning of a written contract, extending at least some way into the negotiations, it is at least a good question to ask why the law would add to the range of available disputes about the meaning of a written contract? There is an unstated premise that the admission of extrinsic evidence of this kind will reveal the objective agreement. Professor Carter said this in his 2014 article, "Context and Literalism in Construction", as follows:

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86 [1971] 1 WLR 1381, 1383-1385.

87 [1974] AC 235, 261.

88 [1976] 1 WLR 989, 995.

> "Every restriction placed on the evidential material which may be used in construction impedes the task of arriving at the meaning intended by the parties."[89]

[96] I remain unconvinced. Often enough, in my view, negotiations do not reveal objective agreement. They reveal the positions of the parties around a point that was not expressly raised or upon which they did not agree expressly. Another criticism of the modernists view is that it devalues the significance of the fact that the parties reduced the extent of what they agreed to writing and agreed that the writing would take effect as the repository of their bargain – not what went before it.

[97] On the other hand, traditionalists do not have an answer to the lack of a robust dividing line between a case where the "plain meaning" of the contract is so clear that no extrinsic evidence will be admitted and one where it is not. This is an undeniable weakness of plain meaning as a gateway to admissibility of all extrinsic evidence.

[98] In recent times, in my view, there is a discernible practical change in the extent to which extrinsic evidence is admitted. In this, I agree with Professor Carter. But that, too, gives rise to practical problems. I raise two examples. First, how do those who would admit negotiations as objective facts deal with the circumstance that there may be many reasons for the gap between what was said in the negotiations and what is provided in the contract? There is no rule or principle of law I know of to resolve that problem. It is not answered by saying that the negotiations are not received to prove the actual subjective intentions of a party.

[99] Second, unless it is a matter that would catch the other side by surprise, there is no rule of court that particularly requires a party to plead any extrinsic fact relied upon as admissible to affect the construction of the contract. In my view, there should be. Recent cases support that proposition.

Ambiguity is not a gateway where something has clearly gone wrong with the text on its ordinary meaning

[100] As previously stated, it is accepted as a binding statement of principle that where the meaning of a contractual provision is susceptible of only one meaning, a court will not admit extrinsic evidence contrary to that meaning. The point was summarised in 2015 by a plurality in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd & Anor*:

> "Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning".[90] (footnote omitted)

[101] The "process of construction" referred to was identified as follows:

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89 (2014) 31 JCL 100, 118.

90 (2015) 256 CLR 104, 116 [48].

> "In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract."[91] (footnotes omitted)

[102] Two points may be made about those statements. First, neither "the circumstances addressed by the contract" nor "the commercial purpose of objects to be secured by the contract" will necessarily be fully articulated by its express terms. Nor does it necessarily follow, in every contract, that they can be inferred from the terms of the contract alone. Second, at least one of the reasons to question whether the expression in a contract is unambiguous or susceptible of only one meaning, before evidence of surrounding circumstances is admissible, is to avoid unnecessary consideration of circumstances which cannot affect that one meaning.

[103] Many disputes about contractual construction emerge from the application of the term or terms to circumstances that were unforeseen by some or all of the contracting parties. That alone is not enough to alter the operation of the contractual text of the term or terms. However, where that operation, according to the ordinary meaning of the text, leads to a result that would be considered to be commercially absurd by the hypothetical reasonable businessperson, legal principle as to the proper construction of a contract or other instrument may require a meaning other than the ordinary meaning of the text.

[104] Although Lord Wensleydale's statement in *Grey v Pearson*[92] is regarded as the articulation of the "golden rule" of construction of statutes,[93] as previously mentioned, it was made in relation to the proper construction of a will and as a statement applicable to all written instruments, including contracts.

[105] There is no shortage of cases where a statute is construed to avoid an absurdity but no farther.[94] In the contractual context, the cognate nature of the principle of statutory construction is recognised.[95] Generally, the principle will apply in contract law where the court is able to ascertain that something has gone wrong with the words or there is a mistake in drafting. In such a case:

> "Words may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency."[96]

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91 (2015) 256 CLR 104, 116 [47].

92 (1857) 10 ER 1216, 1234.

93 See, for example, *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320.

94 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 is a leading example.

95 *Adams v Lambert* (2006) 228 CLR 409, 417 [21], referring to *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297.

96 *Fitzgerald v Masters* (1956) 95 CLR 420, 426-427.

[106] But there are limits to the scope of this principle at both the beginning and end of its application. At the beginning, if the words are unambiguous, it is not enough that it may be guessed or suspected that the parties intended something different, because the court has no power to remake or amend the contract for the purpose of avoiding a result which is considered to be inconvenient or unjust.[97] Accordingly:

> "If after considering the contract as a whole and the background circumstances known to both parties, a court concludes that language of a contract is unambiguous, the court must give effect to that language unless to do so would give the contract an absurd operation. In the case of absurdity, a court is able to conclude that the parties must have made a mistake in the language that they used and to correct that mistake. A court is not justified in disregarding unambiguous language simply because the contract would have a more commercial and businesslike operation if an interpretation different to that dictated by the language were adopted."[98]

[107] In principle, a case where something has clearly gone wrong with the language is one that operates outside the area where an otherwise clear and ordinary meaning of the text of the term to be construed takes precedence. The point was made in this way in one case:

> "Whilst it is correct in my opinion that context and the surrounding circumstances known to both parties can be taken into account… even in cases where there is an absence of apparent ambiguity… that does not permit the Court to depart from the ordinary meaning of the words used by the parties merely because it regards the result as inconvenient or unjust… This does not mean that there are not exceptional cases where… something has clearly gone wrong with the language so as to interpret it in accordance with the ordinary rules of syntax makes no commercial sense… In such a case… a Court is entitled to depart from the ordinary meaning to give effect to what objectively speaking the parties intended."[99]

[108] In another case, the concept was considered as follows:

> "…it is helpful to identify the concept of 'absurdity' as a basis for construing a document otherwise than according to its literal meaning. Although the case was run both in this Court and below on the issue of absurdity, it should not be forgotten that this is but one aspect of broader principles as to the construction of commercial contracts. While in common parlance, the word 'absurd' may have a range of connotations, in this context it is used to mean something opposed to reason, or irrational. It can form a basis for resolving internal inconsistencies in a

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97 *Australian Broadcasting Corporation v Australasian Performing Rights Association Ltd* (1973) 129 CLR 99, 109.

98 *Jireh International Pty Ltd v Western Exports Services Inc* [2011] NSWCA 137, [55].

99 *McGrath v Sturesteps* (2011) 81 NSWLR 690, 697 [17]-[18].

> contract or giving commercial sense to language which is otherwise in a practical sense meaningless."[100]

[109] Another way of putting it is that there is a difference between a case where something has clearly gone wrong with the words, in the nature of a mistake, and an ambiguity which may result in giving the text or words of the provision a meaning they can "naturally" bear. The point was considered by Neuberger LJ, in distinguishing between interpretation (at common law) and rectification (in equity) as follows:

> "Further, as Hoffmann LJ also made clear … there is a difference between cases of ambiguity, which may result in giving the words a meaning they can naturally bear, even if it is not their *prima facie* most natural meaning, and cases of mistake, which may result from concluding that the parties made a mistake and used the wrong words or syntax. However, he emphasised the court does 'not readily accept that people have made mistakes in formal documents'… [H]e also pointed out… that, as the court, and therefore the notional reasonable person, cannot take into account the antecedent negotiations, the fact that the natural meaning of the words appears to produce 'a bad bargain' for one of the parties or an 'unduly favourable' result for another, is not enough to justify the conclusion that something has gone wrong. One is normally looking for an outcome which is 'arbitrary' or 'irrational' before a mistake argument will run.
>
> Accordingly, before the court can be satisfied that something has gone wrong, the court has to be satisfied both that there has been 'a clear mistake' and that it is clear 'what correction ought to be made'…"[101]

[110] The distinction between absurdity and something which is merely a more commercial and business-like operation is regularly reiterated and applied.[102]

[111] The point was recently considered in *obiter dicta* by Leeming JA as follows:

> "Sometimes it is clear on the face of a written contract that something has gone wrong with the language. In such cases, two quite different approaches may, in principle, be available as a matter of Australia law. It is vital to distinguish between the doctrines at common law and in equity.
>
> At common law, if the error is clear, and it is also clear what a reasonable person would have understood the parties to have meant, then the mistake may be corrected as a matter of construction. This is old law…
>
> Two conditions are necessary in order to correct the contractual language in this manner:
>
> (a) that the literal meaning of the contractual words is an absurdity; and

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100 *Miwa Pty Ltd v Siantan Properties Pte Ltd* [2011] NSWCA 297, [13].

101 *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429, [20]-[21].

102 *Schwartz v Hadid* [2013] NSWCA 89, [31]-[32]; *Bayside Council v Corp Constructions Pty Ltd* [2017] NSWCA 120, [70]; *Cushman & Wakefield (NSW) Pty Ltd v Farrell* [2017] NSWCA 24, [71].

(b) that it is self-evident what the objective intention is to be taken to have been."[103] (citations omitted)

[112] Leeming JA also considered the satisfaction required before such a construction is permissible, on this basis, as follows:

> "The court must be satisfied of those matters to a high level of conviction. To use the language of Dixon CJ and Fullagar J… it must be 'clearly necessary in order to avoid absurdity or inconsistency'. As this Court said in *Miwa Pty Ltd v Siantan Properties Pty Ltd*... the test of absurdity is not easily satisfied. Any question of absurdity or inconsistency must be identified according to established principles, by reference to the text of the agreement as understood in its factual and legal context … Courts which are asked to decide to delete, insert or rewrite part of a contract because of what is said to be an obvious error should bear steadily in mind that imperfections and infelicities and ambiguities in contractual language commonly reflect the give and take of negotiations, or the parties' appreciation that some obscurities are incapable of resolution. As Lord Hoffmann explained, the court does 'not readily accept that people have made mistakes in formal documents'"[104] (citations omitted)

[113] In the present case, the plaintiff's construction argument is not that the text of cl 6.1(c) is capable of more than one meaning as a matter of ordinary meaning. It is that the operation of the ordinary meaning of the text should be curtailed or conditioned, because an unconstrained operation leads to an absurd commercial outcome. In my view, subject to the principles set out above, such an argument does not have to pass through a gateway of ambiguity in the meaning of the text of cl 6.1(c) before it can be considered by reference to extrinsic evidence.

[114] At the end of the application of the principle that where something has clearly gone wrong with the text so that words may generally be supplied, omitted or corrected, where it is clearly necessary in order to avoid absurdity, is the requirement that the words to be supplied, omitted or corrected are clear, in the sense that it is clear what correction ought to be made.

The continuing debate about the ambiguity gateway

[115] From the foregoing, it is apparent that I do not consider that this case is one where the existence of an ambiguity gateway for the reception of evidence of extrinsic facts operates, if something has clearly gone wrong with the language so that words may generally be supplied, omitted or corrected, where it is clearly necessary in order to avoid absurdity. But against the possibility of error in that conclusion, I will record my understanding of the present state of authority on the status and scope of the ambiguity gateway, confining reference to the fewest possible cases.

[116] Since 2009, the NSW Court of Appeal has held, in three cycles, that any requirement to pass through an ambiguity gateway before evidence of extrinsic facts is receivable, by reason of

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103 *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq)* [2019] NSWCA 11, [5]-[8].

104 *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq)* [2019] NSWCA 11, [10].

Mason J's true rule in *Codelfa*, has been impliedly overruled, confined or explained by inconsistent later High Court decisions.

[117] The first cycle began in 2009 in *Franklins Pty Ltd v Metcash Trading Ltd*.[105] Other intermediate appellate courts followed *Franklins*, but in 2011 obiter statements made by the High Court in *Western Export Services Inc v Jireh International Pty Ltd* rejected any departure from *Codelfa*,[106] on the ground that the later decisions relied on in *Franklins* did not operate inconsistently with Mason J's true rule. After that, the Victorian Court of Appeal decided that it should hold to Mason J's true rule.[107]

[118] Nevertheless, the controversy continued. The second cycle began in 2014, when in *Mainteck Services Pty Ltd v Stein Heurtey SA*,[108] the NSW Court of Appeal concluded that another High Court decision in *Electricity Generation Corp v Woodside Energy Ltd*,[109] handed down three months before, was inconsistent with what was said in *Jireh*,[110] and went on to hold that Mason J's true rule does not prevent recourse to extrinsic evidence of "context and purpose".[111] Not long afterwards, the Full Court of the Federal Court in *Stratton Finance Pty Ltd v Webb*[112] indorsed that view. A more conservative approach was taken by the WA Court of Appeal, in *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd.*[113] And in 2015, the High Court addressed the question in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*.[114] The plurality reasons made two points relevant to the status and scope of Mason J's true rule. First, the question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice did not arise in *Mount Bruce*.[115] The other members of the court all agreed with that point.[116] Second, other observations as to the applicable principles in that case are not intended to state any departure from the law as set out in *Codelfa* and *Electricity Generation*.[117] Kiefel and Keane JJ also said that the "ambiguity" which Mason J said in *Codelfa* may need to be resolved

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105 (2009) 76 NSWLR 603, 616-618 [14]-[18], 663 - 678 [239] – [305].

106 (2011) 282 ALR 604, 605 [3]-[5].

107 *Retirement Services Australia (RSA) Pty Ltd v 3143 Victoria St Doncaster Pty Ltd* (2012) 37 VR 486, 502 [50].

108 (2014) 89 NSWLR 633.

109 (2014) 251 CLR 640.

110 (2014) 89 NSWLR 633, 653 [71].

111 (2014) 89 NSWLR 633, 656 [85].

112 (2014) 314 ALR 166, 174 [40].

113 (2014) 48 WAR 261, 271 [45] and 298-299 [212] – [217].

114 (2015) 256 CLR 104.

115 (2015) 256 CLR 104, 117 [49].

116 (2015) 256 CLR 104, 133 [113] and 134 [120].

117 (2015) 256 CLR 104, 117 [52].

arises when the words "are susceptible of more than one meaning" and that Mason J did not say how such an ambiguity may be identified.[118] Fairly read, *Mount Bruce* did not disagree with the result in *Franklin* or *Mainteck*. But it was no indorsement of those cases either. It was yet another statement that the High Court had not further considered Mason J's true rule.

[119] Also in 2015, but without reference to *Mount Bruce*, the Qld Court of Appeal, in *Watson v Scott*,[119] generally restated the principles as follows:

> "evidence of surrounding circumstances is admissible to assist in the interpretation of a contract only if the language is ambiguous or susceptible of more than one interpretation; it is not admissible to contradict the language of the contract when it has a plain meaning [and] where the terms of the agreement are unambiguous, extrinsic evidence may inform, but cannot contradict, the meaning of the contract."[120]

[120] In 2016 the Victorian Court of Appeal, in *Apple and Pear Australia Ltd v Pink Lady America LLC*[121] took the view that it is bound to apply the accepted principles of construction, as reaffirmed in *Mount Bruce*.[122]

[121] The third cycle began when the NSW Court of Appeal returned to the topic, after *Mount Bruce*, first in *WIN Corporation Pty Ltd v Nine Network Australia Pty Ltd*,[123] followed by *Zhang v ROC Services (NSW) Pty Ltd*[124] and then *Cherry v Steele-Park*.[125] In similar fashion to the two earlier cycles, the court held that other decisions of the High Court, since *Mount Bruce*, not expressly, but by the effect of their reasoning, justify the conclusion that Mason J's true rule does not support an ambiguity gateway. That is, Mason J's true rule has again been impliedly overruled, confined or explained.[126]

[122] In this case, I do not have to consider the effect of these conflicting authorities, if I conclude that the construction argument in this case turns on something that has clearly gone wrong with the text.

Has something clearly gone wrong with the text?

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118 (2015) 256 CLR 104, 132 [110].

119 [2016] 2 Qd R 484.

120 [2016] 2 Qd R 484, 495.

121 (2016) 343 ALR 112.

122 (2016) 343 ALR 112, 155 [139], 179 [231].

123 (2016) 341 ALR 467.

124 (2016) 93 NSWLR 561.

125 (2017) 96 NSWLR 548.

126 (2017) 96 NSWLR 548, 566-568 [76]-[85].

[123] Consideration of whether something has clearly gone wrong with the text of cl 6.1(c) requires analysis of the operation of the WIRP Deeds. The analysis must consider the operation of the individual WIRP Deed. But it must also consider the operation of the WIRP Deeds collectively. That conclusion follows from two facts: first, the WIRP Deeds were the result of a collective bargaining process towards a standard form contract; second, their subject was the provision of an increase in capacity of the Network so as to transport coal by rail to WICET for shipping, with proportionate allocation of Aggregate Access Rights relating to the Customer's demand under each of the WIRP Deeds and liabilities relating to those proportions.[127]

Structure of the WIRP Deed

[124] The discussion may be shortened by considering the WIRP Deed for the first defendant as reflecting all the WIRP Deeds, unless otherwise stated. Again, for simplicity, I will use the present tense in describing the terms, even though many of the relevant matters are now in the past.

[125] A number of facts are recited in the WIRP Deed, including that:

(a) the plaintiff is responsible for the provision of Infrastructure;[128]

(b) the Customer and the Other Customers have entered into or will enter into long term take or pay arrangements in relation to using the capacity of the "Port Facilities", a term defined to mean WICET;[129]

(c) the Customer or the Customer's Railway Operator need to secure access to Infrastructure to enable them to have coal transported by rail to the Port Facilities;[130]

(d) the Customer wishes for the plaintiff to deliver the "Extension", a term defined to mean the new Infrastructure and upgrades to the existing infrastructure generally (described in Schedule 3 to the WIRP Deed) to meet the needs of the Customer;[131]

(e) if the plaintiff delivers the Extension, the use of the enhancements would be regulated under an Access Undertaking and the Act;[132]

(f) at the request of the Customer and the Other Customers, the plaintiff has agreed to deliver the Extension upon the Customer entering into the WIRP Deed and subject to its terms.[133]

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127 Compare *Zhang v BM Sydney Building Materials Pty Ltd* [2016] NSWCA 166, [45]; *McVeigh v National Australia Bank Ltd* (2000) 278 ALR 429, [77].

