SUPREME COURT OF QUEENSLAND

CITATION:	*Xstrata Queensland Ltd v Santos Ltd & Ors; Santos Ltd & Ors v Xstrata Queensland Ltd* [2005] QSC 323
PARTIES:	**XSTRATA QUEENSLAND LIMITED (ACN 009 814 019)** (applicant) v **SANTOS LIMITED; SANTOS PETROLEUM PTY LTD; SANTOS AUSTRALIAN HYDROCARBONS PTY LTD; VAMGAS PTY LTD; ORIGIN ENERGY RESOURCES LIMITED; ORIGIN ENERGY CSG LIMITED; DELHI PETROLEUM PTY LTD** (respondents) **SANTOS LIMITED; SANTOS PETROLEUM PTY LTD; SANTOS AUSTRALIAN HYDROCARBONS PTY LTD; VAMGAS PTY LTD; ORIGIN ENERGY RESOURCES LIMITED; ORIGIN ENERGY CSG LIMITED; DELHI PETROLEUM PTY LTD** (applicants) v **XSTRATA QUEENSLAND LIMITED (ACN 009 814 019)** (respondent)
FILE NO/S:	BS 7604 of 2005 BS 7672 of 2005
DIVISION:	Trial Division
PROCEEDING:	Applications to set aside subpoenas
ORIGINATING COURT:	Brisbane
DELIVERED ON:	7 November 2005
DELIVERED AT:	Brisbane
HEARING DATE:	6, 7, 11 and 12 October 2005
JUDGE:	McMurdo J
ORDER:	**1. The subpoenas served by Xstrata Queensland Ltd ("Xstrata") upon Incitec Pivot Pty Ltd and Queensland Alumina Ltd be set aside** **2. The subpoena served by Xstrata upon Energex Retail Pty Ltd be varied by deleting paragraphs 9 and 10** **3. The subpoenas served by Xstrata upon Pelican Point Power Limited, Qenos Pty Ltd, Queensland Power Trading Corporation, OneSteel Manufacturing Pty**

Ltd, Ecogen Energy Pty Ltd, Australian Paper Pty Ltd, CS Energy Limited, BlueScope Steel Ltd, Adelaide Brighton Ltd, Adelaide Brighton Cement, Osborne Cogeneration Pty Ltd, Queensland Nitrates Pty Ltd, Comalco Aluminium Ltd and BP Refinery (Bulwer Island) Pty Ltd be varied by deleting paragraphs 4 and 5

4. **The subpoena served by Xstrata upon BHP Petroleum (Victoria) Pty Ltd be varied by deleting paragraph 4**

5. **The subpoena served by Xstrata upon AGL Wholesale Gas (SA) Pty Ltd be varied by deleting paragraphs 8 and 9**

6. **The subpoena served by Xstrata upon Australian Gas Light Company be varied by deleting paragraphs 10 and 11**

7. **The subpoena served by Xstrata upon Arrow Energy NL be varied by deleting paragraph 6**

8. **The subpoena served by Xstrata upon TRUenergy Pty Limited be varied by deleting paragraphs 4, 7, 9 and 10**

9. **The subpoena served by Xstrata upon Origin Energy Retail Ltd be varied by deleting paragraphs 3, 7, 10 and 11**

10. **The subpoena served by Xstrata upon Origin Energy CSG Marketing Pty Ltd be varied by excluding the contract referred to in paragraph 18(b) of the affidavit of Mr Giaouris filed 7 October 2005 and deleting paragraphs 4, 5, 7 and 8**

11. **The subpoena served by Xstrata upon the Oil Company of Australia (Moura) Pty Ltd be varied by deleting paragraph 3**

12. **The subpoena served by Santos Limited, Santos Petroleum Pty Ltd, Santos Australian Hydrocarbons Pty Ltd, Vamgas Pty Ltd, Origin Energy Resources Limited, Origin Energy CSG Limited and Delhi Petroleum Pty Ltd ("the Producers") upon Energex Retail Pty Ltd be varied by deleting subparagraph (a) of paragraph 3**

13. **The subpoenas served by the Producers upon Esso Australia Resources Pty Ltd, Esso Australia Pty Ltd and BHP Billiton Petroleum (Bass Strait) Pty Ltd be varied by deleting the words "During the first six months of supply of natural gas pursuant to the contract or" of subparagraphs (a) of paragraphs 3 and 6 and inserting after the word "issued" the words "for**

gas supplied" in paragraphs 3 and 6

14. **The subpoenas served by the Producers upon BHP Billiton Limited, The Australian Gas Light Company and TRUenergy Pty Limited be varied by deleting the words "During the first six months of supply of natural gas pursuant to the contract or" and inserting after the word "issued" the words "for gas supplied" in paragraphs 3, 6, 9 and 12**

15. **The subpoenas served by the Producers upon BHP Billiton Minerals Pty Ltd, AGL Energy Sales and Marketing Limited, Origin Energy LPG Ltd and Origin Energy (Vic) Pty Ltd be varied by deleting the words "During the first six months of supply of natural gas pursuant to the contract or" and inserting after the word "issued" the words "for gas supplied" in paragraph 3**

16. **The subpoena served by the Producers upon Origin Energy Retail Ltd be varied by deleting the words "During the first six months of supply of natural gas pursuant to the contract or" and inserting after the word "issued" the words "for gas supplied" in paragraphs 3, 6 and 9**

17. **The subpoena served by the Producers upon Gascor Pty Ltd be varied by deleting paragraphs 7 to 18 and the words "During the first six months of supply of natural gas pursuant to the contract or" and inserting after the word "issued" the words "for gas supplied" in paragraphs 3 and 6**

18. **Each party required to comply with a subpoena will have its loss and expense, including its legal costs on an indemnity basis, incurred in responding properly to the subpoena, to be agreed or failing agreement, to be assessed**

19. **In the case of each subpoena which has been the subject of an application to set it aside, the subpoena will be varied so as to require production on 22 November 2005 or such later date as permitted by the arbitrators**

20. **In each case it will be ordered that any document produced to the arbitrators under the subpoena will not be inspected by any person, other than the arbitrators and lawyers who are nominated by the arbitrators, except by leave of the arbitrators given no less than seven days after notice to the party which produced the document of a proposal that leave be given. The arbitrators may authorise nominated lawyers to receive copies of a document on such terms**

as the arbitrators think appropriate to ensure that only nominated lawyers, and other persons authorised by them to see the document, will have a copy

21. Each party is directed to deliver to my associate within seven days a written submission as to the costs of these applications. For each of Xstrata and the Producers, the submissions are not to exceed, in total, four pages. Any submission by any other representative, is not to exceed two pages

CATCHWORDS: ARBITRATION – CONDUCT OF THE ARBITRATION PROCEEDINGS – PROCEDURE AND EVIDENCE – SUBPOENAS – where a contract for the supply of gas provided that after ten years the parties could trigger a price review – where the contract provided that if the parties failed to agree on a new price the matter was to be referred to arbitration – where the contract required the arbitrators to have regard to prices paid by large industrial customers of natural gas which have materially changed over the period since the price was last adjusted – where the parties to the arbitration each, separately, applied to the court to issue subpoenas to third parties under s 47 of the *Commercial Arbitration Act* 1990 (Qld) – where the third parties were either suppliers, purchasers or aggregators of gas – where the majority of the subpoenaed third parties objected to the production of documents pursuant to the subpoenas on several bases

ARBITRATION – THE SUBMISSION AND REFERENCE – WHAT MATTERS MAY BE REFERRED – whether the referral of the dispute between the parties to the contract was an "arbitration" within the meaning of s 4 of the *Commercial Arbitration Act* so as to give the court power to issue subpoenas under s 47

ARBITRATION – CONDUCT OF THE ARBITRATION PROCEEDINGS – PROCEDURE AND EVIDENCE – SUBPOENAS – whether the court had the power to issue subpoenas pursuant to s 47 of the *Commercial Arbitration Act* prior to the final hearing by the arbitrators

ARBITRATION – CONDUCT OF THE ARBITRATION PROCEEDINGS – PROCEDURE AND EVIDENCE – SUBPOENAS – whether the subpoenaed documents were apparently relevant to the subject matter of the arbitration – whether the court ought to exercise its discretion to set aside the subpoenas when considering the commercially sensitive and confidential nature against the relevance of the documents required to be produced under the subpoenas – whether the subpoenas were oppressive

Commercial Arbitration Act 1990 (Qld), s 4, s 17
Uniform Civil Procedure Rules, r 242, r 245, r 247, r 414, r

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Alliance Petroleum Australia NL v The Australian Gaslight Company (1983) 34 SASR 215, not followed
Apache Northwest Pty Ltd v Western Power Corporation (1998) 19 WAR 350, followed
Arhill Pty Ltd v General Terminal Company Pty Ltd (1990) 23 NSWLR 545, followed
Australian Mutual Provident Society v Overseas Telecommunications Commission (Australia) [1972] 2 NSWLR 806, discussed
Australian Pacific Airports (Melbourne) Pty Ltd v Nuance Group (Aust) Pty Ltd [2005] VCA 133, discussed
BNP Paribas v Deloitte and Touche LLP [2004] 1 Lloyd's Rep 233, referred to
Commonwealth v Cockatoo Dockyard Pty Ltd (1995) 36 NSWLR 662, discussed
Goldflax Pty Ltd v Reefield Pty Ltd (Unreported, Supreme Court of Qld, 6 September 1999), discussed
Hogg v Schokman [2004] 1 Qd R 58, distinguished
John Holland Pty Ltd v Federal Building Industries Pty Ltd (in liq) [2001] QSC 326, distinguished
Leighton Contractors Pty Ltd v Western Metals Resources Limited [2001] 1 Qd R 261, discussed
May & Butcher Ltd v The King [1934] 2 KB 17, distinguished
Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd (2001) 1 Qd R 276, cited
National Employers' Mutual General Association Ltd v Waind and Hill [1978] 1 NSWLR 372, discussed
Queensland Electricity Generating Board v New Hope Collieries Pty Ltd [1989] 1 Lloyd's Rep 205, discussed
Seven Network Limited v News Limited (No 5) (2005) 216 ALR 147, cited
Spatialinfo Pty Ltd v Telstra Corporation Ltd [2005] FCA 455, cited
R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361, referred to
Re Commissioner of Water Resources [1991] 1 Qd R 549, discussed
Santos Ltd v Pipelines Authority of South Australia (1996) 66 SASR 38, followed
State of Victoria v Seal Rocks Victoria (Australia) Pty Ltd (2001) VSCA 94, discussed

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P B Hickey (*sol*) for CS Energy Ltd in BS 7604 of 2005

D B Starkoff (*sol*) for BP Refinery (Bulwer Island) Pty Ltd in BS 7604 of 2005

M R Dillman (*sol*) for Wambo Power Ventures Pty Ltd and Braemer Power Station in BS 7604 of 2005

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Corrs Chamber Westgarth for BP Refinery (Bulwer Island) Pty Ltd in BS 7604 of 2005

BCI Law for Wambo Power Ventures Pty Ltd and Braemer Power Station in BS 7604 of 2005

McMURDO J:

Outline

[1] Xstrata Queensland Limited ("Xstrata") uses natural gas for its mining operations at Mt Isa. It acquires the gas from a consortium of producers, being Santos Limited, Santos Petroleum Pty Ltd, Santos Australian Hydrocarbons Pty Ltd, Vamgas Pty Ltd, Origin Energy Resources Limited, Origin Energy CSG Limited and Delhi Petroleum Pty Ltd. I will call them "the Producers". It does so pursuant to a written agreement dated 29 July 1996, by which the Producers have agreed to supply and deliver natural gas to Xstrata in Mt Isa for a term of 15 years (the "Xstrata Agreement").

[2] The agreement provides for a review of the price to be paid as and from 1 April 2006. Either side can initiate the price review process by a notice to the other given at least 15 months prior to the price review date. The parties are then to negotiate in good faith and if they are unable to agree, the price is to be fixed by what the agreement describes as an arbitration.

[3] In December 2004 the Producers gave a notice seeking a price review. The parties did not reach agreement and the matter has been referred to arbitration. The arbitrators are the Hon Sir Daryl Dawson AC and Mr D F Jackson QC. They have made interlocutory directions for steps such as statements of contentions and disclosure.