128 Recital A.

129 Recital C and clause 1.1, definition "Port Facilities".

130 Recital D.

131 Recital E and clause 1.1, definition "Extension".

132 Recital G.

133 Recital H and clause 1.1, definition "Other Customer".

[126] By cl 4.1, the parties acknowledge that the Customer's Segments are necessary in order to enable the plaintiff to provide the "Aggregate Access Rights" and the Customer agrees to the obligations imposed upon it under the WIRP Deed, including those relating to the WIRP Fee, in consideration for the plaintiff undertaking to deliver the Customer's Segments in accordance with cl 4.

[127] The "Aggregate Access Rights" are defined in cl 1.1 to be those specified in Schedule 9. Schedule 9 provides, for the first defendant as follows:

Aggregate Access Rights – Rolleston to Port Facilities		
	Nominated Monthly Train Services (30 Days)	Nominated Annual Train Services
1 July – 30 September 2014	56	Not applicable
1 October – 31 December 2014	84	Not applicable
1 January 2015 – 31 March 2014	162	Not applicable
1 April 2015 – 30 June 2015	162	Not applicable
1 July 2015 until 20 years after the Commitment Date	172	2,064

[128] By cl 4.2, it is provided that the plaintiff must carry out the "Works" for each Segment in accordance with the "Scope of Works" for the Segment. "Scope of Works" is defined, by cl 1.1, to mean, for a Segment, the Scope of Works set out in Schedule 3.

[129] Schedule 3 sets out the Scope of Works for each of the Segments for the whole of the proposed Extension, including those which do not relate to access that the first defendant might utilise. It is unnecessary to set out the whole of the description of the Scope of Works. Two illustrations are sufficient.

[130] First, Segment #1 – Balloon Loop was:

> **"1.1 Description of Segment #1**
>
> The railway Balloon Loop which connects to the North Coast Line at approximately 545 kms.
>
> **1.2 Scope of Works for Segment #1**
>
> Construction of a 13km single rail loop and associated rail infrastructure adjacent to the existing North Coast Line to enable train unloading at the Port Facilities. The Balloon Loop will be designed to cater for Blackwater length train consists. Four train consists will be held on the arrival road and 1 consist on the departure road.
>
> Loaded Trains will enter the Port Facilities from around the Balloon Loop and exit on the straight. The vertical grade of the Balloon Loop is level for the length of a train approaching the Port Facilities and 1:200 on the departure side.
>
> The Balloon Loop formation and track is designed for 26.5 tonne axle loads with minimum 1:16 turnouts and 4m access roads. The rail infrastructure will use RCS signalling track circuits and axle counters. The Balloon Loop is not electrified.

> Signalling and a crossover will be constructed north of the Balloon Loop connection on the North Coast Line.
>
> The scope of works is designed to acknowledge the requirements for the future stages."

[131] Second, Segment #5 was:

> "**5.1 Description of Segment #5**
>
> The rail corridor between 0 km and approximately 26.5 km on the Bauhinia line.
>
> **5.2 Scope of Works for Segment #5**
>
> The construction of a 1.90km passing loop at Kenmare and 26.60km of non-continuous access roads along the eastern corridor supported by 1.7km of easements into the rail corridor.
>
> The formation and track is designed for 26.5t axle loads with minimum 1:16 turnouts and 4m access roads. The rail infrastructure is not electrified and is operated with DTC Signalling."

[132] Clause 4.3 provides that the plaintiff must ensure that the Project Costs for the Extension do not exceed the Target Cost for the Extension. Clause 4.4 provides that the plaintiff must ensure that the "First Milestone" is achieved on or before the "First Milestone Target Date". The "First Milestone Target Date" is defined in cl 1.1 to mean the date specified in Item 1 of Schedule 5. Item 1 of Schedule 5 provides that the date is the later of the "First Milestone Specified Target Date", defined to mean 30 June 2014 or that date as varied, and the "Port Facilities (Initial) Available Date". The First Milestone Specified Target Date was later varied to 30 June 2015. Schedule 5 also defines the "First Milestone" as being that all Segments, other than Segment #2 and Segment #4, are Available. Clause 1.1 defines "Available" to mean, in respect of a Segment, that the Segment has been materially completed in accordance with the Scope of Works for the Segment and, as a result, the Segment is capable of being lawfully used as a railway to allow the operation of Train Services.

[133] As previously mentioned, cl 6 provides for variation to the Scope of Works. Clause 7 provides for Variations to the Milestone Specified Target Dates and the Target Cost. Clause 8 provides for a process of consultation and reporting between the plaintiff, the Customer and Other Customers by a committee termed the Extension Committee.

[134] Clause 9.1 provides that the plaintiff and the Customer agree that on or before the date which is three months prior to the First Milestone Specified Target Date, the Customer and the plaintiff must enter into an Access Holder Access Agreement for the whole of the Aggregate Access Rights for a term not exceeding ten years after the Commitment Date. Clause 9.2 provides that, in default, a document in the form of a Pro Forma Access Agreement is to be taken to be in full force and effect on and from the Due Date as an Access Agreement between the plaintiff and the Customer in respect of the Aggregate Access Rights for a term of ten years. The term "Pro Forma Access Agreement" is defined by cl 1.1 to mean the applicable standard access agreement under the Access Undertaking, from time to time, with all amendments necessary in accordance with cl 9.4.

[135] Clause 9.4 provides that the Pro Forma Access Agreement must include provisions that comply with and are otherwise consistent with the WIRP Deed, including the principles and requirements in Schedule 8. Schedule 8 comprises a table in two parts. The first part relates to the Pro Forma Access Agreement requirements. Item 1 constitutes a description of a Train Service. That description refers to Part 2 of Schedule 8 that sets out the Train Service Description by reference to train service characteristics, times at the destination unloading facility, provisioning time at depot and other dwell time and aggregate access rights, including transit times and operating restrictions, both generally and by reference to particular systems. A number of those items cross-refer to the Aggregate Access Rights and Train Services referred to in Schedule 9.

[136] Under the Access Agreement (as provided for by cl 9), the Customer will become an access seeker entitled to the Aggregate Access Rights in consideration of payment of Access Charges calculated from the Reference Tariff. However, the WIRP Deed provides for additional payments by the customer to the plaintiff in two possible ways.

[137] First, cl 11 provides for payments of the WIRP Fee. Those payments are to commence as soon as reasonably practicable after the start of the "First WIRP Fee Month" and continue for each subsequent month during the "WIRP Fee Payment Period". The "First WIRP Fee Month" is defined by cl 1.1 to mean the month which is six months after the month during which the later of the First Milestone Target Date and the First Milestone Achievement Date occurs. The "WIRP Fee Payment Period" is defined in cl 1.1 to mean the period commencing on the first day of the First WIRP Fee Month and ending at the end of the month which is 233 months after the First WIRP Fee Month. Clause 11.5 provides that if the Customer is unable to use the Access Rights during the whole of a month because of delays of identified kinds caused by the plaintiff acting unreasonably and in bad faith, the WIRP Fee (and any Optimisation Fee) for that month is not payable.

[138] Calculation of the WIRP Fee is complex and is provided for in detail in cl 11. It is unnecessary to set out the detail. It is enough to summarise. The calculation depends in part on the Customer's Proportions as follows:

Segment	Caledon	Cockatoo	Colton	Glencore	Springsure	Wash-pool	Wes-farmers	Yarrabee
#1	14.6%	11.0%	3.2%	39.8%	14.6%	5.8%	5.5%	5.5%
#2	19.0%	0.0%	0.0%	40.0%	19.0%	7.6%	7.1%	7.1%
#3	0.0%	100.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
#4	19.0%	0.0%	0.0%	40.0%	19.0%	7.6%	7.1%	7.1%
#5	0.0%	0.0%	0.0%	67.8%	32.3%	0.0%	0.0%	0.0%
#8	0.0%	100.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%

[139] As at 30 September 2015, an estimate of the total amounts of the WIRP Fees in accordance with the calculation (in addition to the Access Charges payable under the relevant Access Agreement) for the full period of the WIRP Deeds is:

Customer	WIRP Fees
Caledon	$79,056,666
Cockatoo	$40,095,666
Colton	$3,674,502
Glencore	$185,323,554
Springsure (under administration as of 30 September 2019)	$83,097,144
Washpool	$31,576,662
Wesfarmers	$29,593,044
Yarrabee	$29,593,044
TOTAL	$482,010,282

[140] Second, cl 16 deals with the contingency that Project Costs for a Segment might not be accepted by QCA into the RAB. By cl 16.3, the parties agree, in that event, that the Customer will pay an additional amount by payment of a fee, termed the Optimisation Fee, for the relevant Customer's Segment, subject to some exclusions.

[141] Clause 13 expressly provides that the provisions of the WIRP Deed are in addition to and not in substitution for, or variation of, any conditions contained in any Access Agreement. It expressly provides that the parties acknowledge and agree that nothing in the WIRP Deed grants or confers upon the Customer any right to use all or part of the Aggregate Access Rights, it being acknowledged and agreed that Access Rights are only conferred by an Access Agreement and not by the WIRP Deed. It also records that nothing in the WIRP Deed comprises a payment or other consideration for or in respect of the provision of Access Rights. Clause 13(b)(iii) provides further that the parties acknowledge and agree that nothing in the WIRP Deed limits or affects the operation of any Access Agreement or the plaintiff's rights under any Access Agreement.

[142] Having regard to the fact that cl 9 of the WIRP Deed provides for the parties to enter into a relevant Access Agreement for the Aggregate Access Rights by reference to the achievement

of a Milestone under the WIRP Deed and that liability for the Access Charges under the Access Agreement is for provision of the Aggregate Access Rights, created by the expansion providing the additional capacity and access rights related to that capacity provided for by the WIRP Deeds, it is only in a limited sense that it can be said truly that nothing in the WIRP Deed comprises consideration for or in respect of the provision of the Access Rights.

[143] Clause 14 provides for the variation of Access Rights and the maximum net tonnage. By cl 14.1(c) the parties acknowledge and agree that the Aggregate Access Rights, the Access Rights and the Customer's Capacity for each Customer's Segment are all based on the operation of trains with a maximum net tonnage of 8210 tonnes (that is, trains which nominally have the ability to transport up to 8210 tonnes of coal per trip) and that the annual number of Train Services which is reflected in the Aggregate Access Rights for a year was calculated by dividing the total number of tonnes of coal that the Customer wished to have transported during that year by 8210 and then multiplying that number by two to provide for train services to WICET and on the empty return journey. Clause 14.3 provides that the Customer acknowledges that each Other WIRP Deed will contain a clause on substantially the same terms.

[144] Clause 15 provides for termination of the WIRP Deed by the plaintiff, *inter alia*, if the Access Agreement is terminated other than a result of the plaintiff's default. Clause 15.3 provides for payment by the Customer on termination of a relevant Access Agreement and for relinquishment of some of the Aggregate Access Rights under the WIRP Deed, resulting in the payment by the Customer to the plaintiff of what is termed a "Termination Fee".

[145] A cornerstone on which the structure of the WIRP deeds sits is that the Project Costs, defined for the Extension as the costs and expenses incurred by the plaintiff in connection with the Extension or the Works for the Extension and for a Segment as the sum of those costs attributable to or allocated to that Segment, are intended to be included in the RAB for the Network under the Access Undertaking, if possible. To that end, cl 16.1 requires the plaintiff to seek and both parties to do all things they can reasonably do to encourage the QCA to include the Project Costs for each Segment in the RAB.

[146] Clause 16.3 deals with what is to happen if Project Costs are not accepted into the RAB. In that event, it provides that the Customer will pay to the plaintiff the value of the relevant Project Costs (with some exceptions) by payment of the Optimisation Fee, a term defined to mean for a Customer's Segment for a Month the amount calculated in accordance with a schedule.[134] In other words, the costs of Segments not included in the RAB, and recovered together with the regulated return from all access holders under relevant access agreements (including the Access Agreements of each of the Customers under cl 9 of the WIRP Deed) are to be paid by the Customer as Optimisation Fees under cl 16.3, calculated by reference to the Customer's Proportion for the relevant Customer's Segment.[135]

[147] It is in this context that one can turn to the operation of cl 6.1(c). Principle and logic demand that the operation of cl 6.1(c) be considered closely both as a matter of language and as a matter of commercial operation.

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[134] Schedule 7, item 2.2.

[135] Schedule 7, item 2.4.

Ordinary meaning

[148] The opening words of the clause, "Prior to the First Milestone Target Date", impose a constraint on the Customer's ability to serve a notice by reference to a limited time period. The time is a target date for part of the extension works. As to that target date:

(a) the works were divided into the "First Milestone" and the "Second Milestone";

(b) the First Milestone was defined as "All Segments (other than Segment #2 and Segment #4) are Available…", with five of the seven duplications on Segment #4 also to be Available;

(c) "Available" was defined to mean "materially completed in accordance with the Scope of Works…and…capable of being lawfully used".

[149] The relevant time is set by defining:

(a) the First Milestone Target Date[136] as the later of the "First Milestone Specified Target Date" and the "Port Facilities (Initial) Available Date";

(b) the "First Milestone Specified Target Date" as a specific date - 30 June 2014 or as varied;[137] and

(c) the "Port Facilities (Initial) Available Date" as the date the Port Facilities are materially complete and capable of handling coal at 60% or more of the Port Facilities' full design capacity.[138]

[150] Accordingly, at the time the WIRP Deeds were executed, cl 6.1(c) provided that a notice might be given by the Customer at a time when a substantial amount of the extension works may have been completed. As well, from the date 3 months before the First Milestone Specified Target Date, the parties will have entered into an Access Agreement under cl 9. The actual period of time thereby agreed to was at least 2 years 6 months (three months before 30 June 2014) – but as it was also dependent upon the Port Facilities (Initial) Available Date, was potentially significantly longer.

[151] The second part of cl 6.1(c) identifies what the Customer may do within that time frame – that is, notify the plaintiff and each Other Customer. When the word "may" is used in relation to a contractual power it ordinarily means, and it is generally used in this contract to denote, that a party may choose whether or not to exercise the power.[139]

[152] No express reference is made to the Customer's consideration of whether to exercise the power. In other provisions, express reference is made to the Customer considering whether a

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[136] Clause 1.1 and Schedule 5 item 1.

[137] Schedule 5 – First Milestone, Second Milestone. That date was subsequently varied to 31 March 2015.

[138] Clause 1.1.

[139] Clause 6.2(a), clause 6.2(b).

state of affairs exists.[140] Nor is the power to notify under cl 6.1(c) expressly conditioned upon the Customer acting in “good faith” or “reasonably”. Again, in other provisions, express reference is made to such a requirement.[141]

[153] The Customer is to notify both the plaintiff and each Other Customer for the Segment. The power is to notify “that a Segment is to cease being a Customer’s Segment”. “Customer’s Segments” are defined to mean “each Segment specified as such in item 1 of schedule 2.” Item 1 of Schedule 2 sets out a table for each Segment. The left-hand column in each table is headed “Is the Segment a Customer’s Segment?” The Segments which are the Customer’s Segments for the particular Customer of the WIRP Deed are identified by the word “Yes” in the column, for the first defendant as follows:

Segment	Is the Segment a Customer’s Segment?
Segment #1 – Balloon Loop	Yes
Segment #2 – North Coast Line Aldoga	Yes
Segment #3 – Moura East	No
Segment #4 – Blackwater Duplications	Yes
Segment #5 – Bauhinia North	Yes
Segment #8 – Moura West	No

[154] Accordingly, the fact which is to be notified under cl 6.1(c) is that a Segment is to cease being specified as a Customer’s Segment for that particular Customer in item 1 of Schedule 2.

[155] By way of proviso, cl 6.1(c) limits the Customer’s right to notify in two related ways. At the time when the notice is given, the Customer must not be the only Segment Customer for the Segment. That is, the Customer can only give the notice if there is at least one remaining Other Customer for the Segment. After the notice is given, and has the effect that a Segment is to cease being specified as a Customer’s Segment for that particular Customer, there must be at least one remaining Segment Customer for the Segment. These limits create a requirement that there be a “last Customer standing” for a Segment. Their purpose is to protect the plaintiff, by ensuring that there is at least one Customer who will remain liable to pay the total amount of all the WIRP Fees and any Optimisation Fee under all the WIRP Deeds, as originally made, for the Segment.

[156] Notice given under cl 6.1(c) operates so that Item 1 of Schedule 2 will be taken to be varied to specify that the Segment is not a Customer’s Segment. That is, the response to the question “Is the Segment a Customer’s Segment?” will be taken to have been changed from “Yes” to “No”.

[157] For the avoidance of doubt cl 6.1(c) expressly provides for three specific consequences of giving notice:

(a) the Segment will cease being a Customer’s Segment;

(b) the Customer will cease being a Segment Customer for the Segment; and

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140 Clause 6.2(a)(ii), clause 6.2(b)(ii).

141 Clause 6.2(a)(ii), clause 6.2(b)(ii).

(c) the Customer will cease having a Customer’s Proportion for the Segment.