[4] On 9 September 2005 both Xstrata and the Producers applied for leave to issue subpoenas for the production of documents to the arbitrators pursuant to s 17 of the *Commercial Arbitration Act* 1990 (Qld). I then granted leave on the basis that if any recipient of a subpoena applied to set it aside, the applicant for the subpoena would have to make out its case on a hearing *de novo*. Pursuant to that leave, subpoenas were issued, and most are now challenged by these applications to set them aside.

[5] The subpoenas are addressed to suppliers or industrial users of natural gas, to the end of obtaining information as to prices paid or proposed to be paid under contracts or arrangements to which they are parties. The principal concern behind each challenge is that this information is said to be confidential, and that its disclosure would be harmful even in the private context of an arbitration. It is argued that the subpoena is thereby oppressive. Alternatively, it is argued that access to any documents should be strictly limited and granted only to the lawyers representing the parties in the arbitration.

[6] But the subpoenas are challenged also upon other grounds. Nearly every applicant argues that all or some of the documents sought by its subpoena are not demonstrated to be relevant. Some applicants argue that the documents must be directly relevant to an issue for the arbitrators, in the sense which is required for the process of disclosure under the *Uniform Civil Procedure Rules* 1999 (Qld). Other applicants concede that the documents must be only *apparently* relevant, but say that their documents are outside that wider category. To a large extent these arguments as to relevance are premised upon a particular interpretation of the Xstrata Agreement, which is disputed by Xstrata and the Producers. Many applicants complain that the extent of the documentation required, if relevant, imposes a burden which makes the subpoena oppressive. Then there are some applicants who submit that these subpoenas should be set aside as premature. As issued, they required production of documents to the arbitrators on 17 October 2005. During the hearing of these applications I extended that to fourteen days from my judgment or as further ordered. The argument here is that there is no power to issue a subpoena requiring production any earlier than what the applicants describe as the final hearing of the arbitration.

[7] And with one exception,[1] each applicant argued that the *Commercial Arbitration Act* did not authorise the issue of these subpoenas because the process in which Xstrata and the Producers are involved is not, in truth, an arbitration.

The Xstrata Agreement

[8] Only some of the Xstrata Agreement is in evidence. There was no objection to the tender of but part of the document, although some applicants argue that a certain interpretation of what is in evidence cannot be adopted without seeing those provisions in the context of the agreement as a whole. Apart from the front page, what has been tendered consists of the five pages which contain clauses 10.5 through 10.12. It is necessary to set out those clauses in full:

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1 The application by Pelican Point Power Limited

"**10.5 Price Review**

(a) There shall be two opportunities for either the Producers or the Buyer to require a price review. The first may occur on 1 April 2006. The second may occur on 1 April 2011. These dates are hereinafter respectively referred to as "the First and Second Price Review Dates" or (when referred to jointly) as "the Price Review Dates".

(b) The Producers or the Buyer may by notice given to the other not less than fifteen (15) Months prior to a Price Review Date require that there be a price review for the purpose of determining the Unadjusted Unit Charge to operate from that Price Review Date, to the next Price Review Date or the end of this agreement as the case may be.

(c) If a notice is given, the Parties will promptly consult and negotiate in good faith and with all reasonable accommodation to reach agreement on the new Unadjusted Unit Charge. If agreement is not reached by the date which is twelve (12) months prior to the Price Review Date, the Parties will immediately proceed to have the Unadjusted Unit Charge reviewed and a new Unadjusted Unit Charge determined by arbitration in accordance with clauses 10.5 through 10.12.

(d) The Parties agree that it is a fundamental objective and that they will use their best endeavours to ensure that the award in any arbitration under this clause is to be made no later than two (2) months prior to the Price Review Date so that the new Unadjusted Unit Charge may be known in advance of, and be able actually to operate from, that date. Accordingly, the timetable set out in this clause is to be strictly followed and the arbitrators may exercise such control as may be necessary to ensure adherence to the timetable.

(e) The review of the Unadjusted Unit Charge to be conducted under this clause will not include any review of the formulae set out in Schedule 4 by which the Contract Price is derived.

10.6 Appointment of Price Review Arbitrators

(a) In the event an arbitration is required under clause 10.5(c), then at least eleven (11) Months before the Price Review Date the Producers and the Buyer will

each appoint one (1) arbitrator. If either Party fails to appoint an arbitrator within that time and continues in that failure for a further seven (7) Days after receipt of a notice from the other Party requiring it to do so, then that other Party shall request that an arbitrator be appointed for the Party failing to do so by the President of the Queensland Law Society Inc.

(b) Once appointed, an arbitrator will in no way represent any Party. An arbitrator shall not accept instructions nor any expression of interest from any Party except where the arbitrators jointly determine to do so or where the Parties join in an expression of instructions or wishes. The arbitrators will take the expression of the Parties' intentions and authority as being unalterably expressed in this agreement, except where the Parties join in notifying the arbitrators otherwise.

(c) Promptly after their appointment, the arbitrators will jointly appoint a third person to act as umpire in the event that the arbitrators are unable to agree in their award. If the arbitrators fail to appoint an umpire within thirty (30) days of their appointment, then either Party may request the President of the Queensland Law Society Inc. to appoint that umpire. The costs and expenses of the arbitrators and the umpire will be paid half by the Producers and half by the Buyer.

10.7 Powers of Arbitrators

(a) The price review will be determined on an expeditious and fair commercial basis with neither Party being regarded as a claimant with a burden of proof. The proceedings will be conducted in the manner which the arbitrators believe is best calculated to achieve the intentions of the Parties as expressed in this agreement. In particular, the arbitrators will have the power at all times to make orders to fix times and conditions which they believe will achieve those intentions.

(b) The arbitrators may require both parties to put their basic case in writing and may require that those cases be exchanged or, if it seems convenient to the arbitrators that the cases be delivered successively.

(c) The arbitrators may require the Parties to deliver responses to the basic cases in whatever form they think fit.

(d) The arbitrators may at any time make such orders as they see fit for:

(i) the delivery of documents clarifying the issues between the Parties;
(ii) the delivery of witness statements;
(iii) the delivery of interrogatories requiring answer by the other Party; and
(iv) discovery of documents, including orders limited to designated classes of documents or to documents on designated issues

and shall not be required to make on these or other matters any order other than as seen by them as desirable to achieve the Parties' recorded aims.

(e) The arbitrators will not be bound by the strict rules of evidence but shall be conscious of the general policies underlying those rules.

(f) The arbitrators may determine from time to time upon which issues they wish to hear sworn oral evidence and upon which issues they will receive evidence in some other form designated by them.

(g) The arbitrators may receive as evidence of fact material (e.g. tables of past prices or interest rates) publicly published by reputable organizations whose principal business activity includes the compiling of such material and where in normal circumstances people of business would act on that material in the making of commercial decisions.

(h) The arbitrators may accept published audited accounts and recent unpublished audited accounts as evidence of the matters dealt with in them or fairly to be inferred from them.

(i) The arbitrators may, where the nature of the issue and the material makes it, in their view, convenient and safe and fair to do so, accept in evidence an affidavit, the deponent of which is not available for cross-examination or an unsigned statement forwarded by telex or facsimile from an identifiable and apparently proper source.

(j) Where a matter seems to the arbitrators likely to be of small relevance to their determination they may direct that the matter be not pursued whether in evidence or in argument.

(k) The arbitrators may make such orders as they see fit regarding the time allowed for oral argument and oral evidence (including separate orders regarding evidence-in-chief and re-examination on the one hand and cross-examination on the other).

10.8 Confidentiality of Proceedings

The Parties and the arbitrators and umpire will keep all proceedings, pleadings, witness statements and other evidence confidential and will not disclose any of that information other than for the purposes of the arbitration. This shall not apply to information which:

(a) a Party can demonstrate has already been published; or
(b) a Party is obliged to disclose by law (including the Listing Rules of the Australian Stock Exchange).

10.9 Commercial Arbitration Act to Apply

Except as otherwise provided in this clause, the Commercial Arbitration Act 1990 (Queensland) will apply to any arbitration carried out for the purposes of a price review under this clause 10.

10.10 Determination

(a) The decision of the arbitrators must be in writing issued (if practicable) earlier than two (2) Months prior to the Price Review Date. The validity of their decision will not depend upon its being issued by that date.
(b) If the arbitrators are unable to agree on a determination then they must issue a statement in writing to that effect stating the figure which each of them separately would have determined.

(c) On receipt of that statement the umpire must proceed to determine the matter as that person sees fit by decision in writing given as soon as is practicable after notification to the umpire of the failure of the arbitrators to agree. The umpire's decision may be made without regard to the decisions of the arbitrators but the decision of the umpire shall not operate to fix a figure above that of the higher, or

below that of the lower, of the figures decided upon by the separate arbitrators in their statements issued pursuant to paragraph (b).

(d) The umpire will proceed entirely on a review of the transcript and exhibits and submissions of the parties to the arbitration.

(e) A determination under this clause will be final and binding on the Parties for the purposes of the price review.

10.11 Effect on Contract Price

(a) Following agreement between the Parties or a determination under clause 10.10, the Unadjusted Unit Charge will be adjusted to the extent required to take account of any agreement or arbitral determination.

(b) If the award is made or agreement is reached after the Price Review Date, the Unadjusted Unit Charge payable by the Buyer for Gas immediately prior to the Price Review Date will continue to be paid (as adjusted from time to time in accordance with this agreement) pending agreement or arbitral determination of the new Unadjusted Unit Charge ("New Unadjusted Unit Charge").

(c) The Unadjusted Unit Charge to apply on and from the Price Review Date shall be the New Unadjusted Unit Charge as adjusted from time to time in accordance with this agreement.

(d) If the arbitrators' or umpire's award is announced or agreement is reached after the Price Review Date the Parties agree that, (within twenty one (21) Days of that award being made or agreement being reached) an adjustment shall be made between them so that the Unadjusted Unit Charge payable for Gas between the Price Review Date and the date of the arbitrators' or umpire's award or the Parties agreement shall be the New Unadjusted Unit Charge (as adjusted from time to time in accordance with this agreement).

10.12 Factors to be considered

The arbitrators and the umpire, in carrying out the review, shall have regard only to:

(a) any reimbursements or credits being made in respect of any Varied Impost or any New Impost imposed prior to the date twelve (12) Months prior to the Price Review Date; and

(b) the following prices paid by large industrial customers of Natural Gas in the states of Queensland, New South Wales, Victoria and South Australia ("the customers"):

(i) for those customers who pay an Ex-Plant Price separate from a Natural Gas transmission tariff, those Ex-Plant Prices; and
(ii) for those customers who pay a delivered price for Natural Gas, the Ex-Plant Prices attributable to those delivered prices,

which Ex-Plant Prices have materially changed from those applying since the later of:

(A) the date of this agreement; or
(B) the date when the Unadjusted Unit Charge was last adjusted by agreement or arbitration under this agreement.

The arbitrators and the umpire will utilise their analysis of the Ex-Plant Prices to adjust the Ex-Plant Price attributable to the Unadjusted Unit Charge and will award a New Unadjusted Unit Charge in the light of any such adjustment, the Gas transmission tariffs at the relevant Price Review Date and the matters referred to in clause 10.12(a).

The Parties acknowledge that the Unadjusted Unit Charge is a delivered price.

For the purpose of this clause 10.12, "Ex Plant Price" shall mean the price paid or effectively paid to a seller of Natural Gas which meets the sales quality specification specified in the contract for the sale of that Natural Gas at the point at which that Natural Gas exits the plant at which it was processed to meet that sales quality specification."

[9] Clause 10.12 requires the arbitrators to have regard only to the matters set out in its paragraphs (a) and (b). It is common ground within these applications that the matters in paragraph (a) are irrelevant.

Is this an arbitration?

[10] Section 17 of the *Commercial Arbitration Act* provides as follows:

"**17 Parties may obtain subpoenas**

> **(1)** The court may, on the application of any party to an arbitration agreement, and subject to and in accordance with rules of court, issue a subpoena requiring a person to attend for examination before the arbitrator or umpire or requiring a person to attend for examination before the arbitrator or umpire and to produce to the arbitrator or umpire the document or documents specified in the subpoena.
>
> **(2)** A person shall not be compelled under any subpoena issued in accordance with subsection (1) to answer any question or produce any document which that person could not be compelled to answer or produce on the trial of an action.**"**

An arbitration agreement is defined for the Act by s 4 as "an agreement in writing to refer present or future disputes to arbitration". But the Act does not define the term "arbitration".

[11] The applicants argue that an arbitration is a process of the resolution of a dispute consisting of a justiciable issue triable civilly. There must be a dispute which a court could try which, they say, is absent here. They argue that the present case does not involve a dispute in the required sense, because at present neither Xstrata nor the Producers can claim an existing right to a particular price which is to be paid as and from next April. The parties have agreed to negotiate towards an agreement for that price and failing agreement, to have the price fixed for them by others. The price as and when fixed, the applicants argue, will not represent a determination of an existing right or obligation. By contrast "judicial power involves, as a general rule, a decision settling for the future … a question as to the existence of a right or obligation": *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374.

[12] The applicants say that this question of the arbitrability of the issue is not answered by the fact that the parties, in their contract, have described the process as one of arbitration, or that they have agreed that it will have elements which give it the appearance of an arbitration. On their argument, the question is answered by asking whether a court could determine the new price as the arbitrators are to do. That requires some interpretation of the Xstrata Agreement to see whether the questions for these arbitrators allow for something equivalent to judicial decision making. Before looking at what this contract involves, I will discuss the authorities relevant to this question of what constitutes an arbitration.

[13] In Mustill & Boyd *The Law and Practice of Commercial Arbitration in England* (2nd ed 1989) it is said that English law does not provide a comprehensive answer to the question of what is an arbitration. The authors suggest factors which are material to the question, of which one is the existence of a dispute which is already formulated at the time when the arbitrator is appointed, although they do not say that it must be a dispute which a court could determine.[2] *Russell on Arbitration* (22nd ed 2003)[3] says that the subject of arbitrability has not come up directly for decision by an English court. In Australia, however, the question has arisen in three

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2 At 240, 241-250

3 At para 1-27

comparatively recent cases which, as it happens, each involved the price review provisions of a gas supply contract.

[14] In *Alliance Petroleum Australia NL v The Australian Gaslight Company* (1983) 34 SASR 215 the contract provided for a price adjustment by agreement, or failing agreement by process which the parties described as an arbitration. Like the present case, the parties agreed to negotiate in good faith, and failing agreement to refer the matter to two arbitrators, one to be appointed by each side. Unlike the present case, the agreement made no provision for what the arbitrators were or were not to consider. The only indication of any criterion to be applied by the arbitrators was an agreement that in the parties' endeavours to agree a price, regard was to be had "to all economic and other relevant factors existing at the time and in particular but without in any way limiting the scope of the review to the effects of inflation and any increases in capital and operating costs". Recipients of subpoenas for the production of documents had concerns similar to those involved in the present case, and resisted compliance upon several grounds. One was that the so called arbitration was not a "civil proceeding" within the *Service and Execution of Process Act* 1901-1974 (Cth), so that the Supreme Court of South Australia was unable to authorise the service of the subpoenas outside that State. In the course of that argument, it was submitted to the primary judge, Bollen J, that this was not a "true arbitration" in that it was "not the normal subject matter of court proceedings". Bollen J thought that this was a "true arbitration" saying at 230:

> "Much of Mr Angel's argument depends on his submission about the nature of this arbitration. True it is unusual. True it is prospective. Let it be assumed that it contains no justiciable issue in the sense that it is not concerned with issues which could be litigated. Nevertheless, in my opinion, the arbitrators are required to act judicially. … [i]t is much more than a mere fixing of a value. The 'determination,' in my opinion, calls for a consideration of evidence."

[15] Appeals against the refusal by Bollen J to set aside subpoenas, together with a case which he had stated, were heard by the Full Court. As appears from the judgment of King CJ, the question of whether there was a "claim, difference or dispute",[4] and accordingly whether there had been a valid submission to arbitration, was not argued in the Full Court. Noting that, King CJ expressed no opinion on the question.[5] Wells J agreed in the result proposed by King CJ but saw fit to express what he described as a provisional view on the question.[6] He said it was arguable that the failure to arrive at an agreement on price had not given rise to a claim, difference, or dispute which could be the subject of a submission to arbitration. He said:[7]

> "No claim, difference, or dispute, between the parties (it may be said) is resolved by his "Award"; he simply discharges the responsibility he has accepted to determine the price for the benefit

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4 Within the meaning of s 27 of the *Arbitration Act* 1891 (SA)
5 See 235-236
6 At 251
7 At 251-252

> of the parties, and in furtherance of performance by them of their respective duties under the contract."

The dissenting judge, Zelling J, would have set aside the subpoenas on the basis that there was no submission to arbitration. In a passage strongly relied upon by the applicants in the present matter, he said:[8]

> "In my view the applicants fail on a narrower point, namely that the contemplated arbitration here has no resemblance to curial arbitration and is therefore outside the ambit of s.16 however widely it is construed. This arbitration will result in legislation for the future, not the decision of disputes, present or future, relating to existing rights. No doubt the arbitrators have to decide judicially in the sense that they must give the parties a fair hearing but they are not being asked to pronounce on a dispute as to existing rights; they are laying down either a price or a formula for a price legislatively for the future. Halsbury's *Laws of England* 4th ed. vol. 2, par 503, s.v. Arbitration states: The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly; and there are numerous examples given on both sides of the line in relation to the general definition. In my opinion, the arbitration in the instant case does not consist of a justiciable issue triable civilly. Courts pronounce on the existing rights of the parties, they do not give advisory opinions and they do not act legislatively. Holdsworth (*op. cit.* at page 197) makes the same comment that a submission to arbitration has the feature that jurisdiction is taken from ordinary courts and is exercised by other tribunals. I do not think this is a proceeding taken from the ordinary courts. I think the arbitrators in this matter could better be described as quasi-arbitrators. The distinction is not so much the common one that is found in the books between an arbitrator and a valuer but one between an arbitrator performing duties which would otherwise be performed by a court and an arbitrator laying down legislative rules for the future."

[16] The second of these cases is *Santos Ltd v Pipelines Authority of South Australia* (1996) 66 SASR 38. Again, the agreed process was for the parties to negotiate in good faith towards a reviewed price, and failing agreement for it to be determined by a so called arbitration (specifically an arbitration under the *Commercial Arbitration Act* 1986 (SA)). The agreement contained extensive provision for the procedure to be followed by the arbitrators. They were given power to make orders as they thought necessary to enable the determination to be upon "an expeditious, fair and sensible commercial basis", to require parties to put their cases in writing akin to the exchange of pleadings, and to require the delivery of documents, discovery of documents and delivery of interrogatories. There were express provisions for oral evidence and oral argument. The agreement also prescribed the criteria by which the price was to be determined. The overriding requirement was that the arbitrators would have regard "to all economic and all other relevant factors existing at the time" but in particular to changes in capital and operating costs, the market value of gas in the South Australian market, the economic effects of gas

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8 At 244-245

prices upon commercial and industrial consumers of gas and electricity, the equivalent price at which the producers were selling gas to any other person and the equivalent price which the Authority was paying to any other person for gas. It was held to be apparent from these criteria that the arbitrators were required to determine "a fair market price" and that the arbitrators were required "to act objectively and not capriciously or subjectively".[9]

[17] Again in that case, subpoenas were issued for the production of various documents by persons who applied to set them aside. There was a specific argument to the effect that this was not an arbitration agreement as defined in the *Commercial Arbitration Act*. That submission was rejected by the primary judge (Bollen J) and unanimously by the Full Court. Debelle J (with whom Cox and Prior JJ agreed) held that there was a "dispute" and that the agreed process for its resolution was one of arbitration. A dispute existed because the parties disagreed, that is they did not agree, upon what should be the new price.[10] He referred to some indicia as to whether the means by which this dispute was to be resolved was an arbitration. One was that the agreement itself expressed it to be an arbitration and subject to the *Commercial Arbitration Act.* A second was that the parties had agreed upon an inquiry in the nature of a judicial inquiry, which was essential for an arbitration.[11] Some indicia of a judicial inquiry were that the parties had a right to be heard, they were each entitled to see and hear the evidence advanced by the other, and had a right to give evidence and to test the opposing case and to answer it. And there was what Debelle J described as "a subject matter of arbitration, that is, a subject matter in the nature of judicial enquiry".[12] That requirement was satisfied because the arbitrators were obliged to act objectively and by reference to expressed criteria. He summarised his reasoning as follows:[13]

> "In this case, it is the combined effect of a number of facts which point to the conclusion that arbitration is the means intended for the resolution of disputes as to price. They are the fact that there is a dispute, that the dispute is to be submitted to arbitration, that the *Commercial Arbitration Act* is invoked, the fact that the dispute is to be determined by persons called arbitrators, the process prescribed is in the nature of a judicial inquiry, and the issues are capable of judicial inquiry."

[18] Debelle J disagreed with the judgment of Zelling J in *Alliance Petroleum.*[14] In particular he did not accept that the dispute or difference must consist of a justiciable issue triable civilly. In his view, the dispute had to be "capable of being decided in a judicial manner": in a manner "which is generally consistent with a judicial inquiry".[15]

[19] The third case is *Apache Northwest Pty Ltd v Western Power Corporation* (1998) 19 WAR 350. The price there was to be according to certain expressed "pricing principles" and was susceptible to review by a process which could be initiated by

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9 At 48
10 At 44
11 At 46
12 At 48
13 At 48
14 At 49
15 At 49

either party and which would firstly require that the parties to endeavour to agree. Failing agreement, the matter was to be referred to an arbitrator. Western Power applied to the Supreme Court of Western Australia for leave to issue subpoenas for the production of documents pursuant to s 17 of the *Commercial Arbitration Act* 1985 (WA). Objections were taken by a number of recipients, similar to those taken here, and they argued that there was no arbitration agreement in terms of the Act. That argument was rejected by Wheeler J at first instance, and unanimously by the Full Court.

[20] Under that contract, the "pricing principles" required that the price "reflect the price of competitive energy forms in the South West", and to ensure that "the price of gas delivered [was] competitive with all alternative energy sources which could be used for the production of electricity and its sale". It was agreed that the gas would be used by Western Power "in a mixed energy market" where "oil, coal and gas … compete with one another". The relevant inquiry for the arbitrator under that contract was a broad one, but it was defined by agreed criteria.

[21] In the judgment of the Court (Kennedy, Pidgeon and Franklyn JJ) there existed a "dispute" and the agreement constituted an "arbitration agreement" within the meaning of the Act. The submission that there was merely a failure to agree, which was different from a dispute, was rejected. It was argued that there was no arbitration because the subject matter was not "a justiciable issue triable civilly". After extensive reference to *Alliance Petroleum* and *Santos*, the Court expressly agreed with the judgment of Debelle J in the latter case, and concluded as follows:[16]

> "In the present case, as in that case, the arbitrator is not required to complete the contract between the parties or to 'legislate' for them. His powers are not at large. Relevantly, the present arbitrator's task is to determine whether the effect of the [relevant] provisions … is to produce a Prevailing Contract Price which, having regard to the Pricing Principles, fails to reflect the price of competitive energy forms in the South West and, if he so finds, to determine a revised price giving effect to those principles and ensuring that they are satisfied. It will be the responsibility of the arbitrator to determine a price which gives effect to the agreement, having, … ensured that the principles agreed between the respondent and each seller and recorded in cl 15.1 are satisfied.
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> …
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> On the foregoing basis, the inquiry upon which the arbitrator is required to embark is, in our view, in the nature of a judicial inquiry. Furthermore, we agree with Wheeler J [the primary judge] that, in the absence of the redetermination and arbitration structures to be found in the agreement, actions at law founded upon a review under cl 15 could readily be envisaged. In our opinion, the process laid down by cl 15 results in an arbitration, properly so called …".