[158] The term “Customer’s Proportion” is defined in cl 1.1 by reference to a Customer’s Segment as the proportion specified for the Customer’s Segment in item 1 of schedule 2. The table for each Segment in item 1 of Schedule 2 sets out, in the right-hand column, the “Customer’s Proportion” for the Segment. Clause 6.1(c) has the effect that, upon a notice being given that a Segment is to cease being a Customer’s Segment, the Customer’s Proportion for that Segment specified in item 1 of schedule 2 will be reduced to zero. In the calculation of the Base WIRP Fee under item 1.3 of schedule 7, the effect is that no amount is payable by the Customer by way of the WIRP Fee for the relevant Segment thereafter.

[159] Clause 6.1(c) provides that the WIRP Deed will not be varied otherwise. Two effects of that may be noticed. First, the Customer’s liability to pay the WIRP Fee for any Segment which the Customer has not notified under cl 6.1(c) is unaffected, as are the liabilities of the Other Customers for those Segments. Second, the agreement between the plaintiff and the Customer to enter into an Access Agreement for the Aggregate Access Rights and for the Customer to pay Access Charges for those rights and the obligation of the Customer to take all reasonable steps to encourage the QCA to include the Project Costs in the RAB for the calculation of those Access Charges remains.

Immediate context

[160] Clause 6.1(d) provides for the reciprocal situation where an Other Customer notifies under cl 6.1(c) of their WIRP Deed, as follows:

> “(d) If an Other Customer (Former Segment Customer) ceases to be a Segment Customer for a Segment under clause 6.1(c) of the Former Segment Customer's Other WIRP Deed, then as at the date the Former Segment Customer ceases to be a Segment Customer for the Segment under the Other WIRP Deed:
>
> (i) item 1 of schedule 2 will be taken to be varied to remove the Former Segment Customer as a Relevant Other Customer for the Segment;
>
> (ii) for the avoidance of doubt, the Former Segment Customer will cease:
>
> A. being a Relevant Other Customer for the Segment;
>
> B. being a Segment Customer for the Segment; and
>
> C. having a "Customer's Proportion" (as defined in the Former Segment Customer's Other WIRP Deed) for the Segment;
>
> (iii) if the Segment is a Customer's Segment, the Customer's Proportion for the Customer's Segment will be taken be varied to be the proportion (expressed as a decimal) calculated in accordance with the following formula:
>
> $$CPn = \frac{[CPi]}{[1- CPFsc]}$$

where:

CPn = The varied Customer's Proportion for the relevant

Customer's Segment from the date the Former Segment Customer ceased to be a Segment Customer for the relevant Customer's Segment (expressed as a decimal)

CPi = The Customer's Proportion for the relevant Customer's Segment immediately prior to the Former Segment Customer ceasing to be a Segment Customer for the relevant Customer's Segment (expressed as a decimal)

CPFsc = The "Customer's Proportion" (as defined in the Former Segment Customer's Other WIRP Deed) for the relevant Customer's Segment immediately prior to the Former Segment Customer ceasing to be a Segment Customer for the relevant Customer's Segment (expressed as a decimal)."

[161] Clause 6.1(d) operates to increase the proportion of the WIRP Fee to be paid for a Segment by those Customers who remain as Segment Customers for the Segment. If only one Customer remains, then that Customer will be liable to pay 100 percent of the WIRP Fee payable for the Segment.

[162] Similarly, because a Customer giving notice under cl 6.1(c) ceases to have a Customer's Proportion for the Segment, in the event that any of the Project Costs for the Segment are not included in the RAB, that Customer will not be liable for any sum by way of the Optimisation Fee for the Segment and the liability that would otherwise have been incurred by the Customer will be thrown onto the Other Customers whose Customer Proportions for the Segment have been increased. If only one Customer remains then that Customer will be liable to pay 100 percent of the Optimisation Fee payable for the Segment.

[163] Accordingly, it can be seen that a notice given under cl 6.1(c) operates as a self-executing variation of contract, under both the notifying Customer's WIRP Deed and under each Other Customer's WIRP Deed. Upon the notice being given, the Customer is no longer required to pay its proportion of the WIRP Fee for the relevant Segment and the proportions of the WIRP Fee to be paid by the Other Customers who remain as Segment Customers are automatically increased, pro rata.

Commercial operation

[164] Moving one step beyond the direct operation of the text, a logical question relevant to the purpose of cl 6.1(c) is in what circumstances or for what reasons would a Customer be likely to give notice under cl 6.1(c)?

[165] One possibility is simply to avoid paying the WIRP Fee and any Optimisation Fee in respect of the Segment. That is, in effect, the defendants' case. But that begs another question, namely what is the commercial purpose of a clause that has that operation? There is no denying that if the clause operates as the defendants say, it provides for a possible game of musical chairs, as follows.

[166] When the first Customer gives notice, the Other Customers for the Segment automatically take up the Customer's Proportion for the Segment, pro rata, and the corresponding increase in liability for the WIRP Fee relating to the total of Aggregate Access Rights for the Segment. However, on the defendants' case, there is no corresponding amendment to be made under cl 9 of the notifying Customer's WIRP Deed, or under any Other Customer's WIRP Deed as to the Access Agreement made or to be made.

[167] Thus, the additional access rights that constitute the notifying Customer's Aggregate Access Rights will remain the contractual entitlement of that Customer under their Access Agreement. Of course, that Customer will be liable to the plaintiff for those Aggregate Access Rights, along with all other access holders who access that part of the Network, according to their agreed Access Charges. To that extent, no change occurs in the incidence of the liabilities of both the notifying Customer and the all the Other Customers under the WIRP Deeds for their respective proportions of the total of the additional access rights facilitated under the WIRP and made the subject of the WIRP Deeds.

[168] However, the corresponding incidence of liabilities for the WIRP Fee and any Optimisation Fee relating to the additional access rights in the same proportions is shifted. The notifying Customer's liability is shifted to the remaining Other Customers, who obtain no express right or clear benefit in exchange for the shift. An obvious question is why would each of those Other Customers agree to that shift of liability when there is no change in their additional access rights?

[169] From the plaintiff's commercial perspective, the shift of the incidence of the liabilities for the WIRP Fees and any Optimisation Fees creates a change in the commercial credit risk of receipt of the WIRP Fees and any Optimisation Fees. That could be either a commercial detriment or a commercial benefit, depending on between whom the shift occurs. Nothing in the text of the proviso in cl 6.1(c) addresses the financial capacity of the remaining Segment Customers to pay the increase in WIRP Fees. Financial capacity is provided for by cl 26, under which the plaintiff may require a Customer to provide security in the form of a bank guarantee or parent company guarantee – and to increase this security when required. But that clause does not protect the plaintiff against the risk of a shift of the liability for WIRP Fees onto a party who does not have the commercial capacity to pay those fees.

[170] Second, the shift splits or separates the obligee for the Access Charges for the Aggregate Access Rights under the Access Agreement from the obligee for the WIRP Fee and any Optimisation Fee calculated by reference to the same Proportions of the Segment to be funded and constructed by the plaintiff to facilitate the same Aggregate Access Rights. In the result, the new obligee or obligees must pay the additional WIRP Fee without any corresponding direct or indirect financial benefit from the additional Access Rights that correspond to the relevant Customer's Proportion of the WIRP Fee.

[171] Third, the shift and separation of the relevant liabilities will also affect the commercial context of any future assignment or transfer of the rights under the WIRP Deed, because the

transferring notifying Customer may be able to transfer or assign those rights without any liability for the WIRP Fee and any Optimisation Fee for the Segment.[142]

[172] Fourth, having regard to the time period in which cl 6.1(c) operates, a right to notify that each Segment for that Customer is to cease being a Customer's Segment enables the Customer to enjoy all or most of the benefits of the WIRP Deed up to a point nearing completion of the Works before electing to give a notice that will have the effect that it will pay no WIRP Fee nor any Optimisation Fee for the executed consideration moving from the plaintiff up to that point. Commercial self-interest strongly suggests that a Customer would be likely to do so. The game of musical chairs by which all of the defendants (and Cockatoo) gave notices under cl 6.1(c) on 30 September 2015 and 1 October 2015 starkly supports that view.

[173] Fifth, conversely, the same time period exposes the plaintiff to many of the relevant risks which the WIRP Deed was expressed to compensate, to a large extent by payment of the WIRP Fee, before knowing whether its commercial position will be altered to its detriment by shifting the credit risk of recovering all of the WIRP Fees to the last Customer standing for all relevant Segments.

[174] Accordingly, a logical question to ask is what other reasons might there have been for what the defendants concede is a "surprising" operation of clause 6.1(c)?

[175] One submission by the defendants is that, viewed as at the time when the WIRP Deeds were made, the plaintiff's exposure to risks, including the credit risk, was not as great as might be thought otherwise, because the Customers would risk a loss of commercial reputation if they were to give notice at the last minute merely to avoid paying their WIRP Fees. In my view, no weight should be given to that submission, as an explanation for the commercial operation of cl 6.1(c).

[176] Another submission is that if the WIRP Fees were payable in consideration of the provision of the Aggregate Access Rights, the plaintiff would have been exposed to the risk of non-approval by the QCA of the WIRP Deeds as access conditions. This submission raises a couple of potential points. First, there is no evidence that any such risk was a mutually known fact, so whether or not that was the view of any of the plaintiff's officers, internally, would be a subjective fact, not usually admissible in aid of construction. Second, whether or not it was considered advisable to clearly separate the consideration for the plaintiff's promises under the WIRP Deeds to construct, fund and deliver the proposed extension on time and for agreed amounts by way of WIRP Fees and any Optimisation Fees, from the entitlement to payment of the regulated access charges for the proposed additional access rights under access agreements, in accordance with the separate structures of an access agreement and an agreement for approved access conditions, as provided under the Access Undertaking, says nothing directly about any right of a proposed access holder to avoid liability for the WIRP Fee and any Optimisation Fee.

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[142] Clause 21.

[177] In my view, the conclusion that follows, overall, is that something has clearly gone wrong with the text of cl 6.1(c). Accordingly, in my view, extrinsic evidence is admissible to the extent that it will inform what the parties' objective intention was at the time of the contract.

First extrinsic fact

[178] The plaintiff alleges two facts as extrinsic facts relevant to the question of construction of cl 6.1(c).

[179] The first extrinsic fact is that at the time of entering into the WIRP Deeds the Customers were of materially varying experience (from one another) in mining and exporting and were of materially varying financial means. The plaintiff alleges that all the parties to the WIRP Deeds knew that fact.

[180] The defendants admit the fact alleged. Some detail of the circumstances is contained in the joint submission made by the then prospective customers and others to the ACCC in seeking authorisation to negotiate with the plaintiff collectively. Accordingly, some of the Customers (the first, third and fourth defendants) were established miners. Others (Springsure and Cockatoo) were not established or as well established and did not have operating mines. The first defendant was the largest miner, exporting both thermal and coking coal from interests in over 30 mines in Australia. Springsure was the smallest, its parent (Bandanna Energy Ltd) being the holder of coal exploration permits and oil and gas interests. These facts are not contested as being mutually known.

[181] The plaintiff's contention is that it is not necessary to ascertain the quantitative differences among the experience or financial means of individual Customers. The defendants submit that at this level of generality the alleged first extrinsic fact is irrelevant.

[182] In my view, an extrinsic fact that is mutually known may be relevant if it tends to prove a fact that is relevant to a constructional question that is in issue. The plaintiff identified the relevance on which it relied as being the improbability that the Customers agreed, inter se, that the WIRP Fee that was initially set in proportion to the access rights that each Customer was to obtain as a result of the WIRP Deeds could be transferred to a junior minor without a mine. That is, the relevance is as to whether the parties intended, objectively, that cl 6.1(c) might operate in the manner that the defendants allege it has operated.

[183] The differing financial means of the Customers would go to the effect of that operation upon the plaintiff's financial risk. The defendants submit that the WIRP Deeds provide for the plaintiff to require security for the prospective liability for the WIRP Fee, but that does not mean that the plaintiff faced no financial risk of non-payment of the WIRP Fee.

[184] The differing experience in mining and exporting does not directly go to any risk or effect upon the plaintiff. But the financial effect of the operation of cl 6.1(c) for which the defendants contend is not merely a matter between each Customer and the plaintiff. It is a matter that will or might affect the Customers, inter se, and their reasonable expectations, objectively speaking, of how cl 6.1(c) is intended to operate, as previously discussed.

[185] In my view, the first extrinsic fact is relevant to the construction of cl 6.1(c).

Second extrinsic fact

[186] The second extrinsic fact is that at the time of entry into the WIRP Deeds there was a prospect that a Customer's Segment under a WIRP Deed may cease to be necessary to enable the plaintiff to provide the Aggregate Access Rights under the WIRP Deed. The particulars refer to the point at which Springsure proposed to connect to the Network for its proposed mine. Originally, it was proposed that the connection be made at a point on the Bauhinia Branch Line. In the end, that was what was provided for in the WIRP Deeds. Accordingly the first defendant and Springsure were to be responsible for the WIRP Fee for Segment #5 – Bauhinia North in the proportions of 67.8:32.2.

[187] However, between June 2011 and September 2011, Springsure and the plaintiff negotiated about an alternative connection point on the Blackwater Line that would have removed any need by Springsure for access rights over the Bauhinia Line and replaced that with a need for access rights over a section of the Blackwater Line.

[188] The defendants do not dispute the fact of the negotiations over that matter between the plaintiff and Springsure. They dispute that the prospect that Springsure may have ceased to need access rights to Segment #5 - Bauhinia North was a fact of which all defendants were aware. The defendants do not contest that the first defendant knew the fact. But the first defendant does not admit that the other defendants (and Cockatoo) knew it and the other defendants deny that they (and Cockatoo) knew it. None of the defendants called evidence on this question. Their case is that the plaintiff did not prove the fact.

[189] The relevant evidence of the knowledge of the defendants is testimonial and documentary. Ian Lock's testimony dealt with communications before and discussions at a number of meetings. It is unnecessary to canvass all of the relevant parts. That is because the defendants do not substantially contest that the subject of whether the Springsure connection as originally proposed to an approximate point on the Bauhinia Line was discussed at one or more of the relevant meetings attended by representatives of all the defendants.

[190] However, the defendants submit the evidence of the other defendants' alleged knowledge of the discussions is insufficient to show that the other defendants were ever informed that it was proposed to move the Springsure point of connection to the Blackwater Line, which would remove Springsure's need for access rights to the Bauhinia Line and any Segment on that line.

[191] But Mr Lock's evidence went a little further than that. He said that there were open discussions with all Customers about the proposal that if a Customer wanted to change their "load out" location such that they no longer required the use of one of their Customer Segments they could drop out of that Segment and cause the readjustment of the other Customer's Proportions on that Segment. In particular, he said that at a mid-July 2011 Customer meeting he noted that the project percentages were locked in "except segment participation". Immediately after that he noted "transfer sch 9 and not 2". The reference to "except segment participation" was to a Customer who no longer required use of a Segment, withdrawing from the Segment.

[192] Mr Lock was cross-examined as to the extent of his recollection. It is not surprising that he does not recall any of the detail. But he did not waiver from there being discussion about an issue as to where Springsure was connecting and that they needed to do something about it.

[193] Nevertheless, I accept that Mr Lock's oral evidence does not specifically demonstrate the knowledge of the Customers other than the first defendant and Springsure of the possible move of the Springsure connection point to a point on the Blackwater line.

[194] The defendants make the further point that Mr Lock's evidence does not show that the Customers other than the first defendant and Springsure knew that the Springsure connection issue involved Springsure not using the proposed Segment #5 – Bauhinia North. I do not agree. Mr Lock's evidence shows that the Springsure connection issue arose at a meeting in mid-July 2011. Thereafter he made notes of discussions at further meetings on 29 July 2011 and 3 August 2011. At each meeting he noted discussion as to what would happen if a Customer withdrew from a Segment. The notes on 29 July 2011 included that "if Customer chooses to withdraw from a Segment, Other Customers can't object – pro rate". The notes of 3 August 2011 included that "… cl 6.1 – if move out of Segment – pro rate others." In the context of the discussion earlier in July about the Springsure connection issue, and in the absence of any contradictory evidence, in my view, the inference should be drawn that the references to a Customer withdrawing from a Segment were made in the context of that issue and that the Customers other than the first defendant and Springsure were aware of the possibility that Springsure might propose a new connection point that did not involve it using the Segment on the Bauhinia line.

[195] Once it is accepted that the parties to all the WIRP Deeds were aware that the genesis of cl 6.1(c) was the question whether Springsure would connect to the Network using Segment # 5 – Bauhinia North, there is still a dispute about the relevance of the second extrinsic fact.

[196] The defendants submit that it does not support the construction of cl 6.1(c) that notice may not be given for a Customer Segment that is necessary to enable the plaintiff to provide the Aggregate Access Rights for the relevant Customer.

[197] In my view, the second extrinsic fact goes some way towards supporting that construction, in the same way that knowledge of the mischief that a statutory provision was introduced to meet will be relevant to the proper construction of a statute. However, that is no licence to ignore the text. In the contractual context, it is not permissible simply to use mischief to justify a particular construction that is at odds with the text, where there could be other reasons for the text that was adopted.

[198] These points underlie the requirement that where something has clearly gone wrong with the text so that words may generally be supplied, omitted or corrected, where it is clearly necessary in order to avoid absurdity, the words to be supplied, omitted or corrected must be clear.