[22] The Full Court also discussed the various views in *Australian Mutual Provident Society v Overseas Telecommunications Commission (Australia)* [1972] 2 NSWLR 806, the judgment of Jacobs P in which is relied upon by the present applicants. Parties to a lease had agreed upon a rent review in terms that "a fair annual market

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16 At 368

rental" would be determined by two valuers, and failing agreement between them, by a third valuer who would act as an arbitrator. The term "fair annual market rental" was defined as the best annual rent that in the opinion of the valuers or the arbitrator could reasonably be obtained for the premises with vacant possession at the review date. The arbitrator stated a case for the opinion of the court. Jacobs P thought that this was not an arbitration but was an exercise of mere valuation. In his view the subject matter was not one of judicial inquiry; unlike an assessment of compensation for example, this valuation was not of "accrued rights". He said:[17]

> "An agreement for lease at a fair rental is not a good agreement at law any more than an agreement for the sale of land at a fair price. It is true that in exceptional circumstances, where possession has been given and a party has expended monies, equity may insist that the incipient bargain be completed, if necessary by fixation of rental by the court (*Gregory v Mighell*[18]) and perhaps with fixation of price by the court (*Hall v Busst*[19]). As Fullagar J makes clear in the latter case at pp 222-223 this flows from an equitable doctrine and says nothing on the question whether in such circumstances there is a good contract at law.
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> I have the difficulty in the present case that I cannot see that the duty of the valuers in the first place and of the umpire in the second place was to do more than find a rental value, appraise the rent, and thus complete the bargain between the parties. However, neither party has taken the point and I am inclined to deal with at least one question which arises."

Hutley JA and Taylor AJA each held that the so called arbitrator was indeed conducting an arbitration, although their reasons differed in some respects. But each thought that the arbitrator was bound to proceed by something in the nature of a judicial inquiry.

[23] The most recent judgment on this question is that of Nettle JA in *Australian Pacific Airports (Melbourne) Pty Ltd v Nuance Group (Aust) Pty Ltd* [2005] VCA 133. The appellant leased premises to the respondent under a lease which was subject to the functions of an agreed "Review Board", upon which the parties would be equally represented. The lease also contained a dispute resolution provision, in terms that if a difference arose between the parties, the issue was to be determined by an expert nominated by the Australian Property Institute, to whom each party would be entitled to make a submission. The lessee notified the lessor of its desire to amend the terms of the lease which provided for the calculation of rent, and requested the Review Board to meet to consider the matter. The lessor sought a declaration that the Board was not empowered to grant a request to alter the way in which rent was calculated or to reduce the rent payable. In construing the lease's provision for the Review Board, it was relevant to consider whether a difference within the Board was susceptible to resolution by an expert appointed under the dispute resolution clause. Callaway JA and Byrne AJA held that the dispute resolution provision did not apply in this context. Nettle JA thought that it did. He

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17 At 814

18 (1811) 18 Ves 328; 34 ER 341

19 (1960) 104 CLR 206

referred to a submission for the appellant that the clause was modelled on the terms of an arbitration clause and that the expression "difference … between the parties" should be construed accordingly "as confined to a difference concerning existing rights and obligations". In this context, he discussed whether an arbitrable difference need be one which concerned existing rights and obligations. He said:

> "[42] … Even if cl 27.15 is modelled on an arbitration clause and should be construed accordingly, it is clear enough that arbitration as opposed to civil litigation need not be confined to disputes and differences about existing rights and obligations and, depending on the context, issue may mean no more than a point in question.
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> [43] It is true that in order to constitute a submission to arbitration there must be a difference between the parties and that the difference must be something which arises under and is to be determined by reference to an existing agreement. It is also necessary to bear in mind the sometimes difficult distinction between arbitration *stricto sensu*, wherein an arbitrator must determine a difference between the parties to an agreement, and an appraisal or valuation, wherein an expert is left at large to determine an objective fact or to legislate rights and obligations. The essence of arbitration is the resolution of a dispute or difference by a process in the nature of an inquiry in which the arbitrator is bound to resolve the dispute on the basis of competing submissions. The essence of valuation or appraisal is that the expert is left at large to overcome or perhaps avoid a dispute by applying his or her own knowledge and skill to the resolution of the matter in issue. Hence it has been said that arbitration is a process of decision making which is limited by the extent and area of the dispute, whereas appraisal or valuation is a process of decision making to which the only relevance of the dispute is as the condition precedent of the reference.
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> …
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> [45] APAM's argument finds some support in a statement in the fourth edition of *Halsbury's Laws of England*: that for the purposes of arbitration a dispute or difference must relate to a matter capable of being decided in civil proceedings between the parties and being compromised by accord and satisfaction. *Bacon's Abridgment* is cited in support of the statement. *Halsbury's Laws of Australia* puts the matter in much the same way, although in the terms which were used in the third edition of *Halsbury's Laws of England*: the dispute or difference must consist of a justiciable issue triable civilly and that a fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction, and if it cannot, then the dispute is not arbitrable. But neither formulation is complete, as indeed is pointed out in a footnote to *Halsbury's Laws of Australia*. It

> refers to observations of Jones J in *Goldflax Pty Ltd v Reefield Pty Ltd* and, as his Honour there noted, the fourth edition of *Halsbury's Laws of England* omits a number of important points made in earlier editions. One of those which is important for present purposes is that while an agreement to refer a price to a valuer is an agreement for valuation or appraisement, and so not an agreement for arbitration, matters of valuation and appraisement may be the subject of arbitration where it is clear that the arbitrator is intended to proceed judicially on the basis of the evidence and submissions put forward by the parties. Parties may agree that the consideration payable under an agreement is to be determined by agreement and failing agreement that the difference between them as to the amount payable shall be referred to arbitration. It was so stated in *Collins v Collins* almost 150 years ago:
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> > 'If two persons enter into an agreement for the sale of property, and try to settle the terms, but cannot agree, and after dispute and discussion respecting the price, say we will refer the question of price to AB, he shall settle it, and they agree that the matter shall be referred to his arbitration, that would appear to be 'arbitration' in the proper sense of the term within the meaning of the act; but if they agree to a price to be fixed by another, that does not appear to be arbitration.'
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> [46] There is of course a distinction between the arbitration of a difference concerning existing rights and obligations and an arbitration which is directed to a difference about the content of rights and obligations yet to be agreed. The latter is sometimes called a quasi-arbitration in order to distinguish it from the former. But what is thus described as quasi-arbitration is nonetheless arbitration so long as the arbitrator is appointed to act as an arbitrator. The point was explained in the judgment of Rich J in *Jacka v Lewis*[20].

[24] Nettle JA then discussed, amongst other cases, *Alliance Petroleum*, *Santos* and *Apache Northwest*, remarking that it may be that the provisions of this lease would not provide the expert with the same degree of guidance and of dispute as the Pricing Principles afforded the arbitrator in *Apache Northwest*, and for that reason it was perhaps arguable that the failure of the parties to agree on a change of rent through the Review Board would not be susceptible to arbitration. But he doubted that would be so, because it was implicit that the terms to be imposed should be fair and reasonable between the parties, thus providing an objective measure or standard. His judgment then provides support for the arguments of Xstrata and the Producers, that the reasoning in the *Santos* and *Apache Northwest* judgments should be followed. The judgments of Callaway JA and Byrne AJA did not discuss the present point.

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[20] (1944) 68 CLR 455, 460-461

[25] In a judgment cited by Nettle JA, *Goldflax Pty Ltd v Reefield Pty Ltd* (Unreported, Supreme Court of Qld, 6 September 1999) Jones J held that an arbitration involves "an inquiry in the nature of a judicial inquiry". He appears not to have accepted the submission that it must involve a justiciable issue triable civilly, but he held that in any case there were justiciable issues involved in the matter.[21]

[26] In each of the three gas supply cases, whether there is a dispute or a difference and whether the subject of the dispute or difference is arbitrable, were treated as distinct questions. But in my view, they are different ways of expressing the one question, which is whether the matter upon which the parties are not agreed is capable of being decided in a judicial manner. If it is not, then there is no "dispute" as that word is used in the context of arbitrations and in the *Commercial Arbitration Act*.

[27] I agree with Wheeler J who said (when discussing the appeal against her orders in *Apache Northwest* upon a stay application[22]): "In my view, the applicants' focus on the existence or otherwise of a 'dispute' is misconceived; the real question for determination is likely to be what type of dispute is capable of being the subject of an arbitration."

[28] Of course, parties to a contract may agree that a dispute which can be decided in a judicial manner will instead be resolved in a non judicial manner; that it will be decided by an expert and not by an arbitrator. But where the subject matter of the dispute is such that it cannot be decided in a judicial manner, it cannot be the subject of an arbitration agreement, notwithstanding any attempt to dress it up as such with the terminology of arbitration and the procedure of litigation or even by the expressed intention that the *Commercial Arbitration Act* will apply.

[29] A dispute is not capable of decision in a judicial manner absent the existence of certain objective criteria which define how a decision for its resolution is to be reached. If the decision maker is free to apply his or her idiosyncratic view the decision making process cannot in substance be a judicial one. It is only if the decision maker is bound by certain measures, standards or criteria, which are known to the parties, that the process can resemble a judicial one. An arbitration requires the existence of a dispute which is to be resolved according to such defined criteria. In the application of those criteria, there could be more than one answer, such as more than one revised price. Yet that is no different from where, for example, the application of the relevant statute and common law can result in a range of proper awards of damages.

[30] The applicants argue that the matter cannot be decided in a judicial manner if the determination is not one of existing rights and obligations but is what some of the cases describe as a "legislative" prescription of future rights and obligations. But where the price must be assessed only by reference to the application of certain defined criteria, the parties have existing rights in relation to the new price. They have a right to a performance of their contract, as and from the price review date, at a price assessed by, and only by, the application of those criteria. Once the price is assessed by another according to their agreement, that right merges in their right to performance at the price assessed. Again, the process is similar to the adjudication of claims for unliquidated damages. As noted in *Apache Northwest*, cases such as

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21 At [22]

22 (Unreported, Full Court of WA, 14 July 1997)

May & Butcher Ltd v R [1934] 2 KB 17 are different, because they involve incomplete agreements, where there is no present right because there is no contract.

[31] Accordingly whether this is an arbitrable dispute depends upon whether the arbitrators are bound by the parties' contract to decide the matter according to certain objective criteria so that it is possible for them to do so in a judicial manner. That is a question of the proper interpretation of the Xstrata Agreement, of which only part is in evidence. The applicants argued that no terms should be implied absent proof of all of the express terms. But there was no objection by any applicant to the tender of part of the Xstrata Agreement, and the task of interpretation together with the consideration of what terms, if any, should be implied, will have to be undertaken upon such evidence of the contract as the court has. In that respect, that which has been tendered apparently constitutes the entire prescription of the process for price review.

[32] The arbitrators are to determine what should be the "Unadjusted Unit Charge" to apply as the "delivered price" from the review date (1 April 2006). The Unadjusted Unit Charge as originally agreed (and currently applying) is apparently a function of a certain "Ex-Plant Price", so that the Unadjusted Unit Charge is to be varied by an adjustment of that Ex-Plant Price. The arbitrators are to adjust the Ex-Plant Price using their analysis of the facts described in paragraph (b) of cl 10.12 as follows:

> "(b) the following prices paid by large industrial customers of Natural Gas in the states of Queensland, New South Wales, Victoria and South Australia ("the customers"):
>
> (i) for those customers who pay an Ex-Plant Price separate from a Natural Gas transmission tariff, those Ex-Plant Prices; and
> (ii) for those customers who pay a delivered price for Natural Gas, the Ex-Plant Prices attributable to those delivered prices,
>
> which Ex-Plant Prices have materially changed from those applying since the later of:
>
> (A) the date of this agreement; or
>
> (B) the date when the Unadjusted Unit Charge was last adjusted by agreement or arbitration under this agreement."

[33] As already mentioned, cl 10.12 requires the arbitrators to have regard only to the matters specified in that clause, and the parties agree that the matters in paragraph (a) are now irrelevant. Accordingly the arbitrators are to adjust the Ex-Plant Price attributable to the Unadjusted Unit Charge, and thereby to award a New Unadjusted Unit Charge, only in consequence of an analysis of changes in Ex-Plant Prices. The evident intent is for the (Xstrata) Ex-Plant Price to be revised commensurately with movements in Ex-Plant Prices for gas supply to large industrial customers over a period. That period commenced on the date of the Xstrata Agreement (29 July

1996). It ends perhaps on the date from which the new price is to apply (1 April 2006) or perhaps (if earlier) the date of the arbitrators' decision. Precisely when that period ends need not be decided here. No applicant submitted that there was some uncertainty in the contract at least in that respect. The relevance of movements in prices paid by other large industrial customers for their natural gas, since Xstrata and the Producers originally agreed their price, is obvious. Almost certainly any changes in Ex-Plant Prices paid by large industrial users would not be uniform. Accordingly the parties have agreed that the arbitrators will utilise their *analysis* of changes in those prices to adjust their price rather than simply applying a formula. That will require a judgment as to what constitutes an appropriate adjustment of the Ex-Plant Price from which the Unadjusted Unit Charge (originally agreed) was derived. In making that judgment, an arbitrator appointed under this agreement would not be acting at large. The adjustment would not be according to his or her own arbitrary or idiosyncratic notion. Instead, it would be a judgment of adjustment that is fair and reasonable between the parties, having regard only to an analysis of movements in prices in what the parties have agreed are comparable circumstances. As discussed, the exercise of the arbitrators' judgment in that way could result in several different figures, but that does not distinguish it from decision making which is by nature judicial.

[34] The applicants' submissions resist any limitation on the arbitrators of making an adjustment which is fair and reasonable between the parties. They argue that this would require the implication of a term, and that the court should not imply a term without seeing the whole contract because, for example, the implied term might be inconsistent with an express term not presently in evidence. The requirement of fairness and reasonableness comes more from the interpretation of the express terms than from a process of adding a term to fill some gap in the bargain as expressed: see Lewison *The Interpretation of Contracts* (2nd ed 1997) at 123-124. But if the matter be one of implication of a further term, the case for it is compelling, and, with respect, it seems fanciful to suspect that within some other part of the contract there is something which qualifies what is so clear from that which is in evidence.

[35] In his judgment in *Santos*, Debelle J (at 48), after referring to the expressly stated criteria to be applied by the arbitrators, said that it was readily apparent from them that the arbitrators were required to determine the fair market price and that the object was to provide the criteria by reference to which the price would be fixed, requiring the arbitrators to act objectively and not capriciously or subjectively. He cited *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep 205. That was an appeal to the Privy Council from Queensland, involving a contract for the supply of coal with extensive provisions for price variation, including an arbitration clause. The case did not concern whether the dispute was arbitrable but whether, according to the particular terms of the contract, an arbitration might have an effect upon prices for several years prior to any party seeking a price review. The judgment of the Board was delivered by Sir Robin Cooke who said:[23]

> "In accordance with the approach adopted in those cases, their Lordships have no doubt that here, by the agreement, the parties undertook implied primary obligations to make reasonable endeavours to agree on the terms of supply beyond the initial five

[23] At 210

> year period, and failing agreement and upon proper notice, to do everything reasonably necessary to procure the appointment of an arbitrator. Further, it is implicit in a commercial agreement of this kind that the terms of the new price structure are to be fair and reasonable as between the parties. That is the criterion or standard by which the arbitrator is to be guided. If there are cases where the true meaning of the contract is that the arbitrator is to aim not at objectively fair and reasonable terms, but merely at some result which appeals to him subjectively, they must be rare indeed and the present is certainly not one of them."

[36] In *Apache Northwest*, the Full Court cited that passage and said that those observations applied with equal force to its case.[24] In my view, so do they apply to this one.

[37] Some of the applicants argue that the present case is different, because there is no express or implied requirement for the arbitrators to fix a fair and reasonable price; they might, consistently with this contract, arrive at a price which is not fair and reasonable, because they are to adjust an original price which may not have been fair and reasonable. It is true that the arbitrators here are not to fix a fair and reasonable price, unaffected by what the parties have agreed as the original price. Instead, they are to fairly and reasonably apply the criteria expressed within cl 10.12 to adjust a price. The original Unadjusted Unit Charge is a function of an Ex-Plant Price which may or may not be representative of Ex-Plant Prices paid by large industrial users in July 1996. The relevant exercise is to adjust the Ex-Plant Price (and in consequence the Unadjusted Unit Charge) to an extent which fairly and reasonably corresponds with the movements in other Ex-Plant Prices.

[38] In summary, this contract provides the objective criteria for the arbitrators' decision, such that it is a matter which can be decided by a process which is in sufficient respects analogous to a judicial inquiry. The parties are entitled to have the contract performed, as and from next April, according to a price which is the result of the fair and reasonable application of those criteria to the original price. There is a dispute as to what amount represents that adjusted price, which dispute the parties have agreed should be resolved not by a court but by arbitrators. The parties have existing rights to the performance of their contract, as and from the review date, at an adjusted price. The arbitrators will be determining the matter according to those rights rather than creating rights where there presently are none.

[39] This first challenge to the subpoenas fails. This is an arbitration for which the issue of subpoenas pursuant to s 17 of the Act is available.

Are these subpoenas premature?

[40] The argument is that the court has no power to grant leave for the issue of subpoenas which require the production of documents "in advance of the commencement of the hearing date of the arbitration". It was not supported by any authority on s 17 of the *Commercial Arbitration Act* or its equivalent in other jurisdictions. Nor was it supported by any other case involving the process of subpoenas in an arbitration. Instead, this limitation upon s 17 of the Queensland Act is said to result from the *UCPR*.

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[24] At 366

[41] In *Leighton Contractors Pty Ltd v Western Metals Resources Limited* [2001] 1 Qd R 261, Mackenzie J held that a subpoena for production of documents could not be used as a substitute for the process of non party disclosure, so as to require the production of documents other than at a hearing. In reliance upon this authority, it is said that the *UCPR* permit the issue of a subpoena for the production of documents only at a hearing, and indeed at what the argument describes as "*the* hearing date of the arbitration".

[42] The *Commercial Arbitration Act* makes no provision for a process of non party disclosure. The provision for non party disclosure in the *UCPR* is for "a proceeding", that is a proceeding in the Supreme, District or Magistrates courts.[25] Section 47 of the *Commercial Arbitration Act* provides that the court has the same power of making interlocutory orders for arbitration proceedings as it has for proceedings in the court. The process of non party disclosure need not involve an order of the court. A party gives a notice to the non party under r 242 requiring the production of documents, and production to that party, not to the court. The documents must be produced absent an objection by the non party. Where the court orders the non party to produce documents, as it may under r 247, it does so in the context of a notice having been given under r 242 and an objection having been made under r 245. The court's power to make an order for disclosure by a non party exists where there is a notice. As the notice can be given only in "a proceeding", it cannot be given by a party in an arbitration. The *Commercial Arbitration Act* does not subject a non party to a requirement to respond, by making disclosure or by making objection, to a notice given for an arbitration. Nor does it subject that person to the prospect of an order for disclosure. The process of non party disclosure in Queensland is not available for an arbitration under the Act. In *John Holland Pty Ltd v Federal Building Industries Pty Ltd (in liq)* [2001] QSC 326, in a passage cited with approval in *Hogg v Schokman* [2004] 1 Qd R 58, it was said that s 47 permitted various types of orders to be made which arbitrators cannot make, and an order for non party disclosure was one of the examples given. But that was in relation to a different point, and it involved no consideration of the present question.

[43] In any case, Mackenzie J in *Leighton Contractors* did not hold that in proceedings in the court, a subpoena could require documents to be produced only at the trial of the proceeding. He noted that the subpoena in that case was not issued for the trial or an interlocutory application.[26] Moreover, to distinguish between a trial and some other hearing, in the context of an arbitration, would not be straightforward in many cases, having regard to the intended flexibility of arbitration proceedings.

Relevance: must the documents be directly relevant?

[44] Apart from the impact of the *UCPR*, the general rule is that the documents the subject of a subpoena must be apparently relevant, and that it need not be demonstrated that the documents would be admissible in the proceeding at the stage when the court is considering whether inspection by the parties should be permitted: *National Employers' Mutual General Association Ltd v Waind and Hill* [1978] 1 NSWLR 372; *Apache Northwest* at 368-379 especially at 376.

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25 *UCPR* r 3

26 At 261

[45] The submission for Pelican Point Power Ltd, and adopted by some other applicants, is that the position in Queensland is now different because the *UCPR* "embody a conscious departure from the test of relevance under the general law". Both as between parties and in relation to third parties, the *UCPR* require that only directly relevant documents must be disclosed.[27] A document is directly relevant in this sense only if it tends to prove or disprove an allegation in issue in the proceedings: *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd* [2001] 1 Qd R 276 at 282-283. This requirement of direct relevance is said to affect the operation of s 17 of the *Commercial Arbitration Act* in two ways. It is argued that it limits the power under s 17 to a subpoena which requires the production of what is directly relevant. Alternatively, it is said to inform the exercise of the discretion under the section, so that ordinarily, the court would not issue a subpoena which sought more than directly relevant documents, or would set aside such a subpoena which had issued.

[46] In contrast with the rules for disclosure between parties or by non parties, the rules dealing with subpoenas do not, at least expressly, require that the documents be directly relevant. There is no particular basis for thinking that the difference is through a drafting error. The processes of disclosure and subpoena have many differences. One already mentioned is that disclosure, even by a non party, ordinarily involves no order by or other involvement of the court. To confine the process of disclosure to a more limited category of documents might be thought to be more appropriate where ordinarily the process is pursued without the involvement of the court.

[47] In my view the rules relating to subpoenas, and particularly r 414, should not be limited by implication, such that the court could issue only a subpoena requiring directly relevant documents. Nor should the power under the *Commercial Arbitration Act* be so limited. To an extent, the policy evident in limiting disclosure to directly relevant documents, might inform the exercise of the court's discretion in relation to a subpoena. That policy recognises a proliferation of documents unheard of when previous rules were formulated, and the consequent need to confine the process of disclosure to avoid its being an oppressive burden. It does not follow that, in general, a subpoena should be set aside if it requires the production of more than is directly relevant. The documents must be apparently relevant in the sense explained by the authorities. But the relative likelihood of the documents being ultimately admitted in evidence is a factor to be considered in assessing whether the subpoena is oppressive.

[48] Accordingly the subpoenas should not be set aside simply for the reason that they require the production of documents not presently demonstrated to be directly relevant.

What is apparently relevant?

[49] This question involves the interpretation of the Xstrata Agreement, and in particular cl 10.12. The respective statements of contentions in the arbitration indicate some difference between Xstrata and the Producers as to the proper interpretation of their agreement. Such a difference is a question for the arbitrators, and its answer might require evidence admissible in aid of the task. This is not the occasion in which to

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[27] Rules 211(1)(b) and 242(1)(a)

decide such a question between Xstrata and the Producers. If there is an interpretation which is reasonably open, according to which the documents sought would be apparently relevant, then the relevance requirement is met.

[50] Many applicants argue that their documents are irrelevant upon the premise of a certain interpretation of cl 10.12. They say that the arbitrators are limited to a comparison of the price paid by a large industrial customer as at July 1996 with the price now paid by that same customer. Upon that interpretation, a document going to what a customer paid in 1996 would be irrelevant if it is not presently a large industrial customer of natural gas. Similarly, the price paid now by a large industrial customer would be irrelevant if it has become such a customer only since July 1996.

[51] This argument, which might be called the same customer argument, is taken further by some applicants. They argue that only prices under the *same contract* can be considered by the arbitrators. In other words, if a certain customer was acquiring natural gas under one contract as at July 1996, but is presently acquiring gas under a different contract, the respective prices are to be disregarded and documents evidencing either price could not be relevant.

[52] The same customer or the same contract arguments need not be resolved for present purposes. It is sufficient to say that an alternative interpretation is reasonably open. The evident intent of cl 10.12 is to have the arbitrators compare price levels at two points in time. There is no apparent reason why the parties would have sought to confine that comparison to customers acquiring gas as at each date, or moreover, to acquisitions of gas at those dates under the same contract. Some submissions suggested that this was indicated by the reference to "changed" prices, so that a certain price could not be relevant unless it had been paid in July 1996 and it had changed to become the price now paid. If that interpretation is arguable, so too is an alternative which does not involve the same customer or same contract propositions. At least arguably, the required comparison is between prices paid by those who constituted the class of large industrial customers in 1996 and prices paid by those who now constitute that class.