[199] Second, the defendants submit that Mr Lock's evidence, that cl 6.1(c) was introduced into the draft WIRP Deed after the Springsure connection issue was raised, is irrelevant. The first defendant submits that reference to the origins of cl 6.1(c) in the negotiation of the WIRP

Deeds is inadmissible as evidence of negotiations and of the subjective intentions of the parties, relying upon *Queensland Power Co Ltd v Downer Edi Mining Pty Ltd*.[143]

[200] With all respect, I do not consider that case should be treated as a definitive statement of all the relevant cases where a draft contract may be admissible in aid of construction. First, that case did not concern a situation where something had gone wrong with the text. Second, the precise use for which the draft was inadmissible in that case was to construe a contract made in different terms to the draft. That is not the relevant use in the present case, which is limited to showing that cl 6.1(c) was introduced after and in response to discussion about the subject matters of the Springsure connection problem and what would happen if a Customer withdrew from a Segment. *Royal Botanic Gardens and Domain Trust v South Sydney City Council*[144] is authority that in some circumstances a draft contract and an earlier contract are relevant to put the court in the position of the reasonable objective person in construing a written final contract. In that case the High Court had regard to exchanges made by way of draft deeds in aid of construction of a later final deed.[145]

[201] A point made by the defendants is that there is no provision in the WIRP Deed for variation of the Access Agreement to reduce the Aggregate Access Rights before notice may be given under cl 6.1. The defendants submit that the plaintiff's construction of cl 6.1(c) would require the plaintiff to agree to variation of the Access Agreement to reduce the Aggregate Access Rights before notice could be given, except where the relevant Customer maintains the Aggregate Access Rights and can use them without using the Segment which is notified under cl 6.1(c). There are two points to note. First, there is a difference between Access Rights and the use of a Segment. Access Rights are defined in cl 1.1 to be the rights of access granted under an Access Agreement. Aggregate Access Rights are defined as the Access Rights specified in Schedule 9. Schedule 9 identifies those rights as a number of train services between the mine and WICET, without reference to the route or Segments involved. Second, cl 4.2 of the Access Agreement, as made in accordance with the WIRP Deed, provides for the Access Holder to relinquish Access Rights by notice, subject to certain conditions, including compliance with cl 15.3 of the WIRP Deed. However, if a Customer does not wish to utilise a Segment, that does not mean that it will wish to relinquish any of the Access Rights.

[202] Another submission made by the defendants is that the plaintiff's submissions are infected by a fallacy that liability to pay the WIRP Fees is tied to "actual access". In my view, that is not a submission directly made by the plaintiff, except to the extent that it submits that a Customer who necessarily will use a Segment to exercise the Aggregate Access Rights under its WIRP Deed may not give notice under cl 6.1(c). In any event, in my view, the defendants overstate the disconnection that they contend exists between liability to pay the WIRP Fee and the "actual" Aggregate Access Rights. For example, if a Customer, as an Access Holder under an Access Agreement, notifies or nominates to the plaintiff to relinquish some of its access rights, termed "Nominated Access Rights", the right to do so under the Access Agreement (see cl 4.2

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[143] [2010] 1 Qd R 180, 191-192 [70]-[74].

[144] (2002) 240 CLR 45.

[145] (2002) 240 CLR 45, 58-59 [25]-[26].

of the Access Agreements) is made subject to compliance with cls 15.3 of the WIRP Deed (see item 7 of Schedule 8 to the WIRP Deed).

[203] In passing, another possible feature of the operation of the WIRP Deed in such an event should be noted. Notification that a Segment is to cease to be a Customer's Segment for the notifying Customer does not have the effect that the Customer takes up a proportionate responsibility for any additional Segment that they might need to use by a proposed move of their rail pathway. However, it may be that there was no practical likelihood of that occurring. None of the parties addressed this consideration.

[204] The defendants rely on three other grounds to exclude the admissibility of the alleged extrinsic facts. First, they submit that it is impermissible to admit extrinsic evidence of such facts, even where they are mutually known to the parties, where the contract is a long term and assignable contract, and the parties who will need to construe the document will change.[146]

[205] It is not necessary in this case to consider the extent of the operation of that principle. In my view, that is because whatever limit applies to the admissibility of extrinsic facts in the case of long term assignable contracts has no relevance to the operation of cl 6.1(c). That clause was not one that would operate in the long term after assignment. On the contrary, it would operate only "[p]rior to the First Milestone Target Date" as previously discussed. Nor was the WIRP Deed, or cl 6.1(c), a contract like a publicly marketed investment scheme,[147] or an instrument of indefeasible title,[148] where cognate considerations are engaged.

[206] Second, the defendants submit that consideration of the first and second extrinsic facts is excluded by the fact that the WIRP Deed was subject to the approval of the QCA. I do not agree, or even understand the basis in principle for the submission. Clause 3.1 provided that the obligations of the Parties under the WIRP Deed were subject to the Conditions that, as defined, include the condition precedent of "[t]he unconditional approval by the QCA of all of the terms of this Deed as "Access Conditions" under cl 6.5.4 of the Access Undertaking."

[207] As previously discussed, the QCA's Access Undertaking provides that where the plaintiff and all the access seekers agree to the terms of access conditions, the QCA will approve the access conditions unless it is satisfied that it would be contrary to the public interest, including the interest in having competition in markets, or is reasonably expected to disadvantage future access seekers or other, or that the plaintiff has failed to provide access seekers with the report, or that it would contravene a provision of the Access Undertaking or the Act. None of that has any relevance to the possible operation of cl 6.1(c), in my view.

[208] Finally, the defendants submit that consideration of the first and second extrinsic facts is excluded by cl 24.12 of the WIRP Deed that provides:

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[146] *Burns Philp Hardware Ltd v Howard Chia Pty Ltd* (1987) 8 NSWLR 642, 655; *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64, [151]-[154]; *Reliance Rail Pty Ltd v Permanent Custodians Ltd* (2017) 122 ACSR 317.

[147] *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 583 [38].

[148] *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2006) 233 CLR 528, 539 [37].

> "…
>
> (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of this Deed are merged in and superseded by this Deed and are of no effect. No party is liable to another Party in respect of those matters.
>
> (c) No oral explanation or information provided by any Party to another:
>
> (i) affects the meaning or interpretation of this Deed; or
>
> (ii) constitutes any collateral agreement, warranty or understanding between any of the Parties."

[209] Paragraph (b) refers to the prior negotiations being "merged" and superseded by the WIRP Deed. Sometimes, such a clause is described as a "merger" clause. Previously, I have expressed the view, to which I adhere, that it is better to describe it as an entire agreement clause. It operates by way of mutual contractual promises. It may also operate as an implied or express rescission by agreement of a prior contract. However, it does not operate as a merger of prior rights or liabilities, in the way that a cause of action merges in a judgment.[149]

[210] In some jurisdictions there is support for the conclusion that, notwithstanding an entire agreement clause, extrinsic evidence may be admitted for the purposes of interpretation.[150] However, the question in the present case may be answered by closely considering the operation of the text of cl 24.12(b). The paragraph does not purport to have an evidentiary effect. It operates as an agreement that no party is liable to another in respect of the identified matters. Agreement that no party is liable in respect of the negotiations does not expressly preclude extrinsic evidence from the negotiations of a mutually known fact or circumstance in aid of the proper construction of a provision of the contract.

[211] Clause 24.12(c) is apt to exclude a contractual promise by way of agreement or warranty or an estoppel as to the understanding, and may also constitute an answer to an understanding said to support a rectification claim, but it does not expressly preclude extrinsic evidence from the negotiations of a mutually known fact or circumstance in aid of the proper construction of a provision of the contract.

[212] A more difficult question is the scope of the agreement in cl 24.1(c)(i) that no oral explanation provided by one party to another affects the meaning or interpretation of the contract. Do the discussions at the meetings attended by Mr Lock constitute an oral explanation provided by one party to another as to the meaning or interpretation of cl 6.1(c)? In my view the answer to that question is "no", because the discussions were not an "explanation" as to the meaning or interpretation of cl 6.1(c) and the evidence of those discussions is not relied on in any direct way to affect the meaning of cl 6.1(c).

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[149] *Coast Corp Pacific Pty Ltd v Stockland Development Pty Ltd* [2018] QSC 305, [116].

[150] For example, *John v Price Waterhouse* [2002] EWCA Civ 899, [67]; *Air New Zealand Ltd v Nippon Credit Bank Ltd* [1997] 1 NZLR 218, 224.

Conclusion as to the proper meaning of clause 6.1(c) and implied term

[213] Despite my conclusions so far, in the result, I am unable to accept that the proper construction of the WIRP Deed is or that an implied term in fact of the WIRP Deed requires that a notice may not be given under cl 6.1(c) for a Customer's Segment that is necessary to enable the plaintiff to provide the Aggregate Access Rights to the Customer.

[214] In my view, both arguments fall at the hurdle of clarity that for the supply of words by construction to avoid absurdity the words to be supplied must be clear and that to imply a term in fact the term must be capable of clear expression. The required words in the present case would make clause 6.1(c) read as if it provided:

> "Prior to the First Milestone Target Date, the Customer may notify QR Network and each Other Customer that a Segment [*that is not necessary to enable QR Network to provide the Aggregate Access Rights to the Customer*] is to cease being a Customer's Segment provided that…"

[215] It is not clear enough, in my view, that the only circumstances in which the parties might have contemplated that notice could be given under cl 6.1(c) are where the Customer no longer requires the Segment to utilise the Aggregate Access Rights.

Implied term of good faith and fair dealing

[216] Alternatively to the proper construction of the WIRP Deed or an implied term in fact that a notice may not be given under cl 6.1(c) for a Customer's Segment that is necessary to enable the plaintiff to provide the Aggregate Access Rights, the plaintiff alleges an implied term that the Customer must act in good faith and fairly deal with the plaintiff in giving notice under cl 6.1(c). All of the defendants deny any implied term of good faith and fair dealing.

[217] Detailed submissions are made as to the alleged implied term of good faith and fair dealing. They engage another unresolved question in the Australian common law of contract, namely whether there is an implied term of good faith in the performance of commercial contracts, generally speaking, or whether the implication of such a term must always satisfy the requirements for a term implied in fact.

[218] The plaintiff submits that the Supreme Court of New South Wales has accepted, on many occasions, that a term of good faith or reasonableness may be implied as a legal incident of commercial contracts and that the Federal Court of Australia and the Supreme Court of Victoria, on occasion, have also accepted that conclusion. The defendants submit that numerous cases reject any implication of a term or duty of good faith into commercial contracts, generally speaking. In any event, particular submissions are made as to whether a term of good faith and fair dealing should be implied in this contract, whether as an implied term in fact, or more generally.

[219] Before considering other cases, the appropriate starting point is that the High Court, in 2002[151] and again in 2014,[152] has observed that it has not had occasion to decide the issues respecting

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151 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45.

the existence and scope of a general good faith and fair dealing doctrine in the performance of contracts or the exercise of contractual rights and powers.[153]

[220] Nevertheless, since 1992, the NSW Court of Appeal has accepted the existence of an implied contractual duty of good faith and fair dealing in the performance and exercise of contractual rights and powers, in a commercial contract, either generally or in a particular context.[154] The Victorian Court of Appeal has considered the question.[155] So has the Full Court of the Federal Court.[156]

[221] The parties' submissions predominantly focussed on the implication of an implied term of good faith and fair dealing in the context of the provisions of the WIRP Deed. Accordingly, it may be unnecessary to consider whether there is any more general implied duty or obligation of good faith in the performance of commercial contracts, per se. In any event, it is appropriate to consider the alleged implied term of good faith and fair dealing in the present case, having regard to the nature of cl 6.1(c) as a contractual power conferred on the Customer for the benefit of the Customer. Accordingly, closest consideration should be given to cases dealing with arguments about implied terms or duties that might limit the scope of the operation of a term of that kind.

[222] Another useful starting point is the uncontentious rule of construction, or implied term, under the Australian common law of contract described as the "duty to cooperate". The leading case is *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*.[157] In that case, the contract provided for the sale of a commercial office building being developed by the vendor. At the time of the contract, the building was still to be leased. Part of the purchase price was to be ascertained by reference to the aggregate rental payable by tenants as at a nominated end date that was after the date of completion of the sale. Between the date of the contract and the date of completion, an express term made any new lease granted by the vendor as owner subject to the purchaser's approval, which was not to be arbitrarily or capriciously withheld. After completion, but before the nominated end date, any new lease would be granted by the purchaser as owner. It was held that the purchaser was obliged not

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152 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169.

153 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, 63 [40] and 95 [156]; *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 195 [42] and 214 [107].

154 For example *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 255-270; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 363-369; *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558, 566-573; *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 74 NSWLR 618, 634-635; *Bartlett v Australia & New Zealand Banking Group Ltd* (2016) 92 NSWLR 639, 649-652.

155 For example, *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228, [22]-[28].

156 *Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd* (2015) 237 FCR 534, 561 [142] – 563 [150]; *Paciocco v ANZ Banking Group Ltd* (2015) 236 FCR 199, 272 [287] - 274 [292]; *Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd* (2017) FCAFC 190, [149], [167]-[185].

157 (1979) 144 CLR 596.

to arbitrarily or capriciously refuse any new lease proposed by the vendor after completion but before the nominated end date. Mason J reasoned by reference to the implied obligation on each party to do all that is reasonably necessary to secure performance of the contract, described as the "duty to co-operate". He continued:

> "It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the act shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself."[158]

[223] Any analogy between an implied term of good faith and fair dealing, as alleged in the present case, and the duty not to act arbitrarily or capriciously found in *Secured Income*, is a loose one. However, it is worth observing that Mason J considered a number of arguments that echo submissions made by the defendants in the present case. His Honour rejected an argument that there was no need to make the implication because it was as much in the interests of the purchaser to lease the premises as it was in the interests of the vendor that the purchaser should do so.[159] The argument overlooked that in the situation which arose it was in the interests of the purchaser not to grant a lease at the relevant time so as to disentitle the vendor to payment of the final balance of the purchase price. The argument also overlooked the general tenor of the provisions of the contract that contemplated leases would be granted until the nominated end date and that it was in the interests of both parties that the leases be granted, as well as entitling the vendor to payment of the final balance of the purchase price. This was held to be inconsistent with the hypothesis that the purchaser had an unfettered discretion to decide whether a lease would be granted or not.[160] The drafter had chosen language that was inappropriate to the circumstances but that did not obscure the evident intention of the parties that the purchaser should not be able to prevent a grant of lease by any capricious or arbitrary decision.[161] Finally, I note that although *Secured Income* recognised the principles upon which an implied term in fact is found,[162] the critical reasoning did not proceed by reference to those requirements.

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[158] (1979) 144 CLR 596, 607-608.

[159] (1979) 144 CLR 596, 608.

[160] (1979) 144 CLR 596, 608.

[161] (1979) 144 CLR 596, 609.

[162] (1979) 144 CLR 596, 605-606.

[224] Questions as to implied limits upon a contractual party's power or right to vary or affect the parties' rights and obligations or relationships under a commercial contract arise in a variety of different contexts.

[225] One of them is the satisfaction of a condition precedent to a party's performance. So, a contract of sale of land that is subject to satisfactory finance impliedly obliges the buyer to consider an offer of finance either in good faith or in good faith and reasonably.[163] And a contract of sale of land that is subject to a condition that the purchaser first sells their existing home impliedly requires that the purchaser's sale is made within a reasonable time.[164] These cases, too, were not reasoned by reference to the principles upon which an implied term in fact is found.

[226] Another context relates to the contractual powers of a lessor to approve or consent to an event under a commercial lease. Many cases concern an express contractual promise by the lessee not to assign the lease, subject to the consent of the lessor, which is not to be unreasonably withheld. In the absence of a statutory or contractual restriction on the power of the lessor to refuse consent, the common law did not impose an obligation by the lessor to act reasonably.[165] So, where a statutory restriction had been excluded, it was held that there was no implied obligation that the lessor act reasonably in refusing to approve or consent to an assignment.[166] And where a lessee promised to obtain the lessor's prior approval to insurance of the demised premises, the lessor was entitled to refuse to give approval arbitrarily, there being no express provision that it was not to be withheld unreasonably.[167]

[227] In one case, it was said that there is authority for the proposition that a term of a contract which confers upon a party an absolute discretion to do or refrain from doing an act excludes an obligation to act reasonably in the exercise of that discretion.[168] However, such a statement is conclusory – an absolute discretion and an obligation to act reasonably in the exercise of the same discretion are inconsistent alternatives. It does not follow that, in all cases where the ordinary meaning of the particular text is unrestricted, no implied restriction or limit can exist - *Secured Income* is an illustration to contrary effect.[169]

[228] Recent case law tends to treat *Renard Constructions (ME) Pty Ltd v Minister for Public Works*[170] as marking a significant development in the law relating to the implication of an implied term of good faith and fair dealing. That case concerned a contractual power of the principal under a building contract to suspend the works and to call on the contractor to show cause why

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163 *Meehan v Jones* (1982) 149 CLR 571, 581, 590-591 and 597.

164 *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537, 554, 560 and 567-568.

165 *AMP v 400 St Kilda Rd* [1991] 2 VR 417, 422.

166 *AMP v 400 St Kilda Rd* [1991] 2 VR 417, 424-426.

167 *Tredegar v Harwood* [1929] AC 72, 79.

168 *Platinum United II Pty Ltd v Secured Mortgage Management Ltd (in liq)* [2011] QCA 162, [5].

169 Compare *Jackson v Swift Australian Company Pty Ltd* [1968] 1 Qd R 1, 11-12.

170 (1992) 26 NSWLR 234.

specified powers under the contract should not be exercised, including powers to take over the works and cancel the contract. The clause could be engaged in a number of circumstances, including default in the performance or observance of any covenant, condition or stipulation in the contract.