[53] A further submission, made by many applicants, is to the effect that the relevance of a document must be assessed by considering only what that document reveals as to an ex-plant price, rather than by what it might reveal when considered with other documents or evidence. That would not be the test of its admissibility (if the laws of evidence applied) and nor is it the test of apparent relevance.

[54] Where a subpoena requires the production of documents for a court proceeding, a challenge to their production on the ground of irrelevance can be considered by the court with two advantages which the court does not have in the present context. The first is that the court is conducting the proceeding for which the documents are produced, and is better placed to say what is or is not relevant. The second is that the documents are produced to the court, so the court can inspect them, and those seeking the documents are able to argue for their relevance with the benefit, if the court permits, of seeing the documents.. The relevance of the present context where the court lacks those advantages, and the potential for unfairness to the parties seeking the production of the documents was discussed by the Full Court in *Apache Northwest* in a passage at 379 which I respectfully adopt:

> "… [T]he point still remains that, ultimately, the relevance of the material is for the arbitrator, and it is not appropriate at the present stage of the arbitration proceedings to embark upon a detailed preliminary inquiry involving evidence from the respondent and the companies against whom subpoenas are sought to be issued … as to whether the documents would ultimately be admissible in the arbitration. Without having the information contained in the documents, the respondent will be placed at a grave disadvantage in any such inquiry."

[55] The question of what is meant by apparently relevant was extensively discussed by Moffitt P (with whom Hutley and Glass JJA agreed) in *National Employers' Mutual General Association Ltd v Waind and Hill* at 378-386. Moffitt P said that the requirement of apparent relevance could be stated in terms that the documents must "relate to the subject matter of the proceedings", a relatively undemanding requirement. However, he also said that the relevance of documents must be more clearly demonstrated where there are competing considerations such as privacy:[28]

> "The crucial question in relation to the exercise of the discretion to permit inspection [of documents produced to the court] is whether the documents have apparent relevance to the issues. It is at the [stage when the documents are tendered] that questions between the parties of relevance in fact and admissibility are ruled upon. The judge is in some difficulty in determining whether documents are relevant prior to the presentation of the evidence or at the commencement of the case. If there is particular objection from the witness, or questions of privacy are involved, no doubt procedures can be adopted to ensure that only relevant documents are inspected. In other cases, it would appear appropriate to proceed to exercise the discretion [to permit inspection], provided the documents are apparently relevant or are on the subject matter of the litigation."

[56] Each applicant claims to have concerns of confidentiality or privacy. As I will discuss, they are relevant, but not of themselves determinative, considerations. A genuine concern for the confidentiality of the document does not, in every case, require that its relevance be demonstrated, in ways which would be necessary for its admission to evidence. The relevance might be demonstrable only with the benefit of other evidence. The relative likelihood that the document will be shown to be relevant is another consideration in the court's decision as to whether to require the document to be produced, or to permit it to be inspected and on what conditions. There will be a stronger case to require production and permit inspection of a document which is obviously relevant than will exist where, although a document relates to the subject matter of the proceeding, there seems to be a relatively small prospect that it will have any probative value. In the same way, the relative likelihood that apparently relevant documents will prove to be relevant, is considered against the burden of the task in having to produce them.

Confidentiality

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28 At 385

[57] As explained by Mr Hackett, (an employee of Santos Limited) in an affidavit read by the Producers, in the gas industry there are broadly three groups: producers, aggregators and customers. The producers sell to either aggregators or directly to customers. Aggregators buy from producers and on sell to other aggregators and/or to customers. Examples of aggregators who are applicants are Energex, AGL, TRUenergy, Origin Retail and Gascor. Some aggregators are also customers, and Mr Hackett gives TRUenergy as an example in its operation of the Torrens Island Power Station.

[58] Subpoenas have been issued to entities falling within one or more of those three groups. In relation to each subpoena which is challenged, there is some party which claims that the information contained in the documents is confidential, and that its disclosure would be to its commercial disadvantage. In some instances, the claim is not made by the party to whom the subpoena is addressed but by another party who says that its interests are affected. Xstrata suggests that those who resist production upon this basis, have not proved the existence of information which is truly confidential, in the way that it could be the basis for an action for breach of confidence. But in each case I am satisfied that there is a party with a genuine concern that the disclosure of information contained in the documents would be to its commercial disadvantage, although that disclosure would be only to those who would be involved in the arbitration. Apart from some concerns as to the size of the task of producing all that some subpoenas require, the obvious concern which has resulted in each of these applications, and the considerable expense of prosecuting them, is this one of confidentiality. In particular the concern is that information as to prices will be divulged in circumstances where that information could later be misused, either by parties in the arbitration or by consultants engaged to assist parties in the arbitration, who are likely to be involved in other dealings for which the information would be valuable. These claims are not surprising having regard to what the Producers say about the sensitivity of the Xstrata Agreement. Mr Hackett swears that its terms "constitute valuable commercial and proprietary information which, in the hands of a competitor or customer, could reasonably be apprehended to give a competitor or customer of [the Producers] an advantage in future price negotiations for the supply of natural gas". That is likely to be at least one reason why the parties agreed to a process of arbitration, and expressly agreed in cl 10.8 that all proceedings, pleadings, witness statements and other evidence in the arbitration would be kept confidential.

[59] Each application thereby involves a tension between these genuine and substantial interests of the subpoenaed party, and other interests. There are the interests of Xstrata and the Producers. There is also the public interest. There is a public interest in the fair conduct of litigation, and specifically by its conduct by reference to the truth. In *Re Commissioner of Water Resources* [1991] 1 Qd R 549, Byrne J explained why that public interest also exists in the conduct of an arbitration, and specifically in what he described in this context as the crucial role of subpoenas. That public interest was referred to in each of *Alliance Petroleum*, *Santos* and *Apache Northwest*. In *Alliance Petroleum*, King CJ said that "the risk to the confidentiality of the information must be tolerated in the interests of the administration of justice", a view expressly endorsed in *Santos* at 56 and in *Apache Northwest* at 379.

[60] The applicants challenge that approach, submitting that whilst it might be correct for a court proceeding, or perhaps for what some applicants have called a "true

arbitration", it is not apt for a proceeding such as this. It is said that the existence and nature of a relevant public interest was not explored in those three cases, and that they should not be followed. They argue that if the present process is an arbitration, it is not an arbitration of the kind which Byrne J was discussing in *Re Commissioner of Water Resources*. Accepting that there is a public interest in the ascertainment of the truth, both in an arbitration or a court proceeding, the applicants say that what the present arbitration is to determine is not "the truth", but a price. They argue that there is no "true" price. They accept that the arbitrators will consider evidence and make factual findings. But they argue that the matter for determination does not involve what one submission described as "an ultimate truth". This is another version of the submission already discussed, which is that the parties do not have existing rights or entitlements which are to be identified by the arbitrator's decision, but that the decision will create rights and obligations. For reasons already given, that misstates the effect of this agreement. The parties do have present rights to the performance of the contract, as and from next April, at a price which is varied from the present price according to the agreed criteria. This arbitration is as much a search for the "truth" as is a court proceeding for the recovery of unliquidated damages which involves a discretionary judgment and for which there can be several "true" answers. The arbitrators' judgment will be upon the facts as they find them, and there is a particular interest that they be able to find those facts by reference to relevant information. The analysis by Byrne J in *Re Commissioner of Water Resources*, which I respectfully adopt, seems just as relevant to the present case.

[61] It is said that the parties to this agreement have created a price review mechanism where, through an arbitration and the process of a subpoena, they can require others, including their competitors, to disclose information of the very kind which, in the case of their own agreement, they are at pains to keep confidential. It is submitted that this involves an injustice, if the applicant's claims to confidentiality have to give way to the interests of the arbitrating parties. That submission has force, at least because it highlights the tension between the different private interests which are involved. But it does not address the public interest which might be involved. The public interest in the administration of justice in court proceedings does not exist simply because courts are an arm of government or that, ordinarily, their proceedings are conducted in public. As with court proceedings, there is a public interest in the proper conduct of arbitration proceedings, because of their important role in the orderly resolution of disputes, by a process in which the participants can be confident, through the justice of an inquiry conducted in a judicial manner Loss of that confidence in the process of arbitration would deprive the community, especially the commercial community, of a means of dispute resolution which might be thought essential to many commercial dealings.

[62] The connection between the effective resolution of commercial disputes by the judicial method, and the promotion of commerce, should be obvious. But it needs to be noted because of the recurring suggestion here that there is no public interest in a case such as this because it is a private dispute. According to one submission, an arbitration is not "on the same public interest footing as a curial process [because] a commercial arbitration traces its origin and existence to a private contract, the terms of which are at the complete discretion and imagination of the parties". But so too does a court proceeding which involves the enforcement of a contract result from what parties see fit to put in their contract. Parties are free to make contracts which might require factual inquiries by a court for which evidence

would have to be compulsorily obtained. And many cases in court are private disputes in the sense that their particular outcome is of no concern to anyone but the parties. Yet the court will compel others to participate in the resolution dispute, and sometimes to divulge what is confidential, in interest of promoting a process of dispute resolution in which there can be public confidence, as well as doing justice between those parties.

[63] The plainest demonstration of the public interest in the fair conduct of arbitration proceedings is in the enactment of the *Commercial Arbitration Act* itself, its equivalents in other jurisdictions, and similar earlier statutes. Specifically, it is that public interest which explains why the public, through its legislature, has given the court power to compel by a subpoena the unwilling participation of others in a private process. As Byrne J said in *Re Commissioner of Water Resources* at 554, the then equivalent of s 17[29] distinctly indicated "that the reach of [subpoenas] when deployed in aid of arbitrations was to be co-extensive with their effect in litigation". There is no indication to the contrary in what Morison J said in *BNP Paribas v Deloitte and Touche LLP* [2004] 1 Lloyd's Rep 233 at 236. It was there held that s 43 of the *Arbitration Act* 1996, which permitted persons to be compelled to attend or produce documents, did not permit something equivalent to non party disclosure. The passage relied upon by some applicants does not deal with the present question.

[64] The exercise is a balancing one; the interests of the parties required to produce documents need not give way in every case and in every respect to the interests of the arbitration. That is why restrictions are sometimes placed upon access to the produced documents. As Wheeler J said in *Apache Northwest*:

> "… although, standing alone, confidentiality is not a ground for refusing to issue, or for setting aside a subpoena, it is a factor which is to be taken into account together with those tests for oppression which are determined by reference to the breadth of the subpoena, the definition of documents involved and the type and degree of burden placed upon those to whom the subpoena is addressed."

Those remarks have recently been applied by Sackville J in *Seven Network Limited v News Limited (No 5)* (2005) 216 ALR 147 at [11] and Sundberg J in *Spatialinfo Pty Ltd v Telstra Corporation Ltd* [2005] FCA 455 at [51].

[65] In some cases I am persuaded that the subpoena should be varied so as not to require the production of certain classes of documents, at least because of the size of the task involved in identifying, locating and producing them. In a relatively small number of cases, which are discussed below, the subpoena should be set aside. Otherwise the question in each case becomes one of the orders, if any, which the court should make to limit access to the documents once they are produced to the arbitrators.

Restrictions on access to subpoenaed documents

[66] The documents will be produced to the arbitrators, not to the court. The arbitrators will have the advantage of seeing the documents and they will be better placed to assess the relative importance of the parties being able to inspect them and for

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[29] Section 18(4) of the *Arbitration Act* 1973 (Qld)

certain persons involved in the arbitration to have access to them. Plainly, they are better placed than the court to decide whether a particular document is probative, or as Rogers CJ (Comm D) put it in *Arhill Pty Ltd v General Terminal Company Pty Ltd* (1990) 23 NSWLR 545 at 556, to decide what of the documents produced are necessary for disposing fairly of the proceedings. The arbitrators are able to affect the disposition of issues within the arbitration in ways which might make some of the present arguments about inspection of no practical importance. The arbitrators may see the necessary factual inquiry as a more limited one than that which the parties have in mind, and which makes many documents, in their view, irrelevant.

[67] There are very substantial advantages then in leaving it to the arbitrators to decide the terms of any restrictions upon inspection. But this raises a question of an arbitrator's powers and duties in relation to the interests of a third party affected by a subpoena. Some applicants seem to suggest that arbitrators could be guided by different considerations than those which would affect the court's discretion in relation to access to produced documents. And it is said that the court has no effective means of reviewing an arbitrator's decision on that question, however unfair to the third party.