[229] It was held that the powers of the principal under the clause were required to be exercised reasonably, but the reasoning of Priestley JA and Handley JA also engaged upon the existence of an implied term of good faith and fair dealing. As Priestley JA put it, the kind of reasonableness he was discussing had much in common with the notions of good faith which are regarded in all States in the United States as necessarily implied in many kinds of contracts[171] and were elucidated by Steyn J in an Oxford Lecture called "The Role of Good Faith and Fair Dealing in Contract Law".[172]

[230] In 1993, a number of significant developments followed closely upon the decision in *Renard*. First, in *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church (Archdiocese of Sydney)*,[173] the NSW Court of Appeal followed *Renard*.[174] Second, in *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd*,[175] Gummow J considered, but did not accept the existence in Australian common law, of a general duty of good faith in the performance of a commercial contract.[176] However, his Honour made a statement relevant to the present case, which has often been cited since, as follows:

> "Where one party has an express power the exercise of which will significantly affect the interests of the other party (eg by cancellation of their supply contract) if the holder of the power is satisfied that a certain state of affairs exists, the words of the contract are fairly readily construed (and the more so when the parties have given such a power to a third party) as requiring a reasonable as well as honest state of satisfaction: see the authorities referred to by Priestley JA and Handley JA in *Renard Constructions* (supra) at 260, 279-280, and see also *Amann Aviation Ply Ltd v Commonwealth* (1990) 22 FCR 527 at 532, 542-543; and in the High Court, *Commonwealth v Amann Aviation Ply Ltd* (1991) 174 CLR 64 at 95-97. But this is a result arrived at by a process of construction of the express terms in the setting of the contract as a whole. It is best not seen at all as the implication of a further term.
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> There is a number of cases where an obligation to act reasonably and in good faith is implied as a term to give business efficacy to a contract which otherwise would be apt to fail for uncertainty. Loosely drafted terms in vendor and purchaser contracts as to the provision of finance (eg *Meehan v Jones* (1982) 149

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[171] (1992) 26 NSWLR 234, 263.

[172] (1992) 26 NSWLR 234, 264.

[173] (1993) 31 NSWLR 91.

[174] (1993) 31 NSWLR 91, 93 and 100.

[175] (1993) 45 FCR 84.

[176] (1993) 45 FCR 84, 92.

CLR 571) and in leases as to the fixing of the rent by the nominee of a third party (eg *Booker Industries Pty Ltd v Wilson Parking* (Qld) *Pty Ltd* (1982) 149 CLR 600) provide examples."[177]

[231] Third, Sir Anthony Mason, one the most influential Australian Judges as to contract law in the 20th century, gave a Cambridge Lecture: "Contract and its Relationship with Equitable Standards and the doctrine of Good Faith",[178] which later became the basis for an article in the Law Quarterly Review: "Contract, Good Faith and Equitable Standards in Fair Dealing".[179] Sir Anthony also gave the area of contractual powers specific consideration, as follows:

> "A contract may confer power on a contracting party in terms wider than are necessary for the protection of the legitimate interests of that party. In such a case, the courts will interpret the power as not extending to action proposed by the party in whom the power is vested when that action exceeds what is necessary for the protection of the party's legitimate interests. Alternatively, the courts may conclude that the power is being exercised in a capricious or arbitrary manner or for an extraneous purpose. The courts have taken this approach in Australia and Canada in dealing with the clauses in contracts for the sale of land entitling a vendor to rescind the contract if unable or unwilling to comply with or remove objections or requisitions made by the purchaser.
>
> Another approach which has been taken is to refuse to allow a vendor to exercise a contractual power where it would be unconscionable in the circumstances to do so. As this approach is based on the application of equitable standards and remedies to contractual powers, I leave it for later discussion.
>
> Another illustration of the tendency to construe contractual powers in such a way as to require the party exercising the power to take account of the interests of the other party is provided in the case of the form of contract into which Australian governmental agencies have sometimes entered. The form of contract is one which confers on a senior public servant--the Secretary of a Department - a very wide power to cancel a contract, subject to the observance of a 'show cause' procedure, so long as the public servant is 'satisfied' of a failure to carry out the contract or comply with a condition of it. The decision-making function under such a clause 'call[s] for something more - than a mere pursuit of what was to the advantage, or in the interests of', the government.
>
> Hence, in the interpretation of contractual powers, there is a developing tendency to tie them closely to the objects of the contract and, more than that, to ensure that, within reason and in conformity with the express provisions of the contract, the exercise of power is not capricious, arbitrary, unconscionable or

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177 (1993) 45 FCR 84, 94.

178 The Cambridge Lectures, 1993 (8 July 1993).

179 (2000) 116 LQR 66.

> unreasonable, even to the extent of insisting upon, in an appropriate case, taking account of the interests of the other party."[180] (footnotes omitted)

[232] After those developments, later cases could be seen to adopt a wider view, more like that of Priestley JA in *Renard*, or a narrower view, more like that of Gummow J in *Service Station*. On the wider side, in *Hughes Aircraft Systems International v Airservices Australia*,[181] Finn J considered and accepted a generalised duty of fair dealing although recognising the difficulty of determining the standard of fair dealing in particular contexts.[182] Subsequent decisions in the Federal Court did so too.

[233] In the same vein, by 2004, the NSW Court of Appeal reiterated that a duty of good faith and fair dealing in performing obligations and exercising rights under a commercial contract may be implied, in particular in *Alcatel Australia Ltd v Scarcella* [183] and *Burger King Corporation v Hungry Jack's Pty Ltd*,[184] while accepting that the express terms of a particular contract are of primary importance and no implication may be made that is inconsistent with the express terms, as in *Vodafone Pacific Ltd v Mobile Innovations Ltd*.[185]

[234] On the narrower side, in *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL (receivers and managers appointed)*[186] the Victorian Court of Appeal rejected the conclusion that commercial contracts are a class of contracts carrying an implied term of good faith applied indiscriminately to all the rights and powers conferred by the contract, but accepted that it may be appropriate to import such an obligation to protect a vulnerable party from exploitative conduct which subverts the original purpose for which the contract was made, as a term implied in fact.[187]

[235] Later cases have not changed the landscape significantly. So, for example, in 2009, in *United Group Rail Services Ltd v Rail Corporation New South Wales*,[188] the NSW Court of Appeal accepted that the law in Australia is not settled as to the place of good faith in the law of contracts, but held that the court should work on the basis that it has said, on a number of

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180 (2000) 116 LQR 66, 76-77.

181 (1997) 76 FCR 151.

182 (1997) 76 FCR 151, 192-193.

183 (1998) 44 NSWLR 349, 363-369.

184 (2001) 69 NSWLR 558, 566-570.

185 [2004] NSWCA 15, [191]-[208]. This reasoning was earlier recognised in *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558, 570 [172]-[173] and is consistent with earlier cases like *AMP v 400 St Kilda Rd* [1991] 2 VR 417; and *Tredegar v Harwood* [1929] AC 72, 79; and the later case of *Platinum United II Pty Ltd v Secured Mortgage Management Ltd (in liq)* [2011] QCA 162, [5].

186 [2005] VSCA 228.

187 [2005] VSCA 228, [25].

188 (2009) 74 NSWLR 618.

occasions, in some degree or to some extent, that good faith is part of the law of performance of contracts.[189]

[236] In 2012, the Victorian Court of Appeal, in *Specialist Diagnostic Services Pty Ltd v Healthscope Ltd*[190]rejected that an obligation of good faith should be implied indiscriminately into all commercial contracts, holding that in the case of a detailed written lease made between commercial entities of equivalent bargaining power such a term will ordinarily be implied if it meets the tests laid down for the implication of a term in fact.[191] The particular lease gave rise to an implied obligation of good faith not to alter a hospital building so as to deprive the lessee of a benefit of a promise of exclusive entitlement to carry on a pathology business in the building.[192]

[237] In 2015, the Full Court of the Federal Court, in *Paciocco v ANZ Banking Group Ltd*,[193] held that good faith is a conception recognised as an implication or feature of Australian contract law attending the performance of the bargain and its construction and implied content, reiterating the analysis from *United Group Rail Services*,[194] Allsop CJ adding as to the usual content of the obligation that it:

> "…is an obligation to act honestly and with a fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained."[195]

[238] Also in 2015, the Full Court of the Federal Court, in *Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd*[196] held that the implied duty of good faith applied to the performance of a franchise contract for an exclusive franchise area,[197] in effect coterminous with the implied duty of co-operation[198] but that did not require the franchisor to take positive steps against another franchisee's encroachment on the area.

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189 (2009) 74 NSWLR 618, 635 [61].

190 (2012) 41 VR 1.

191 (2012) 41 VR 1, 20 [86] – [87].

192 (2012) 41 VR 1, 20 [88] – [89].

193 (2012) 236 FCR 199.

194 (2012) 236 FCR 199, 272 [287].

195 (2012) 236 FCR 199, 273 [288].

196 (2015) 237 FCR 534.

197 (2012) 237 FCR 534, 562-563 [146] - [148].

198 (2012) 237 FCR 534, 563 [150].

[239] In 2016, in *Bartlett v Australia and New Zealand Banking Group Ltd*, Macfarlan JA concluded that the reasoning of Gummow J from *Service Station*, set out above, stands unaffected by subsequent authority and warranted the conclusion that a contractual power by a bank to dismiss an employee if in the bank's opinion the employee engaged in serious misconduct impliedly required the bank to have a reasonable and honest opinion,[199] while another contractual power to terminate on four months' notice for any reason was inconsistent with implication of a requirement to act reasonably.[200]

[240] And in 2017, the Full Court of the Federal Court, in *Virk Pty Ltd v YUM! Restaurants Australia Pty Ltd*,[201] held that a franchisor's power to fix maximum prices for products to be sold was subject to an implied obligation that it was to be exercised honestly and reasonably, in the sense described in the other cases mentioned above.[202]

[241] In passing, I note that some of the cases analyse the scope of a contractual power by analogy with equitable limits upon exercise of contractual rights for a purpose otherwise than for which it was conferred,[203] such as a contractual power to rescind on the ground of an objection to title or conveyance,[204] or the contractual constitutional power of directors or a company in a general meeting,[205] or the administrative law concept of unreasonableness.[206] No considerations of those kinds were raised by the parties in the present case and I leave them to one side.

[242] If, however, an implied term or obligation of good faith and fair dealing is not an incident of all commercial contracts, and not necessarily an incident of a power to give a notice significantly affecting the interests of the other party, what is the legal basis for the implication of such a term or obligation as attaching to the exercise by the defendants of the power to notify under cl 6.1(c)? By analogy with *Service Station*, it would be that it is necessary to give business efficacy to the contract. Does that mean implied as a term in fact under the requirements reiterated by the plurality of the High Court in *Commonwealth Bank of Australia v Barker*,[207] as enunciated in 1977 in *BP Refinery (Westernport) v Shire of Hastings*,[208] and accepted in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*,[209] that:

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199 (2016) 92 NSWLR 639, 651 [49].

200 (2016) 92 NSWLR 639, 660 [86]-[87].

201 [2017] FCAFC 190.

202 [2017] FCAFC 190, [149].

203 For example, *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15, [216]-[218]

204 For example, *Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd* (1972) 128 CLR 529, 548; *Pierce Bell Sales Pty Ltd v Frazer* (1973) 130 CLR 575, 587.

205 *Mills v Mills* (1938) 60 CLR 150, 185.

206 For example, *Bartlett v ANZ Banking Group Ltd* (2016) 92 NSWLR 639, 651 [46]-[49].

207 (2014) 253 CLR 169, 185-186 [21] and footnote 89.

208 (1977) 180 CLR 266.

"(1) it must be reasonable and equitable;

(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(3) it must be so obvious that 'it goes without saying';

(4) it must be capable of clear expression; and

(5) it must not contradict any express term of the contract."[210]

[243] Or is the approach to be taken more general, like that of Mason J in *Secured Income*?[211] I am conscious that in *Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd*, P McMurdo J said as follows about the statement of Mason J in *Secured Income*, set out above:

> "Mason J thereby distinguished between acts according to whether they are necessary to the performance of a party's fundamental obligations under the contract. There is a duty to co-operate in the doing of acts which are necessary to the performance of such obligations. But a duty to co-operate in the doing of acts which are not necessary to the performance of fundamental obligations has to be found in "the intention of the parties as manifested by the contract itself", **that is by a term implied in fact**."[212] (emphasis added)

[244] I considered this question in *Wellington v Huaxin Energy (Aust) Pty Ltd (formerly Cuesta Coal Limited)*,[213] concluding that I did not accept that the proper construction of the contract, ascertained by reference to the principle underlying the duty to cooperate that is based on giving business efficacy to the contract, must necessarily be parsed further, or again, through each of the five factors of the *BP Refinery (Western Port)* analysis as applied to the acts or omissions alleged to constitute breach of the duty of cooperation.[214] I will not repeat that reasoning.

[245] Nevertheless, this case squarely raises whether an obligation of good faith and fair dealing is to be implied in respect of the contractual power in cl 6.1(c) as a term implied in fact and I propose, therefore, to follow the *BP Refinery* requirements. I mention also, in passing, the recognition in *Commonwealth Bank* of the view that the implication of terms is in one sense an exercise in construction, for implication of terms in particular classes of contracts or

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209 (1982) 149 CLR 337, 347.

210 (1977) 180 CLR 266, 267.

211 (1979) 144 CLR 596.

212 [2006] QCA 126, [50].

213 [2019] QSC 18, [41]-[70].

214 [2019] QSC 18, [67]-[70].

generally,[215] and the broader approach taken in some English cases to the question as an exercise of construction,[216] which the High Court did not decide upon in that case.

[246] It is at this point that the submissions of the parties engage one another. The plaintiff submits that the reason to imply an obligation of good faith and fair dealing is to address the inconsistency between the Customer enjoying the Access Rights for a Segment and an unconstrained right to avoid paying the WIRP Fee and any Optimisation Fee for the Segment. It submits that a right to do both things undermines the consideration of the WIRP Fee and any Optimisation Fee for construction of the Segment, so that the implication of an obligation of good faith and fair dealing is necessary, and if not implied as a matter of law, is also reasonable, equitable, obvious, capable of clear expression, and is not inconsistent with any express term of the WIRP Deed.

[247] The first defendant submits that that this argument is answered by the following circumstances:

(a) the careful distinction which the parties drew between Access Rights to be conferred under Access Agreements and the rights and obligations connected with delivery of the Extension;

(b) the WIRP Deeds do not link Access Rights with the obligation to pay the WIRP Fee in circumstances where cl 4.1 addresses the need for work to be done to increase the capacity of the Network, not the need for the Customers to run trains down the specified train paths described in their Aggregate Access Rights; and

(c) the prospect that the obligation to pay the WIRP Fee might be transferred to a single Segment Customer, including a Customer which held only a low proportion of the rights to access a Segment ought to have been obvious to all of the parties when they entered into the WIRP Deeds. That created a risk, but risk is present in every commercial transaction. Evidently, each of the parties was prepared to accept that risk in the context in which the WIRP Deeds were executed.

[248] In my view, the distinction between the provision of Access Rights under an Access Agreement, and the provision of the Extension by way of the upgrades comprising the Segments so as to increase the capacity of the Network to enable those Access Rights to be provided, is dictated by the terms of the Access Undertaking. The Access Undertaking provides for, and the parties agreed upon, additional consideration for terms of the latter kind, as Access Conditions, the primary consideration moving from the Customer for those terms, being the agreed WIRP Fee and any Optimisation Fee. Accordingly, the separation of the Access Rights and provision for the payment of Access Fees under the Access Agreement does not speak clearly to whether the operation of cl 6.1(c), to permit a Customer to avoid liability for the WIRP Fee and any Optimisation Fee for a Segment, is unconstrained by an implied term or obligation of good faith and reasonableness.

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215 (2014) 253 CLR 169, 187-188 [25]-[26].

216 (2014) 253 CLR 169, [22].

[249] Second, I do not accept that the obviousness of the possibility that cl 6.1(c) and the balance of cl 6.1 and 6.2 might operate in a way that would leave a Customer who held only a low proportion of the overall increase in capacity for access rights for a Segment as the only Customer responsible for all the WIRP Fees and any Optimisation Fees that would have been payable by the Other Customers evidences that each of the parties was prepared to accept that risk in the context in which the WIRP Deeds were executed.

[250] The suggested inference may be tested by reference to Segment # 1 - Balloon Loop at WICET, in which all the Customers (and no users outside the Customers) were interested. Assume that all the Other Customers, except the Sixth Defendant, give notice under cl 6.1(c). The postulated scenario would leave all the other Customers entitled to access Segment # 1 – Balloon Loop by train movements in the same proportions as envisaged and agreed by the WIRP Deeds. However, the Sixth Defendant, with a 3.2 percent proportion of the train movements and a corresponding initial liability for WIRP Fees and any Optimisation Fees payable for the Segment, would remain entitled only to 3.2 percent of the train movements, but become the only Customer responsible for the whole of the WIRP Fees and any Optimisation Fees, thereby increasing its original liability from approximately $3.657 M by $91.434 M, but with no corresponding commercial benefit of significance. Had that possibility been raised at a meeting at the time of entering into the WIRP Deeds, in my view, all the parties would have responded: “Of course not!”.

[251] The first defendant submits that the implied term of good faith and fair dealing is not necessary to give business efficacy to the contract. The nub of the argument is that the power to give notice under cl 6.1(c) is one the Customer is entitled to exercise in its own interests. To some degree, that must be true, otherwise the clause would be devoid of purpose. However, necessity, in the relevant sense, is not to be equated to that possibility. Again, I would compare the duty to cooperate and the obligation not to act arbitrarily and capriciously as analysed in *Secured Income*, qualifying the purchaser’s right to act in their own interests.

[252] The other defendants submit that the implied term of good faith and fair dealing does not satisfy the criterion of necessity because the interests of the plaintiff are adequately protected by the last Customer standing provisions (which always keep the plaintiff whole with respect to the WIRP Fee and Optimisation Fee) and the provisions requiring Customers to provide security (enabling the plaintiff to protect itself against credit risks). This argument is removed from any practical consideration of the operation of cl 6.1(c) if the last man standing rule is engaged, for example by notices given for Segment # 1 – Balloon Loop, leaving only a Customer that is unable to pay the full amount of the WIRP Fees over the term of 20 years.

[253] The first defendant submits that the implied term of good faith and fair dealing is not so obvious that it goes without saying. In my view, it is obvious that the parties to the WIRP Deeds cannot have intended an outcome like the one I have referred to above in relation to Segment # 1- Balloon Loop. From that negative, the question moves to whether they should be taken positively to have intended that exercise of the power under cl 6.1(c) is constrained by an obligation of good faith and fair dealing. In this respect the first defendant submits that if there is no implied term in fact that the power may not be exercised for a Segment necessary to enable the plaintiff to provide the Aggregate Access Rights for the relevant defendant, there is no scope for the implication of an implied term or obligation of good faith and fair dealing. I do not agree. There may be other possible circumstances according to

which one Customer or another might wish to alter its responsibility as a Segment Customer. An implied term of good faith and fair dealing does not foreclose all possibility of the power under cl 6.1(c) being exercised if a Customer continues to have access to the relevant Segment. It requires the circumstances to be considered according to the facts. Further, acceptance of the existence of a legal principle of fidelity to the bargain in the performance of contracts goes some way towards satisfying the requirement of obviousness. In that sense, an implied term of good faith and fair dealing may be more likely to be obvious, in relation to the exercise of power under a clause like cl 6.1(c), than a specific implied term that turns only on whether the Aggregate Access Rights of the notifying Customer under cl 6.1(c) are maintained over that part of the network comprised by the relevant Segment.

[254] The first defendant relies upon the context of other terms in the WIRP Deed as supporting the conclusion that the implied term of good faith and fair dealing is not to be found, either as a matter of obviousness or as a matter of constructional inconsistency. As to obviousness, it submits that the express provision for obligations of good faith in cls 3.5, 3.13, 6.11(c), 12.2(b) and 12.3(c) negate the obviousness of an implication of good faith in cl 6.1(c). I accept that the contextual effect of those clauses does tell against an implication of such an obligation in other provisions of the contract, but it is not determinative, *per se*.

[255] As to constructional inconsistency, the first defendant relies on the fact that the WIRP Deeds are detailed formal written contracts made between sophisticated parties with the benefit of legal advice. Second, the first defendant refers to cl 24.12(a) of the WIRP Deed that provides:

> "This Deed contains the entire understanding between the parties as to the subject matter of the Deed."

[256] The first defendant does not submit that cl 24.12 excludes the possibility of an implied term. Nonetheless, it submits that in considering whether to imply terms not stated in an agreement, it is relevant that well-advised, commercially sophisticated parties expressly state that their written instrument contains their entire understanding as an indication that the parties sought to include, by way of express terms, all of the terms that they determined to be relevant. Again, I accept that the contextual effect of cl 24.12 does tell against an implication of an implied term of good faith and fair dealing, but it is not determinative, *per se*.[217]

[257] The first defendant submits that the implied term of good faith and fair dealing is inconsistent with the express terms of the contract, because the text of the clause already provides expressly for limits for its operation in the limits as to the time for notifying under the clause and the limit of the "last man standing" provision. However, neither of those limits is directly inconsistent with an obligation of good faith and fair dealing. The suggested inconsistency may be an invocation of the principle expressed in the Latin maxim *facit cessare tacitum*.[218]

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217 *Hart v MacDonald* (1910) 10 CLR 417, 430.

218 *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 322.

That maxim does not have a role when the implied limit is not one dealing with the same subject as the express limits.[219]

[258] The other defendants advance the same submissions. An additional submission is that there was a sound commercial reason for the admittedly "surprising" operation of cl 6.1(c) in the circumstances of this case that repels any conclusion of absurdity. Simplified for brevity, the suggested reason is that the plaintiff desired to separate the consideration of the WIRP Fee and any Optimisation Fee for provision of the Extension and Segments from the provision of the Aggregate Access Rights over the increased capacity of the Network under the Access Agreement in consideration for the payment of the Access Fees under that agreement because of the regulatory regime. Although there is some truth in the distinction made, I do not accept it provides a commercial reason for the surprising operation of cl 6.1(c). As previously stated, the structural divide between the provision of Access Rights under an Access Agreement and the provision for the increase in capacity of the Network by construction of the Extension and the Segments to the value provided under the WIRP Deeds is dictated by the provisions of the Access Undertaking. But nothing about the Access Undertaking required or suggested that there should be a provision that has the surprising operation of cl 6.1(c). There is no sound commercial reason in that. The defendants relied on some internal communications of employees of the plaintiff as support for the existence of the suggested reason on the plaintiff's part, but there is no suggestion that those communications or views were known to any of the defendants. The suggested sound commercial reason is not one that was mutually known by the parties to the WIRP Deeds.

[259] It is important to keep in mind that absent the WIRP Deeds the plaintiff was under no obligation to build the Extension or the Segments that were necessary to increase the capacity of the Network for the Customers to obtain the additional capacity needed for their proposed additional access rights. The financial incentive and the consideration for the plaintiff to do so were the Customers promises to pay the WIRP Fees and any Optimisation Fees, as well as the promises of the Customers to enter into Access Agreements under which they would be liable to pay Access Fees. Whether or not the QCA approved the WIRP Deeds as Access Conditions was a fundamental condition precedent to performance of the contracts comprised in the WIRP Deeds. But nothing really suggests that the need to obtain that approval was the commercial occasion to provide for an ability on the part of all of the Customers to divest themselves of liability for the WIRP Fee and any Optimisation Fee, subject to the last man standing rule.

[260] In my view, it should be accepted that the exercise of the power under cl 6.1(c) is subject to the implied term of good faith and fair dealing.

[261] Was the implied term of good faith and fair dealing breached? The plaintiff alleges that it was breached because the notices were given for a purpose other than the purposes for which the power under cl 6.1(c) was conferred, namely to allow removal of a Customer's Segment not necessary to provide the Aggregate Access Rights and the effect of the notices was to deprive the plaintiff of a substantial benefit.

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[219] For example, *cf Helicopter Sales (Aust) Pty Ltd v Rotor-Work Pty Ltd* (1974) 132 CLR 1, 12 and *Gemmell Power Farming Co Ltd v Nies* (1935) 35 SR (NSW), 469 at 476-477.

[262] The defendants submit that these facts do not amount to a breach of the implied term of good faith and fair dealing. They do not dispute that their purpose was other than to allow removal of a Customer's Segment not necessary to provide the Aggregate Access Rights, but submit that is not enough. Depending upon the circumstances, I agree.

[263] Second, they submit that the notices did not undermine the substance of the benefit bargained for by the plaintiff and did not seek to withhold the benefits for which the plaintiff contracted. They expand this point by submitting that the only benefit that the plaintiff has been deprived of by reason of the issuing of notices is the benefit of not having its credit risk of receiving the WIRP Fees and any Optimisation Fees altered.

[264] This characterisation is uncommercial, as the example of the effect upon the WIRP Fees and any Optimisation Fee for Segment # 1 – Balloon Loop shows. It is commercially unrealistic because no possible reason emerges as to why the Customers (except for the last Customer standing) would all seek to remove their liability for the WIRP Fees and any Optimisation Fee, except to avoid the liabilities for those fees. The proposition that the plaintiff would not be deprived of the substantial benefit of payment of the WIRP Fees because of the protection provided by the last Customer standing rule and the provision permitting the plaintiff to demand additional security from the last Customer seems far-fetched.

[265] The plaintiff points out that the Extension Committee provided for by the WIRP Deeds had met several times in 2015 before the notices under clause 6.1(c) were given. At those meetings, the plaintiff and the Independent Engineer made presentations to and consulted with the Customers in relation to the progress of the Extension.

[266] As well, the plaintiff and the defendants had entered into the relevant Access Agreements under which the defendants had the right to access the Network between their mine locations and WICET and some were using those rights. As will be discussed below, shipments of coal from WICET started in April 2015.

[267] It is of some interest that in casting about for an explanation of the purpose of cl 6.1(c), the first defendant made two points that, in my view, indirectly support the plaintiff's claim of breach of an implied term of good faith and fair dealing. First, the first defendant submits that the purpose of clause 6.1(c) was to give the Customer meaningful bargaining power in the consultation process provided for under the WIRP Deed. Second, the first defendant submits that cl 6.1(c) was intended to enable the Customer to opt out of the obligation to pay the WIRP Fee and any Optimisation Fee if the rights under the WIRP Deed ceased to be beneficial, in the Customer's view. In my view, such arguments suggest that some honest basis, in good faith and fair dealing, is required before a Customer exercises the power or right under clause 6.1(c). None of the defendants led any evidence as to why, in the circumstances of this case, it decided to give notice under clause 6.1(c).

[268] Accordingly, in my view, prima facie, the defendants breached the implied term of good faith and fair dealing.

[269] The defendants other than the first defendant, mount an additional argument as to the breaches alleged against them. They submit, in substance, that their purpose in giving notices under cl 6.1(c) was to avoid having to bear the additional liabilities for the WIRP Fees and any

Optimisation Fee that would otherwise have been transferred to them by the first defendant giving notice.

[270] In my view, this does not amount to good faith and fair dealing. If it did, the operation of cl 6.1 would expose the plaintiff (and all Other Customers) to the risk of the game of musical chairs that happened in this case on 30 September and 1 October 2015, because any shift in the responsibility of one Customer for the WIRP Fee and any Optimisation Fee for a Segment would trigger a right in all Other Customers to do the same. In my view, exercise of the power solely to avoid liability for the payment of the WIRP Fee and any Optimisation Fee or solely to avoid responsibility for a proportionate increased liability for payment of the WIRP Fee and any Optimisation Fee does not fall within the scope of the obligation of good faith and fair dealing in exercising the power under cl 6.1(c).

Port Facilities (Initial) Available Date

[271] The plaintiff's alternative case is that the First Milestone Target Date had occurred by 30 September 2015, with the consequence that the defendants were not entitled to give notice under cl 6.1(c) of the WIRP Deeds. Under the definition of "First Milestone Target Date" in cl 1.1, the disputed question is whether the Port Facilities (Initial) Available Date had occurred by 30 September 2015. Under the definition of the "Port Facilities (Initial) Available Date" in cl 1.1, the disputed question is as to:

> "the date the Port Facilities are… capable of Handling coal at 60 percent or more of the Port Facilities' full design capacity."

[272] The "Port Facilities" are defined in cl 1.1 to mean WICET. "Handle" is defined in cl 1.1 to mean "in relation to coal at the Port Facilities… the receiving by rail, unloading, stacking, storing and reclaiming of coal and **loading of vessels with coal at the Port Facilities**" (emphasis added).

[273] It is common ground that "full design capacity" refers to WICET's "nominal capacity" of 27 million tonnes per annum. It is also common ground that the only question to be decided is whether WICET was capable of loading of vessels with coal at 60 percent or more of 27 million tonnes per annum.

Construction of "capable of loading of vessels with coal at 60 percent"

[274] As will appear, the approach of the parties' respective experts differed as to the assessment of whether WICET was capable of loading of vessels with coal. To an extent, the parties on either side of the dispute made submissions that the proper construction of the relevant definitions favoured the approach of the expert that they called to give evidence.

[275] Accordingly, the plaintiff submits that on the proper construction of the text as to whether WICET was "capable of Handling coal at 60 percent of the... full design capacity" the relevant inquiry is to assess the capability of WICET as a standalone facility, without regard to the availability of vessels at the wharf for the ship loader. On the other hand, the defendants submit that the proper construction requires the capability of WICET to be assessed as part of a supply chain, because the capability of WICET to load more than one vessel is affected by the time it takes for vessels to depart and berth at the wharf for the ship loader.

[276] Second, the plaintiff submits that the proper construction of the text as to “the date the Port Facilities Are capable of Handling” requires that the assessment be made of WICET’s capability at a particular date, not over a prior time period. The defendants do not directly dispute that submission, but advance their case as at 30 September 2015 based on the assessment of the prior month’s performance, in particular.

[277] Third, the plaintiff submits that the proper construction of the text that the Port Facilities “are capable of Handling” requires that the assessment is of the capability as at the relevant date, not simply the historical performance up to that date, so that the assessment is one that is forward looking and is not controlled by past events that will not be repeated. Again, the defendants do not directly dispute that proposition, but advance their case having regard to the prior month’s performance that includes a number of events that the plaintiff challenges as not having future relevance as at the assessment date.

[278] In my view, the meanings of the relevant parts of the definitions of “Port Facilities (Initial Availability Date” are to be approached in a practical and business-like way, having regard to what the hypothetical reasonable business person would have understood them to mean, on the basis that the parties intended to produce a commercial result, one which makes commercial sense,[220] and having regard to the purpose of the use of the defined expression “First Milestone Target Date”, both in cl 6.1(c) and in cl 4.4 of the WIRP Deed, as follows:

(a) clause 4.4(a) requires that the plaintiff must ensure that the First Milestone is achieved on or before the First Milestone Target Date. The “First Milestone” is defined as “All Segments (other than Segment #2 and Segment #4) are Available, and in respect of Segment#4, five of the seven duplications to be carried out in accordance with the Scope of Works for Segment #4 are Available”. Clause 4.5(a) acknowledges that non-compliance with clause 4.4(a) will reduce the amount of the WIRP Fees payable by the Customer;

(b) as previously discussed, under clause 6.1(c) the Customer’s power to notify that a Segment is to cease being a Customer’s Segment in a way that relieves the Customer of liability for the WIRP Fee for the Segment is limited to the period before the First Milestone Target Date.

[279] Under cl 4.4(a), the earlier that the First Milestone Target Date occurs, the greater the financial risk to the plaintiff of a decrease in the amount of the WIRP Fees that will become payable. Under cl 6.1(c), the earlier the date occurs, the shorter the period of the opportunity for the Customers to give notice so as to reduce the amount of the WIRP Fees that will become payable.

[280] In that context, in my view, it is correct to say that the assessment whether the Port Facilities (Initial) Available Date must be made as at a particular date. However, the capability that is being assessed is a percentage of a capacity that is expressed as a quantity over time, namely million tonnes per annum. Accordingly, the capability must also be ascertained as a quantity over time in order to be expressed as a percentage. Because the assessment is to be of what WICET is “capable” of Handling, on the ordinary meaning of “capable” it is to be an assessment

[220] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2016) 261 CLR 544, 551 [16]-[17].

of whether WICET has the ability, power or fitness[221] to load vessels with coal at the rate of 60 percent of 27 million tonnes per annum. That is, whilst the assessment is to be made at a particular date, it must be of WICET's capability of achieving a quantity over time, as at and from that date, looking forward.

[281] On the facts of this case, in assessing WICET's capability, it is not relevant to consider whether operations that will occur "upstream" of the processes of reclaiming and transporting coal through the ship loading facilities at WICET affect that capability, because it is common ground that the capability to load vessels with coal is the relevant constraint upon or "choke point" of WICET's capability.

[282] Nor, in my view, is it relevant to consider, generally speaking, whether there are sufficient available ships to meet WICET's ability, power or fitness to load the coal at the required rate to constitute 60 percent of the rate of 27 million tonnes per annum. Generally speaking, the expert evidence called by the parties conformed to this parameter. One exception which it will be necessary to consider is the inter-vessel berthing time between ships dictated by the physical harbour conditions and relevant marine regulations and directives. The plaintiff submits it should be ignored. The defendants submit it should be taken into account.

[283] Apart from these considerations, in my view, it would be inappropriate to refer to a number of the facts relied on by the parties in aid of their respective submissions as to the proper construction of the relevant definitions. For example, in some of those submissions, reference was made to documents brought into existence and events that occurred well after the date upon which the WIRP Deeds were entered into. Such documents and events cannot bear upon its proper construction, in the usual course. Nor, in my view, is it appropriate to assess capability at a particular date with the benefit of hindsight. Attention should be focussed on the facts as at and occurring up to the date of the assessment.

[284] A document referred to by both the parties and their experts, that is admissible as context in the construction of the definition of Port Facilities (Initial) Target Date as to the "full design capacity", is a simulation model entitled "Wiggins Island Coal Export Terminal Simulation Model – Nominal Base Case Capacity Estimates" prepared by a firm named Simulation Modelling Services Limited Pty Ltd ("SMS") in September 2010. That model was, at least in part, the basis for the "nominal capacity" of WICET of 27 million tonnes per annum. It included an assessment of what would be the terminal's capacity to load coal onto vessels under various scenarios. The first defendant, in particular, submits that the constraints or assumptions which form the basis of the SMS Simulation Model that identified the nominal capacity of 27 million tonnes per annum may be taken into account in the assessment of WICET's capability as at 30 September 2015.

[285] Another area where the parties' submissions conflict as to the effect of the proper construction of the definition of Port Facilities (Initial) Availability Date is the extent to which regard should be had to particular facts occurring between 21 April 2015, the date on which the first vessel was loaded with coal at WICET, and 30 September 2015, the date of the assessment as to whether WICET was capable of loading vessels with coal at 60 percent or

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221 Shorter Oxford English Dictionary, 6th Ed, Vol. 1, p 341, definition "capable", third meaning.

more of the rate of 27 million tonnes per annum. It is common ground that WICET was undergoing a "ramp up" process over those months and would continue to do so in the following months, up to approximately May 2016. As part of the commissioning and ramp up process, from time to time, there were planned shutdowns that affected or may have affected the availability of the facilities to load vessels with coal. The experts differed among themselves as to the extent to which those shutdowns that occurred or were planned to occur in the future should be taken into account in the assessment of WICET's capability.