[68] Where the process of a subpoena is used in aid of an arbitration proceeding, it remains the court's process and under its control. An arbitrator's power to employ that process is limited, in that it is to be employed with due regard to the interests of those affected by it, including but not limited to the parties to the arbitration. As an example, an arbitrator has a power to excuse a person, who has been required by a subpoena to attend to give evidence, from attending on certain days, or at certain times, or at all. That is a power which could also be exercised by the court, but n its exercise, either the court or the arbitrator would have to consider the witness' interests. In the same way, for a subpoena for the production of documents, an arbitrator would have regard to the interests of the party producing the documents as well as of the parties to the arbitration. That is because of an implied limitation on the arbitrator's power so far as the arbitrator's use of the court's process is concerned. The use of the court's process is not a matter simply for the agreement of the parties to the arbitration. For example they could not agree that the process be abused by an arbitrator.

[69] In turn, an arbitrator's use of the court's process is subject to the court's review and control. The limitations upon the court's power to supervise interlocutory orders of an arbitrator do not apply in this context, because the matter is one of the court's controlling its own process. In *State of Victoria v Seal Rocks Victoria (Australia) Pty Ltd* (2001) VSCA 94 an arbitrator rejected the State's claimed public interest immunity in respect of documents produced to the arbitrator, where the State was a party to the arbitration. The Court of Appeal held that although the Victorian equivalent of s 47 of the *Commercial Arbitration Act*[30] did not give the court a general right to supervise or otherwise interfere in interlocutory decisions of an arbitrator, the claim for public interest immunity was not within the dispute submitted to arbitration, and nor could it be so; the court therefore had an inherent jurisdiction to resolve the issue. Similarly, in *Commonwealth v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662 an arbitrator ordered the Commonwealth, a party to the arbitration, to keep its own documents confidential. The Commonwealth sought to have the Supreme Court of New South Wales review this direction. Kirby P,

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30 Section 47 of the *Commercial Arbitration Act* 1984 (Vic)

with whom Priestley JA agreed, held that the court did have jurisdiction to review the direction because it was not within the "scope of the arbitration": see 675-677. The use of the court's process of a subpoena is not according to the parties' agreement and is not within the scope of the arbitration.

[70] Accordingly, the terms of any restrictions upon access to these documents could be set by the arbitrators, who would exercise their discretion guided by the same considerations as would guide the court. And their decisions as to that matter are reviewable by the court.

[71] In *Alliance Petroleum*, Bollen J left it to the arbitrators "to take all good steps to protect confidential information" saying that it was for them to decide the exact means of protection.[31] In the same way, Debelle J in *Santos* said that the arbitrators could make appropriate orders to protect the confidentiality once the documents were produced to them and that "the arbitrators [could] determine whether the documents are confidential, whether they should be disclosed and if so, the terms in which they will be disclosed including requiring undertakings as to confidentiality from those inspecting the documents".

[72] Xstrata submits that the protection of confidentiality should be left to the arbitrators. It proposes that the documents be available at first only to nominated lawyers for the parties and that if it is sought to have anyone else look at the documents, application for the arbitrators' leave to do so would be only upon seven days' written notice to the party which produced them. In that event the subpoenaed party would be entitled to appear when leave is sought from the arbitrators.

[73] Under the Producers' proposal, the documents would be held by Phillips Fox. The arbitrators have already arranged for Phillips Fox to hold the documents, as solicitors independent from the proceedings and not representing any of the subpoenaed parties. The Producers propose that only lawyers and certain approved experts could inspect the documents which should be kept at Phillips Fox, and that copies or summaries of the documents could be made or taken only by "masking" them, that is by removing the names of parties or other parts of them. There are other details of their proposal which need not be discussed here.

[74] Under what at least most applicants propose, the documents would be held by the solicitors for the subpoenaed party, not by Phillips Fox. That seems inconsistent with the notion of production of the documents to the arbitrators. Secondly, the applicants strongly object to any experts having access. There are again more detailed provisions which need not be discussed here. But notably there was extensive argument as to the detail of both the Producers' and the applicants' proposals, and different applicants offered varying details of their side's model. As those matters of detail were argued and counter argued, the benefit of having that debate decided by a tribunal which does have the documents, and has control the proceedings for which they are sought, became yet more apparent. So did the argument as to whether experts should be able to inspect the documents, reinforce the advantage of the arbitrators deciding these questions in the first instance. And when the lawyers see a document which is produced, they may see no need for the expert's assistance with it.

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31 At 232

[75] Some applicants said that the matter was best left entirely in the court's hands, because a dissatisfied applicant would be likely to seek a review by the court so that the arbitrators' decision would not resolve the matter. That could be so in some cases, but not in all cases. It was also said that there would be a duplication of the arguments in that much of what has been submitted by the applicants here, as to appropriate restrictions to protect confidentiality, would have to be reargued before the arbitrators. To some extent that is true, but of course the argument before the arbitrators, if and when it has to occur, would be different for the fact that they would have the documents.

[76] In my view it is clearly the better course to leave it to the arbitrators to impose the necessary restrictions to protect confidentiality. In substance the Xstrata proposal should be adopted.

The individual applications

[77] The reasons already given effectively dispose of most of the arguments but it is necessary to shortly state my conclusions by reference to the individual cases. I shall discuss first the applications in relation to subpoenas procured by Xstrata and then those procured by the Producers. Some applicants have received subpoenas procured by each side.

THE XSTRATA SUBPOENAS

Energex Retail Pty Ltd

[78] The subpoena describes the required documents within ten paragraphs. Eight of them describe contracts for the supply of natural gas. The other paragraphs are in these terms:

> "9 In relation to all of the contracts referred to in paragraphs 1 to 8 above:
>
> (a) All invoices, credit notes, or periodic reconciliations in relation to the natural gas supplied under any of the said contracts at any time since 1 July 1996;
>
> (b) Any report, memorandum or correspondence which records the ex-plant price paid for, or the volume of, natural gas supplied under any of the said contracts at any time since 1 July 1996;
>
> (c) If the price payable for natural gas under any such contract does not comprise an identified ex-plant price:
>
> (i) All contracts providing for the transmission or distribution of such natural gas from the producer's plant to the end-use (or any part of that transmission or distribution).
>
> (ii) All invoices, credit notes, or periodic reconciliations in relation to the transmission or distribution of such natural gas from the producer's plant to the end-user (or any part of that transmission or distribution) pursuant to any of the contracts referred to in (i).

(iii) Any report, memorandum or correspondence which records the cost of the transmission or distribution of such natural gas from the producer's plant to the end-user (or any part of that transmission or distribution) pursuant to any of the contracts referred to in (i).

(iv) Any report, memorandum or correspondence which records the costs incurred and profit gained by Energex Retail Pty Ltd (or any other intermediary) in causing the transmission or distribution of such natural gas from the producer's plant to the end-user (or any part of that transmission or distribution) pursuant to any of the contracts referred to in (i).

10 Any contract, report, memorandum or correspondence that identifies the producer or seller of, or volume of, the gas sold to Energex Retail Pty Ltd (ACN 078 848 549) that was (in whole or in part) on sold to any purchaser or customer pursuant to any contracts referred to in paragraph 3."

[79] Xstrata has adduced evidence that Comalco purchases gas from Energex for use at its refinery in Gladstone, that Energex purchases gas to supply its major industrial customers from producers including Moura Sales and that Energex is an aggregator supplying gas to Queensland Nitrates. Energex has adduced evidence that its Comalco and Queensland Nitrates contracts post-date the Xstrata agreement. For reasons given, that does not put paid to an apparent relevance. There is also evidence to the effect that the documents Energex is able to produce would not identify the ex-plant price for such contracts. That evidence should not be lightly dismissed but it is an example of the difficulty in the court determining these matters when it does not have the documents and it is not informed, as the arbitrators are or will be, by evidence that would assist in determining whether these documents do or do not indicate something relevant. There is a sufficient connection between those contracts and the subject matter of the arbitration for the subpoena not to be set aside upon this ground. As discussed, the relative likelihood of the documents having probative value can be considered by the arbitrators in deciding who is to be allowed access to them.

[80] A distinct question is the time and cost involved in answering the subpoena. The evidence for Energex shows that the task is too burdensome. In my view that results from the breadth of paragraphs 9 and 10 set out above. The further problem with paragraph 9 is that it seems to go well beyond the documents which could be relevant to ex-plant prices. It goes as far as requiring any report, memorandum or correspondence recording the profit gained by Energex. The subpoena must be varied by deleting paragraphs 9 and 10.

Pelican Point Power Limited

[81] This is an industrial user acquiring gas from BHP Billiton Petroleum (Victoria) Pty Ltd. The subpoena seeks contracts under which it acquires natural gas as well as other documents within these paragraphs:

"4 In relation to all of the contracts referred to in paragraphs 1 to 3 above:

(a) All invoices, credit notes, or periodic reconciliations in relation to the natural gas supplied under any of the said contracts at any time since 1 July 1996;

(b) Any report, memorandum or correspondence which records the ex-plant price paid for, or the volume of, natural gas supplied under any of the said contracts at any time since 1 July 1996;

(c) If the price payable for natural gas under any such contract does not comprise an identified ex-plant price:

(i) All contracts providing for the transmission or distribution of such natural gas from the producer's plant to the Pelican Point Power Station (or any part of that transmission or distribution).

(ii) All invoices, credit notes, or periodic reconciliations in relation to the transmission or distribution of such natural gas from the producer's plant to the Pelican Point Power Station (or any part of that transmission or distribution) pursuant to any of the contracts referred to in (i).

(iii) Any report, memorandum or correspondence which records the cost of the transmission or distribution of such natural gas from the producer's plant to the Pelican Point Power Station (or any part of that transmission or distribution) pursuant to any of the contract referred to in (i).

5 Any contract, report, memorandum or correspondence that identifies the producer or seller of, or the volume of, the gas sold to Pelican Point Power Limited pursuant to any contracts referred to in paragraph 2."

[82] The breadth of these paragraphs 4 and 5, I am persuaded, makes the subpoena in those respects oppressive. Otherwise the submissions by this applicant have been addressed earlier in this judgment. It will be ordered that paragraphs 4 and 5 of the subpoena be set aside. Other industrial users have subpoenas (obtained by Xstrata) with paragraphs in substantially the same terms as those in 4 and 5. I shall refer to them as the users' paragraphs.

BHP Petroleum (Victoria) Pty Ltd

[83] This subpoena seeks contracts for the supply of natural gas to Pelican Point Power Limited and to any other purchaser for industrial purposes where the annual volume of the gas sold, whether under that contract alone or over all, was agreed to be or has been equal to or greater than 2.5 petajoules. It seeks contracts varying or assigning rights under any such contract. It also seeks invoices and other

documents in terms broadly similar to the paragraphs of the subpoenas to Energex and Pelican Point set out above. At least in that respect, specifically paragraph 4 of this subpoena, it should be set aside.

[84] As to the balance the applicant says that there are further problems. The subpoena seeks "All contracts for the sale of natural gas … which concern natural gas used *or to be used* in the Pelican Point Power Station at any time since 1 July 1996". The applicant says that it is confused by the words "to be used" because it "cannot be certain whether gas will be used in the future or not". That may be so but the subpoena is, in my view, quite clear in this respect. There is a related point then advanced, which is that gas contracts providing for "future intended supply" cannot be relevant to prices now paid or which have been paid. As explained by this applicant's oral argument, the submission has this effect: if there is a contract which would evidence a price now paid but which would also, not surprisingly, provide for the ongoing or future supply of gas, it is irrelevant at least in so far as it relates to that ongoing supply. The submission goes so far as to suggest that the subpoena should have sought that part of the document which is relevant. That would involve the subpoenaed party in the task of sorting the relevant from the irrelevant, and disassembling its own contract documents. In that example the subpoenaed party should be under no doubt as to what document or documents are required. To the extent that there are irrelevant parts, they can be withheld from the parties to the arbitration by directions of the arbitrators.