[286] Accordingly, in my view, as a matter of construction, the assessment required was not simply a backwards looking exercise. In other words, the conclusion that WICET had not achieved the loading of vessels with coal at 60 percent or more at the rate of 27 million tonnes per annum in September 2015 does not answer the question whether it was capable of doing so as at 30 September 2015.

[287] On the other hand, in my view, the question is also not answered by taking a forward looking view that ignores the planned "ramp up" process and expected or reasonably anticipated shutdown events that may be associated with bringing WICET to its full capability.

Loading from May to September 2015

[288] Against that background, I proceed to the factual context and a consideration of the competing opinions on the disputed question whether at 30 September 2015 WICET was capable of the loading of vessels with coal at the rate of 60 percent or more of 27 million tonnes per annum.

[289] On 21 April 2015, the Toro Orient berthed at WICET and was the first vessel loaded with coal.

[290] On 30 April 2015, construction of WICET reached mechanical completion.

[291] From May 2015, WICET adopted a "ramp up profile" for the next 12 months. The ramp up profile adopted was as follows:

Period	Percentage of Capacity
May - July 2015	15 %
August - October 2015	30 %
November 2015 - January 2016	60 %
February – April 2016	90 %
May 2016 onwards	100 %

[292] During the ramp up period, WICET planned to increase the operation of a number of systems, including those operations for loading of vessels with coal. The planned activities included optimisation works, system testing (such as bias testing of the sample station which occurred during September 2015), assessing and inspecting work areas, completing ongoing construction work, providing contractors with access to rectify defects and finalising outstanding items.

[293] At the end of the ramp up period, in May 2016, WICET planned to carry out testing intending to satisfy the requirements of the "completion test" under the Senior Syndicated Facilities

Agreement for the WICET project, in order to achieve the "completion date".[222] The proposed testing included ship loading of coal at an annualised rate equivalent to at least 90 percent of 27 million tonnes per annum over a continuous period of 30 days.

[294] During the ramp up period until 30 September 2015, WICET produced reports that assessed its own performance on a month by month basis. They included board reports for the months of August 2015, September 2015 and October 2015. By way of example, Section 2 of the Monthly Board Report recorded the capacity made available in relation to the planned (ramp up) nominal capacity and a shipping plan made in May 2015 for the financial year ending 30 June 2016 for both unloading and loading of coal streams, on both a monthly and a period to date bases.

[295] For September 2015, the loading of coal stream was as follows:

Period	**Actual**	**FY2016 Plan**	**Nominal Capacity**	**Made Available**
September 2015	648,038	482,000	675,000	975,505
Period to date	1,206,279	1,441,000	1,687,500	2,309,493

[296] The "Actual" column refers to the tonnes of coal loaded in the month. The "FY2016" column refers to a shipping forecast made in May 2015. The "Nominal Capacity" column is the month's capacity in tonnes of coal calculated in accordance with the month's ramp up profile percentage of one twelfth of the annual nominal capacity of 27 million tonnes per annum. The "Made Available" column is calculated as the sum of the capacity or capacities made available in another series of documents identified as the "Weekly Plan". That was described as WICET's view of what was made available at the terminal for a particular week, based on the days that the terminal was available or planned to be available in that week.

[297] WICET also kept a database of tonnes and times for the berthing, loading of coal and departure of vessels, described as "WICET's SCM Database". For September 2015, the relevant vessels were as follows:

Vessel	**Official Tonnes**	**Berth Time Commence**	**First Coal**	**Last Coal**	**Berth Time Complete**	**Gross Load time**	**Loan Time**
10	105,390	31/08/2015 5:18	31/08/2015 9:05	01/09/2015 22:48	02/09/2015 7:46	37.72	50.47
11	165,042	03/09/2015 20:15	03/09/2015 22:09	05/09/2015 11:02	06/09/2015 13:28	36.88	65.22
12	164,614	12/09/2015 16:18	12/09/2015 18:52	16/09/2015 1:08	16/09.2015 20:04	78.27	99.77
13	159,776	18/09/2015 10:37	18/09/2015 12:38	20/09/2015 3:07	20/09/2015 10:42	34.48	48.08
14	82,500	22/09/2015 12:58	22/09/2015 14:28	23/09/2015 14:50	24/09/2015 2:24	24.37	37.43
Total	**677,322**					**211.72**	**300.97**

[222] Appendix 4 to the Monthly Report to Senior Agent for September 2015, p 19.

[298] In accordance with the previously described operations and activities, WICET planned and experienced shutdowns for repair or maintenance operations. During September 2015, there were three items of that kind that were the subject of particular analysis in the evidence.

[299] First, on 5 September 2015 at 14:00PM, a shutdown commenced that continued for 136 hours until 11 September 2015 at 6:00AM. The shutdown is evidenced by a number of documents, including the "WICET Planned Constraints – Four Week Summary" dated 4 September 2015, "WICET's Data Vessel Billboard", which is a tab in the spreadsheet comprising the "WICET Weekly Operations Summary" dated 6 September 2015, the "Weekly Report" tab from the same spreadsheet and the "Monthly Report to the Senior Agent for September 2015", although the latter does not identify the dates or period.

[300] As to the work completed in the shutdown, the WICET Monthly Board Report for September 2015 identified five items, being completing the server and adjusting the ship loader boom, conveyer/pulleys and idlers; completing shimming of gravity take up carriages; installing tapered shims on shuttle idlers of the ship loader, installing two inverted "V"s idler frames on the ship loader boom conveyer; and working on the lag rollers on steering frames for the ship loader boom conveyer. Whether they were all items of work carried out during the 136 hour shutdown is not established.

[301] Between 29 May 2015 and 7 September 2015, WICET and the contractor, Monadelphous Muhibbah Marine Joint Venture ("MMM"), corresponded in relation to painting rectification work for the long travel drives, including when the work could be carried out. It appears that WICET initially required the work to be carried out over a four day period, that MMM proposed ultimately to carry out the work in the period 8 September 2015 to 19 September 2015 and that the work was done, in part at least, during the 136 hour shutdown period.

[302] In the period between 6 September 2015 and 13 September 2015, work was done in relation to the surge bin-magnet lift and dump contacter, the surge bin kicker relocation and the surge bin conveyor magnet.

[303] In the period between 13 September 2015 and 4 October 2015, work was done by way of installing tapered shims on Jetty Conveyor 1.

[304] A WICET document described as the "AMPLA Delay Data Loading Stream" recorded down time in ship loading for testing or commissioning, described as Sample Plant Bias Testing, starting on 14 September 2015 at 16:19PM whilst the vessel "Frontier Unity" (Vessel 12 in the SCM Database) was at berth. The delays were not continuous but ended on 15 September 2015 at 18:06PM for a series of durations that totalled 19 hours and 40 minutes.

[305] As at 30 September 2015, WICET planned further shutdowns in October, November and December 2015:

(a) from 12 to 16 October 2015 a planned optimisation shutdown of 96 hours;

(b) from 25 to 28 November 2015, a planned optimisation shutdown of 72 hours; and

(c) from 3 to 6 December 2015, a planned optimisation shutdown of 84 hours.

Plaintiff's case as to capability

[306] The plaintiff submits that WICET was capable of the loading of vessels with coal at 70 percent of the rate of 27 million tonnes per annum. That was the conclusion of Bruce Martin, an expert witness called by the plaintiff. Mr Martin produced three reports dated 24 July 2017, 22 June 2018 and 4 September 2018, and was an author of part of the joint report as to capacity dated 2 August 2018. His methodology is expressed in the following equation:

> Average annualised loading throughput capacity = gross loading rate (tonnes per hour) x hours per calendar year x utilised hour percentage/1,000,000

[307] The inputs to the equation adopted by Mr Martin were as follows:

> Average annualised loading throughput capacity = 2,686 tonnes per hour x 8760 hours x 80%/1,000,000 = 18.82MT/pa

[308] The first input was the gross loading rate. Mr Martin calculated the hourly gross loading rate from the data for the vessels that berthed, loaded and sailed in September 2015, not including vessels 10 and 12, by calculating the average for each vessel and then the average of the average rates, which resulted in 2,686 tonnes per hour.

[309] The second input was Mr Martin's 80 percent utilised hours percentage. He adopted that rate as being consistent with his "extensive experience with other comparable coal terminals operating under similar conditions". As to that, he referred to his direct experience working in operations for "two of the world's biggest coal terminals" and "one of the world's biggest integrated iron ore supply chains". The coal terminals were Abbot Point Coal Terminal and Dalrymple Bay Coal Terminal. From February 1999, he held positions at Dalrymple Bay Coal Terminal, focussed on coordination, planning and scheduling of coal movement from mine to site to port and shipping parcels. That additionally involved the coordination of ship berthing, loading and sailing, including the development of simulation models. From January 2005, he was employed by British Maritime Technology Maritime Consultants and assisted in the development of a ship queue management system for Dalrymple Bay Coal Terminal and the Port of Hay Point.

[310] However, in cross-examination it emerged that Mr Martin relied on data from Dalrymple Coal Terminal for the 1998 year, before he was employed there. None of that data was disclosed or included in his report. Dalrymple Bay Coal Terminal had two berths in 1998 as opposed to the single berth configuration at WICET. Similarly, none of the data he relied on for Hay Point was disclosed or included in his reports.

[311] As support for his utilised hours percentage, Mr Martin relied on a WICET document described as the "WICET Terminal Parameters" which stated a berth occupancy of 79 percent. However, that document appears to have been derived from the SMS Simulation Model which stated a berth occupancy of 79.3 percent. That model was based on the predicted operations of WICET without taking in to account any ramp up period and assuming that the Clinton Bypass channel was available for departing and arriving vessels to pass whilst leaving and entering port. In the joint report, Mr Martin also referred to the WICET board papers for February 2016, which referred to the 30 day test proposed for May 2016 as intending to achieve an availability of 95 percent over the 30 day period. However, that test was scheduled for a time after the ramp up period would have been completed and some evidence given by Andrew Wells, a senior

manager at WICET in this period, suggested that the 95 percent was directed to the availability of equipment to move coal from the stockpile to the ship loader.

[312] Mr Martin referred to two other WICET documents in support of his opinion as to the utilised hours percentage. First, the "Monthly Report to Senior Agent for October 2015" referred to equipment availability rates of 98.7 percent and 98.3 percent. However, those percentages were of the amount of time equipment was available out of the time it was scheduled to be available, not the amount of time equipment was available for the whole of the month. Second, Mr Martin referred to the "Asset Life Cycle Management Plan – Offshore Assets" that stated that the majority of maintenance could be performed while the terminal was operational, as going to whether shutdowns in September 2015 were opportunistic, meaning carried out because no vessels were available. However, that document referred to the "Offshore Assets", being the wharf structure, jetty structure and mooring system. There was a separate Asset Life Cycle Management Plan for the ship loading conveyers and surge bin facility which did not contain the same statement.

[313] It follows from the methodology adopted by Mr Martin, that his opinion rests critically on the utilisation hours percentage that he estimated at 80 percent. Given the facts surrounding the WICET facility as at 30 September 2015 as set out above, and the absence of any underlying data or reasoning or calculation to support the 80 percent estimate, I do not find as a fact that WICET would have been able to load vessels with coal for 80 percent of the total available hours at 30 September 2015 looking forward on the basis of Mr Martin's estimate. It follows that I do not accept the conclusion that it was capable of loading vessels with coal at 70 percent of the rate of 27 million tonnes per annum at and from that date, based on Mr Martin's methodology or evidence.

[314] The other input to Mr Martin's equation and opinion was his assessed gross loading rate of 2,686 tonnes per hour. As previously stated, Mr Martin derived that rate by first averaging, for each vessel in September 2015, the gross capacity per hour of berth time, by dividing the tonnes loaded on the vessel by the vessel berth time. From there, he averaged the individual vessel average loading rates for all vessels that berthed, loaded and departed in September 2015, with the exclusion of vessel 10 and vessel 12. Vessel 10 was excluded because its loading hours were affected by belt alignment works. Vessel 12 was excluded because its loading hours were affected by bias testing. In Mr Martin's opinion, those vessels should be excluded from the assessment or calculation of WICET's gross loading rate as not representative of normal loading times. It will be necessary to return to this question.

Defendants' case as to capability

[315] The defendants submit that, subject to three assumptions that they submit were made too favourably to WICET's capability, in September 2015 WICET was capable of loading 1,161,079 tonnes of coal on vessels, to be compared to the full design capacity for the month of 2,219,178 tonnes, so that WICET was capable of handling coal at 52.3 percent of the full design capacity.

[316] The defendants rely on the evidence of Martin Oldfield, an expert called by the defendants other than the first and second defendant in support of that conclusion. Mr Oldfield made four reports dated 20 May 2017, 11 May 2018, 21 August 2018 and 11 September 2018 and

also was a part author of the joint report as to capacity dated 2 August 2018. Mr Oldfield's methodology involved six steps:

(a) Step 1: assess the actual number of hours spent at berth in September 2015, being the hours spent loading plus the periods for lines on to first coal and last coal to lines off;

(b) Step 2: calculate the average actual berth time for the five vessels that berthed at WICET in September 2015;

(c) Step 3: assess the actual number of hours WICET was unavailable for loading coal in September 2015 due to maintenance and optimisation shutdowns to the loading stream;

(d) Step 4: calculate how many vessels could have been loaded at WICET in September 2015 had there been more than five vessels to load (by dividing the total hours available for the month after subtraction of the hours for shutdowns and actual vessels by the sum of average berth time and inter-vessel arrival time);

(e) Step 5: calculate the gross loading rate as the average actual tonnes loaded per vessel during September 2015;

(f) Step 6: calculate the total tonnes that WICET was capable of loading during September 2015 by multiplying the average actual tonnes loaded per vessel by the number of vessels that could have been loaded.

[317] Below is a spreadsheet that shows Mr Oldfield's preferred calculation based on his six step methodology:

	Calculation of Capability of Outloading System	
	Include vessels 10,11,12,13,14; September shutdown 172hrs+commissioning 19.66hrs; Modified GLR for vessel 12	
		September (Oldfield)
A	Number days in month	30
	Calculating WICET Capability as Vessels per Month	
	Hours lost due to closures and staff constraints	
B	Planned closures for routine maintenance and optimisation shutdowns (hrs/mth)	191.7
C	Staffing constraint (% reduction in terminal hours from staff shortage)	0%
D	Staffing constraint (hours reduction in terminal hours from staff shortage) (hrs/mth)	0.0
E	**Terminal downtime total (hrs for the month)**	191.7
	Berth Time	
F	*Actual performance for this month*	
G	Hours spent loading vessels	196.06
H	Hours Lines on to first coal	11.77
I	Hours last coal to lines off	73.48
J	Total berth time	281.31
K	Number vessels loaded this month	5
L	Average berth time for all vessels this month	56.3
M	**Number of vessels/mth possible this month**	**8.6**
N	Berth time for this number of vessels (hrs)	482.2
O	Intervessel arrival time per vessel (hrs)	5.38
P	Intervessel time consumed for the number of vessels possible this month (hrs)	46.1
Q	**Total (berth time + intervessel time) when using all available hours of WICET (hrs)**	528.3
R	**Total hours consumed (downtime + unloading time + intervessel time) (hrs)**	**720**
S	Berth Utilisation %	73.4%
T	Number hours in month	720
	Calculating WICET Capability to move tonnes	
	Actual performance for this month	
U	Tonnes loaded in the month	677,322
V	Average tonnes per vessel	135,464.40
W	Number of vessels possible this month	8.6
X	Tonnes that could have been loaded on number of vessels possible (tonnes/mth)	1,161,079
Y	Tonnes per month required to achieve nominal Full Design Capacity (tonnes/mth)	2,219,178.08
	% of WICET full design capacity possible this month	**52.3%**

[318] As to Step 1, an immediate difference between Mr Oldfield's approach and that of Mr Martin is that Mr Oldfield did not exclude vessel 10 or vessel 12 in September 2015. Mr Oldfield's reason for not excluding vessel 10 is that the belt alignment problems that affected loading of that vessel typically arise during a start-up phase and were representative of the performance of WICET for September 2015. That may be so, but it does not necessarily represent the likelihood that similar delays will continue as at 30 September 2015 and into the future. As to vessel 12, Mr Oldfield made an adjustment for vessel 12 by deducting 19.66 hours from its loading time, but included the same time as additional shutdown hours of WICET's unavailability for the month of September.

[319] As to the calculation of post loading times (from last coal to lines off) for the five vessels loaded in September 2015, another expert witness called by the plaintiff, Bruce Anderson, expressed the opinion that those times were inflated because there was no ship queue in September 2015, pointing to the difference between the 20.3 hour average and the 1.8 hour assumption in the SMS Simulation Model. The defendants submit that other reasons might explain the delay, relying on general evidence of the harbour master for the Port of Gladstone, John Fallon, that it was unsafe to leave loaded vessels at berth. However, the defendants offered no real evidence as to what the causes of post loading delays might have been.

[320] As to Step 3 of Mr Oldfield's methodology, namely the calculation of the hours of maintenance and optimisation shutdowns for September 2015, Mr Oldfield ultimately assessed 191.7 hours as follows:

Dates	Cause of unavailability	Hours
5-11 September 2015	Planned shutdown for optimisation and rectification work	136
14 September 2015	Bias testing during loading of Vessel 12	19.66
17 September 2015	Installation of tapered shims on jetty conveyors	12
27 and 28 September 2015	Installation of tapered shims on jetty conveyors	24
	Total	**191.7**

[321] Mr Oldfield's methodology proceeded on the basis that those hours of shutdowns were not available for loading of vessels with coal.

[322] The plaintiff challenges each of the components of Mr Oldfield's estimate of unavailable time for maintenance and optimisation shutdowns in September 2015. First, assuming the 136 hour shutdown started on 5 September 2014 at 14:00 hours, it commenced while vessel 11 was at berth but had completed loading. Vessel 11 remained at berth until about 13:30 hours on 6 September 2015, that is about 23.5 hours after the commencement of the shutdown. By subtracting both the time that vessel 11 remained at berth and those hours as part of the optimisation and maintenance shutdown from the total hours for the month, Mr Oldfield has subtracted the same period twice, in calculating the hours available to load additional vessels.

[323] In addition, as Mr Anderson discussed in his evidence, immediately prior to the 136 hour shutdown, it was estimated to occur for 96 hours, but then increased to 140 hours. It appears that the change to increase the hours coincided with a lack of loading activity. The plaintiff submits that 96 hours should be adopted for the planned optimisation and maintenance shutdown.

[324] Second, the plaintiff submits that the 19.66 hours allowed by Mr Oldfield for bias testing of the sampling plant was a one-off event that would not recur after 30 September 2015. Accordingly, the plaintiff submits those hours should not be included as at 30 September 2015 in the unavailable hours to calculate WICET's capability.

[325] Third, the plaintiff submits that the 36 hours, in total, allowed by Mr Oldfield to install tapered shims on the jetty conveyor does not represent any actual recording of time or assessment of time within Mr Oldfield's expertise. Mr Oldfield's allocation was based upon a John Holland estimate of three days for the work, and assumptions about the work consisting of three shifts of 12 hours, with those shifts occurring outside the scheduled shutdown and that the works required isolation. The plaintiff submits that the documents do not support those conclusions or assumptions.

[326] Accordingly, the plaintiff submits that Mr Oldfield's assessment or adoption of 191.7 hours of unavailable time in September 2015 is not reliable as to the capability of WICET to load vessels with coal as at 30 September 2015 and thereafter. The plaintiff submits that I should find that there were fewer than approximately 114 hours of berth unavailability for the month, looking forward, that should be taken into account. It submits that conclusion is supported by Mr Anderson's evidence that the works to be carried out could have been performed in parallel and during a 36 hour window if necessary. The plaintiff also submits that on Mr Oldfield's methodology otherwise, there were 170.4 hours of combined post loading and inter-vessel arrival time in which there would be opportunity to perform the work.

[327] In my view, there is substance in a number of these submissions. If the plaintiff's reduction of Mr Oldfield's assessment of berth unavailability to 114 hours were accepted, Mr Oldfield's calculation of WICET's capability of loading coal expressed as a percentage of WICET's full design capacity for September 2015, otherwise, would rise to 60 percent.

[328] In my view, the plaintiff's challenge to the bias testing hours should be accepted. Also, in my view, Mr Oldfield's evidence did not establish that the installation of the tapered shims on the jetty conveyor was either an activity that would not have been able to occur concurrently with periods when the ship loader would not have been operating, in any event. Third, in my view, it is likely that the planned shutdown could have been carried out in fewer than 136 hours, if vessels had been available for loading between 5 and 11 September 2015.

[329] On the other hand, I note that acceptance of the plaintiff's submission that the period of unavailable hours should be reduced to 114 hours would increase the utilised hour percentage for September 2015, to 84.2 percent, using Mr Oldfield's inputs otherwise. That percentage rate is higher than Mr Martin's opinion of the appropriate rate at 80 percent. On the other hand, 114 hours compares reasonably to WICET's planned shutdowns for October 2015 of 96 hours, November 2015 of 72 hours and December 2015 of 84 hours.

[330] In the result, I accept that there should be a reduction of at least 50 hours in Mr Oldfield's assessment of the planned closures for routine maintenance and shutdowns, to a total of no greater than 141.7 hours.

[331] As to step 5 of Mr Oldfield's methodology, being the calculation of the average gross loading rate per hour, I have already observed that Mr Oldfield's approach directly applied the average actual tonnes for September 2015, with an adjustment for vessel 12. It is necessary to consider the use of gross loading rates for vessels 10 and 12 a little more closely.

[332] Vessel 10 was the "UNTA". It berthed on 31 August 2015 at 5:18AM, commenced loading coal at 9:05AM, completed loading coal on 1 September 2015 at 10:48PM and departed the berth on 2 September 2015 at 7:46AM.

[333] The document described as the "Report to Senior Agent 30 September 2015" stated that the loading of vessel 10 was adversely affected by belt alignment works on the ship loader and that the consequence of the belt alignment works was that significant progress had been made with belt tracking. As previously stated, Mr Martin excluded vessel 10 because of the delay, whereas Mr Oldfield included it on the basis that such issues are typical of the facility undergoing commissioning during its ramp up phase. That is, Mr Oldfield treated the delay as

representative of WICET's actual capability during the relevant period. In a sense, this point illustrates Mr Oldfield's focus on the performance during September 2015 as a measure of the capability of WICET to load ships with coal as at 30 September 2015 looking forward.

[334] The plaintiff submits that, in adopting that approach, Mr Oldfield nullified the significant progress that had been made with belt tracking. But there was no detailed evidence one way or the other whether the belt tracking issues were significantly slowing what the gross loading rate might otherwise have been, or as to the offset of the improvements as at 30 September 2015.

[335] As well, the plaintiff submits that by including vessel 10 which berthed and commenced loading on the morning of 31 August 2015, Mr Oldfield increased the total hours of the relevant month in a way which decreased his capacity assessment inappropriately. I do not consider that materially affects the overall conclusions to be drawn.

[336] Vessel 12 was the "Frontier Unity". It berthed on 12 September 2015 and commenced loading coal at 6:52PM. It completed loading coal on 16 September 2015 at 1:08AM. It departed the berth. Its gross loading rate from lines on to lines off was 2,103 tonnes per hour, which was less than half the rate of the vessel before and about half the vessel after it.

[337] During that period, WICET carried out bias testing of the sample plant. The Report to Senior Agent dated 30 September 2015 recorded that as having an adverse impact on the gross loading rate. Mr Anderson explained that bias testing is a process where bulk samples are taken from a stationary conveyor belt to analyse and check the results from the sample plant. He said that such testing is extremely disruptive and, assuming the test is successful, only happens once.

[338] As previously stated, Mr Martin excluded vessel 12 from his analysis of the average gross loading rate. Mr Oldfield sought to excise the time during which the bias testing was being carried out, but otherwise retained vessel 12 in his calculations. The plaintiff challenges that approach on the ground that even if the time during which the testing was carried out could be accurately isolated, there is an assumption that the performance of the loading was otherwise unaffected. The plaintiff submits that was inconsistent with Mr Anderson's evidence that such testing is extremely disruptive and not just during the period of the test.

[339] In any event, the plaintiff submits that Mr Oldfield's attempt to isolate the testing time is not reliable. It was a desktop documentary analysis that did not call upon any experience or expertise held by Mr Oldfield.

[340] The plaintiff submits that if vessel 12 is removed from Mr Oldfield's calculations, the appropriate adjustments are to reduce the number of hours loading by 99.77 hours, to reduce the number of vessels from five to four and to reduce the total tonnes loaded by 164,614 tonnes. The plaintiff submits that the result of Mr Oldfield's assessment of capability of loading coal expressed as a percentage of WICET's full design capacity for September 2015 otherwise would rise to 56.8 percent.

[341] The defendants submit that if vessel 12 is removed from Mr Oldfield's calculations, the appropriate adjustments are to reduce the hours for the entries in line G by 58.61, line H by 2.57 and line I by 18.93 (totalling 80.11 hours in comparison to the plaintiff's reduction of 99.7

hours), to reduce the number of vessels for the entry in line K by 1 and to reduce the tonnes for the entry in line U by 164,614, and his calculation of capability of loading coal expressed as a percentage of WICET's full design capacity for September 2015 otherwise would rise to 54.8 percent. The difference of 2 percent from the plaintiff's submission lies in the different reduction of hours, because Mr Oldfield has reallocated 19.67 hours to maintenance and optimisation delays. Accordingly, in my view, the defendants' calculation is the correct one, assuming that Mr Oldfield's allowance for the delay from bias testing of the sampling plant is dealt with separately under the assessment of Step 3 of his methodology.

[342] In my view, vessel 12 should be removed from the calculation of the average gross loading rate for September 2015.

[343] Acceptance of both my conclusions as to required adjustments to step 3 and step 5 of Mr Oldfield's methodology results in adjustments to his calculations as shown in the "September (adjusted)" column of the spreadsheet below:

	Calculation of Capability of Outloading System		
		September (Oldfield)	September (adjusted)
A	Number days in month	30	30
	Calculating WICET Capability as Vessels per Month		
	Hours lost due to closures and staff constraints		
B	Planned closures for routine maintenance and optimisation shutdowns (hrs/mth)	191.7	141.7
C	Staffing constraint (% reduction in terminal hours from staff shortage)	0%	0%
D	Staffing constraint (hours reduction in terminal hours from staff shortage) (hrs/mth)	0.0	0.0
E	**Terminal downtime total (hrs for the month)**	191.7	141.7
	Berth Time		
F	*Actual performance for this month*		
G	Hours spent loading vessels	196.06	137.45
H	Hours Lines on to first coal	11.77	9.2
I	Hours last coal to lines off	73.48	54.55
J	Total berth time	281.31	201.2
K	Number vessels loaded this month	5	4
L	Average berth time for all vessels this month	56.3	50.3
M	**Number of vessels/mth possible this month**	**8.6**	**10.4**
N	Berth time for this number of vessels (hrs)	482.2	522.5
O	Intervessel arrival time per vessel (hrs)	5.38	5.38
P	Intervessel time consumed for the number of vessels possible this month (hrs)	46.1	55.9
Q	**Total (berth time + intervessel time) when using all available hours of WICET (hrs)**	528.3	578.3
R	**Total hours consumed (downtime + unloading time + intervessel time) (hrs)**	**720**	**720**
S	Berth Utilisation %	73.4%	80.3%
T	Number hours in month	720	720
	Calculating WICET Capability to move tonnes		
	Actual performance for this month		
U	Tonnes loaded in the month	677,322	512,708
V	Average tonnes per vessel	135,464.40	128,177.00
W	Number of vessels possible this month	8.6	10.4
X	Tonnes that could have been loaded on number of vessels possible (tonnes/mth)	1,161,079	1,331,356
Y	Tonnes per month required to achieve nominal Full Design Capacity (tonnes/mth)	2,219,178.08	2,219,178.08
	% of WICET full design capacity possible this month	**52.3%**	**60.0%**

[344] If properly made, the adjustments demonstrate that as at 30 September 2015, Mr Oldfield's methodology will support the finding by inference that WICET was capable of loading of vessels with coal at 60 percent of the full design capacity, subject to the following points.

[345] As previously mentioned, the defendants submit that three of Mr Oldfield's opinions or assumptions were too favourable to the capability of WICET. Those assumptions are that other shutdowns should not be included in the hours for shutdowns already considered (191.7

hours), there was no impact on capability from staffing constraints and that the appropriate average allowance was made for inter-vessel arrival time (5.38 hours).

[346] As to the staffing constraints, a document described as the "Operations Manning Buildup" dated 30 November 2016 contains a table setting out staff numbers month by month commencing July 2014 and continuing to and past 30 September 2015. As at September 2015 there were 50 employees across a number of categories, including 17 to 18 operations staff compared to 27 operations staff at May 2016 at the end of the ramp up period. Mr Oldfield opined that there is a strong argument to suggest that WICET had insufficient staffing levels in September 2015 to sustain continuous operation and Andrew Wells, a senior executive at WICET, also expressed the opinion that 17 to 18 operations staff were insufficient for WICET to operate at full capacity for a sustained period.

[347] However, as appears from the spreadsheet set out above, Mr Oldfield made provision in his model to include unavailable hours due to staff constraints but in fact made no reduction in available hours on that ground in his preferred assessment. In my view, it should not be accepted that WICET was not capable of performing at 60 percent of that capacity due to staffing constraints, by reference to the number of staff later employed to operate at full design capacity.

[348] As to other shutdowns, in his various reports, Mr Oldfield opined that it was reasonable to conclude, apparently in addition to the 191.7 shutdown hours he allowed in his preferred assessment, as set out above, that there were an additional 58.3 shutdown hours during September 2015, on account of:

(a) 12 hours for Magnet Area Handrail Works;

(b) 12 hours for Tapered Shims along the length of the Wharf; and

(c) 34.3 hours for the Surge Bin Conveyor.

[349] Again, given that Mr Oldfield did not rely on these additional hours in his preferred assessment, I do not consider that further reductions should be made to the available hours for the loading of additional vessels with coal in September 2015, or to the available hours to load vessels with coal as at 30 September 2015 looking forward.

[350] As to the inter-vessel arrival time, the defendants submit that Mr Oldfield assumed that each departing and arriving vessel would be able to pass in the Gatcombe channel and the Gatcombe Bypass channel but still utilise the same flood tide to depart and berth at WICET. Mr Oldfield's assessment of an average 5.38 hours for inter-vessel arrival times was calculated by adjusting the average period of 3.38 hours allowed in the SMS Simulation Model upwards. SMS had assumed that some vessels would be able to pass in the Clinton Bypass channel, that is closer to WICET than the Gatcombe channel or the Gatcombe Bypass channel. In effect, Mr Oldfield allowed for an extra hour steaming out of port to the passing point by the departing vessel and an extra hour steaming from the passing point into WICET by the arriving vessel, thereby adding two hours to SMS's average inter-vessel arrival time.

[351] The defendants submit that Mr Oldfield's adjustment is not enough, because he still assumes that the departing vessel and the arriving vessel will be able to make use of the same flood

tide, described as "hot berthing". It is not disputed that it was a condition of the departure of vessels from and berthing of vessels onto the WICET wharf that both manoeuvres must be performed on a flood tide. The defendants submit that Mr Oldfield's hot berthing assumption is too favourable to WICET's capability, having regard to the evidence of the harbour master, Mr Fallon, that depending on the tidal heights and under-keel clearances, it may not be possible to hot berth on the same flood tide and that, in any event, congestion in the channels may result in other shipping movements being given priority over WICET vessel movements. The defendants note that the SMS Simulation Model assumed that 42 percent of ships per year would be able to depart from and arrive at WICET on the same flood tide. They submit that assumption is inconsistent with the assumption inherent in Mr Oldfield's calculations that all vessels would be able to do so.

[352] In my view these points place a significant difficulty in the path of an inference that the appropriate assumption for the calculations made by Mr Oldfield is that the average inter-vessel arrival time at 30 September 2015, looking forward, was 5.38 hours. The potential inaccuracy created by the 5.38 hour assumption was identified in the evidence, but the solution was not established by other evidence. In the end, the evidence on this point was left in an unsatisfactory state.

[353] The plaintiff submits that this consideration is not significant, in effect for three reasons.

[354] First, the plaintiff submits that the inter-vessel arrival time is an externality that does not affect the capability of WICET to load vessels with coal, within the meaning of the definition of the Port Facilities (Initial) Available Date. I accept that some externalities should not be treated as going to capability in this context. For example, if there are insufficient ships arranged to make full use of the capability of WICET to load vessels with coal, in my view, that does not affect the relevant capability. But other constraints that were present when the "nominal capacity" and "full design capacity" of WICET of 27 million tonnes per annum was settled upon are not necessarily to be ignored, simply because they are physically external to WICET. Accordingly, in my view, the effect upon the available time for loading of coal caused by the necessity for one vessel to depart the wharf and another vessel to berth at the wharf is a matter that does go to the capability of WICET to load vessels with coal. That exchange of vessels necessarily employs the harbour and its physical attributes and restrictions in coming into and going out of the Port of Gladstone.

[355] Second, the plaintiff submits that the possibility of congestion causing delay to WICET's vessel movements should also be treated as an externality that does not go to the capability of WICET to load vessels with coal. On this point, general evidence was given by the harbour master, Mr Fallon, on which my mind has wavered. In any busy port, such as the Port of Gladstone, there are likely to be priorities in the order of movements in the main shipping channels. That is something that may be taken into account, in a general way, when considering inter-vessel arrival times at a loading facility. However, increased congestion caused by changes occurring after the nominal capacity or full design capacity of WICET was determined for the purposes of the WIRP Deeds is not something that the hypothetical reasonable observer would necessarily take into account. In any event, there was no detailed evidence of the extent to which congestion might affect the assumed average inter-vessel arrival time of 5.38 hours for WICET because congestion might prevent hot berthing on the same flood tide.

[356] Third, the plaintiff submits that the appropriate assumption for inter-vessel arrival time should be made on the basis that departing and arriving vessels would be able to pass in the Clinton Bypass, with the consequence that the additional average two hours of steaming time assessed by Mr Oldfield should be rejected. In my view, as at 30 September 2015, it was not appropriate to assume that departing and arriving vessels would be able to use the Clinton Bypass. As Mr Fallon said, approval of the harbour master was required before that manoeuvre would be permitted and, before any such permission would be granted, it would be necessary to show that it could be performed safely. As at 30 September 2015, no application for permission had been made and there was no evidence either that it was intended to make such an application in the near future or that any such application was likely to be approved. The fact that in the following year there was one occasion when WICET vessels did pass in the Clinton Bypass channel, apparently without approval, does not detract from those conclusions.

[357] Taking these points into account, in the end, I am unpersuaded that as at 30 September 2015, looking forward, it was a reasonable assumption or assessment that on average there would be an inter-vessel arrival time of 5.38 hours.

[358] For that reason, notwithstanding the other adjustments that, in my view, should be made to Mr Oldfield's calculations, I am not satisfied, on the basis of his calculations and the evidence otherwise, that by 30 September 2015 WICET was capable of Handling coal by loading vessels with coal at 60 percent or more of the rate of 27 million tonnes per annum.