[85] The applicant has a further problem with the subpoena at paragraph 2 which seeks documents pursuant to which:

> "Natural gas was or is or will be sold by BHP Billiton Petroleum (Victoria) Pty Ltd to a purchaser … for industrial purposes at any time since 1 July 1996."

The applicant says it is unsure about the term "industrial purpose". It wonders whether a sale of gas to an aggregator for retail distribution is a sale for an industrial purpose. In my view the meaning is clear enough. It is the purchaser's purpose which is relevant. A purchaser will use the gas for industrial purposes (in the relevant sense) where it burns the gas, but not where it on-sells it.

[86] This subpoena will be varied by deleting paragraph 4.

Qenos Pty Ltd

[87] This is a purchaser of gas from TRUenergy and other suppliers. Its subpoena contains as paragraphs 4 and 5 the users' paragraphs. For similar reasons, those paragraphs should be deleted.

[88] Otherwise the particular arguments here are the same as those just discussed in relation to BHP Petroleum (Victoria) Pty Ltd.

Queensland Power Trading Corporation

[89] This is a purchaser from CH4 Pty Ltd, BHP Coal Pty Ltd and other suppliers.

[90] Paragraphs 4 and 5 of this subpoena are in terms to the users' paragraphs, and will be struck out.

[91] Another submission refers to the definition of "end user" in this subpoena, although that expression is not within any of its paragraphs in which the required documents are described. It may be ignored. Paragraphs 1 to 3 are clear enough.

[92] This applicant submits that it pays a price for "raw gas" which is neither a "delivered price" nor an "ex-plant price". This is one example of the difficulty of assessing the likely relevance of documents without seeing them and with the court being relatively uninformed about relevant matters. In my view the apparent relevance of documents within paragraphs 1 to 3 is demonstrated.

AGL Wholesale Gas (SA) Pty Ltd

[93] This is a purchaser of gas and a supplier to TRUenergy. Paragraphs 8 and 9 of its subpoena have the same vice as paragraphs 9 and 10 of the Energex subpoena. For similar reasons they should be struck out.

[94] Some of the applicant's submissions as to relevance have already been discussed. A further submission, made also for the Australian Gas Light Company, OneSteel and AGL Energy Sales and Marketing Limited is that the contracts and other documents sought will not of themselves show either an ex-plant price or an ex-plant price "attributable to a delivered price". If that is that case, it does not follow that the documents lack apparent relevance. They have probative value when linked with other evidence. It is submitted that the necessity to link them with other documents explains the breadth of the documents sought by paragraph 8 of this subpoena. That might be correct. But the unavailability of the documents sought by paragraph 8 does not, as far as this court can presently judge, preclude the possibility that other evidence put with the documents sought within 1 to 7 of the subpoena would make those documents relevant.

[95] Once paragraphs 8 and 9 are deleted, the size of the task of complying with the subpoena does not seem excessive.

The Australian Gas Light Company

[96] This is an aggregator, supplying to industrial users. For reasons already given, this subpoena should stand save for its paragraphs 10 and 11 which will be struck out.

OneSteel Manufacturing Pty Ltd

[97] This is a purchaser of gas from Australian Gas Light Company and others. Paragraphs 4 and 5 of its subpoena are in terms of the users' paragraphs, and will be struck out.

Arrow Energy NL

[98] This is a new entrant to the market as a supplier. It has not yet sold gas. It has entered into conditional contracts for supply. It says that it does not know whether its contracts will become unconditional within the relevant period, which it accepts as extending to April 2006. It says it does not know whether it will supply gas and be paid for it within that period. In these circumstances it submits that its contracts are not apparently relevant. I reject that submission. The likelihood that the contracts will be relevant cannot be further explored without seeing the contracts and considering more evidence. The apparent relevance test is satisfied. The arbitration clearly has some way to go before an award. Arrow's case is different

from some others, where there is an existing contract which provides for the supply to commence on a date which is well after April 2006, where it can be said now that the contract will not evidence a price paid at a relevant date.

[99] It is said that the conditional nature of Arrow's contracts makes the subpoena oppressive where it seeks contracts for the sale of gas "to be used" by the purchaser. The complaint is that this requires Arrow to predict whether there will be a supply under the contract. That is not how I read this subpoena. For example, paragraph 1 of the subpoena seeks "All contracts for the sale of natural gas to CS Energy Limited, which concern natural gas … to be used in the Swanbank Power Station …". The circumstance that the contract is conditional, and that the condition as to its performance might fail, would not take it outside this paragraph of the subpoena. If the intended use of the purchaser, if and when the gas is supplied under the contract, is a use in that power station, then the contract is clearly within the subpoena.

[100] Paragraph 6 of this subpoena is in the same pattern of "all invoices" etc. In Arrow's case, the problem is not so much the burden of the task but that there would be no such documents if, as it appears, Arrow is yet to supply gas. For that reason paragraph 6 of this subpoena will be struck out.

Ecogen Energy Pty Ltd

[101] This is a purchaser from TRUenergy and other suppliers. Its subpoena is in relevantly the same terms as that of Pelican Point Power. Paragraphs 4 and 5 should be deleted.

[102] One submission made on its behalf, and also for TRUenergy, is that none of these subpoenas obtained by Xstrata or the Producers should stand whilst the parties to the arbitration have taken no steps to narrow the scope of their dispute by, in particular, obtaining some ruling from the arbitrators as to the interpretation of their contract. That point has force, but I am not persuaded that upon that ground, the subpoenas should be set aside. The arbitrators will no doubt consider it, in deciding whether it is necessary for anyone other than the lawyers to see the documents at a particular stage of the arbitration, or at all. Again, it is a point better considered by the tribunal which has the conduct of the proceedings.

[103] It is submitted that also paragraphs 2 and 3 of the subpoena are oppressive. Paragraph 2 seeks "All other contracts pursuant to which natural gas was or will be sold for use in its Newport Power Station at any time since 1 July 1996". Paragraph 3 seeks all contracts which varied or assigned rights under contracts within paragraphs 1 and 2. Paragraph 1 of the subpoena refers to contracts between Ecogen and TRUenergy. I am unpersuaded that paragraph 2 or paragraph 3 places an undue burden upon the applicant.

[104] This applicant, together with TRUenergy, submitted that there was a difference between the circumstances of this case and those in *Santos* or *Apache Northwest*, in that since those decisions, there is full contestability and interconnection in the gas market in the eastern states, with the result that confidentiality is of yet more concern. That is a relevant consideration, just as it will be the arbitrators in considering whether, and on terms, inspection should be permitted.

TRUenergy Pty Ltd

[105] Further to submissions already discussed, it argues that paragraphs 4, 7, 9 and 10 of its subpoena are oppressive. Paragraphs 9 and 10 are in the terms of the Energex subpoena. They should be struck out.

[106] This applicant is a gas retailer within a group of companies. Its customers include large industrial and commercial users. It acquires gas from a number of sources through various arrangements with gas producers and gas swaps with both producers and other retailers. It therefore acts as an aggregator. The subpoena requires the production of contracts under which it purchases gas as well as contracts by which it sells gas to industrial users. Paragraphs 1, 2, 3, 5 and 6 are confined, in total, to three particular purchasers from this applicant. Paragraphs 4 and 7 are in more general terms. I am persuaded that they involve an undue burden and that they should be set aside.

[107] According to the affidavit of Mr Young of TRUenergy, the information as to ex-plant prices paid by large industrial customers in the Victorian market is publicly available and there is no need to refer to confidential documents. I am not persuaded that this warrants setting aside the balance of this subpoena or any other subpoena that might seek information relating to that market. Yet again, if that information is so accessible, that will no doubt be relevant to the arbitrators in ruling on questions of inspection of the documents.

[108] Accordingly paragraphs 4, 7, 9 and 10 of this subpoena will be struck out.

Australian Paper Pty Ltd

[109] This is a user of gas supplied by TRUenergy, which applied to set aside this subpoena upon its customer. The subpoena contains paragraphs 4 and 5; the users' paragraphs. They will be struck out. Otherwise the subpoena will stand.

CS Energy Limited

[110] This company does not apply to set aside the subpoena served upon it. That subpoena is challenged on the application of Queensland Gas Company Limited, a supplier to CS Energy for its Swanbank Power Station. It is also challenged by Energex and Arrow. The subpoena contains paragraphs 4 and 5 in the terms of the users' paragraphs. Those paragraphs will be struck out. Otherwise the subpoena will stand.

[111] It was submitted for Queensland Gas Company that its contract with CS Energy, described in its evidence as CSE 2006 GSA, is irrelevant because it will not involve the supply of gas until after April 2006. However the evidence about that is not so clear. In an ASX announcement of 22 February 2005, Queensland Gas said that the first delivery under the contract would be "not later than 30 June 2006 – and with the possibility of an earlier commencement date". In a further announcement of 10 June 2005 it was said the Queensland Gas had a plan "to deliver our first project within 9 months" and said that it was expected to deliver gas to CS Energy in March 2006. In the same announcement, reference was also made to the contract which required the first gas supplies to be no later than 30 June 2006. As I see it, it is quite possible that there will be supplies by March 2006 and therefore by the review date. The contract is therefore at least apparently relevant.

BlueScope Steel Ltd

[112] This is a purchaser from BHP Billiton Petroleum (Bass Strait) Pty Ltd, Esso Australia Resources Pty Ltd and others. Again paragraphs 4 and 5 are the users' paragraphs and should be struck out.

[113] One submission made by it in relation to relevance is that some contracts sought by its subpoena were not negotiated on a commercial arm's length basis. At present that does not deny their apparent relevance. Another submission was that the meaning of "*materially* changed" in cl. 10.12 should be determined before there can be an assessment of what is apparently relevant. I do not accept that submission. What constitutes a material change in a price, or in prices, is a factual question for the arbitrators.

Incitec Pivot Pty Ltd

[114] This is another industrial user. Paragraphs 4 and 5 of its subpoena are the users' paragraphs and will be struck out.

[115] Paragraph 1 of the subpoena seeks all contracts between Incitec and Origin Energy CSG Marketing Pty Ltd for natural gas to be used in Incitec's fertiliser plant at Gibson Island. The evidence from Incitec is that it has no such contract pursuant to which there has been any sale or supply of gas to date (and nor has any price been paid). There is an agreement with that company but it provides for no supply prior to 2007.

[116] Paragraph 2 of the subpoena asks for all contracts between Incitec and Queensland Gas Company Limited and Pangaea Oil and Gas Pty Ltd for the supply of gas to the Incitec plant. Again, no gas has been supplied or paid for under that contract. It is another contract for which gas will be supplied no earlier than 2007, according to the Incitec evidence. Extracts from each contract were tendered but not the whole agreements (consistently with what was done with the Xstrata agreement). The Origin Energy contract seems to call for supply no earlier than 2007. The agreement with Queensland Gas is arguably different because it does permit Incitec to seek obtain gas before the agreed commencement of supply on 1 October 2007. Having regard to other evidence, and in particular that these contracts have been made to meet Incitec's needs after its present arrangements expire in 2007, there is no apparent prospect of supply of gas under either of them by April 2006. Neither contract would evidence the price paid by Incitec as a large industrial customer at any relevant time. Xstrata's response is that they are nevertheless existing contracts, and the prices within them could be indicative of some trend in prices paid by industrial customers. It was also suggested that they might in some way assist in cross-examination. Nothing more specific than those speculations was advanced. In my conclusion Xstrata has failed to prove an apparent relevance of these documents. Perhaps as the arbitration proceeds further the relevance might appear. At present however Incitec should not be compelled to produce them.

[117] Paragraph 3 of the Incitec subpoena refers only to documents within paragraphs 1 and 2. Having regard to what I have said about paragraphs 4 and 5, it follows that the whole of this subpoena should be set aside.

Queensland Alumina Ltd

[118] This is another industrial customer. Paragraph 1 of its subpoena seeks a certain contract with Origin Energy Retail Limited. Other paragraphs seek documents

ultimately referable to that contract. It seems clear enough that this contract provides for the supply of gas only from November 2006 and that there is no prospect of an earlier supply pursuant to it. Although it is referred to in the statements of contentions in the arbitration, it is no more apparently relevant than the Incitec contracts.

[119] The whole of this subpoena should be set aside.

Origin Energy Retail Ltd

[120] This is an aggregator. As mentioned already, it is a supplier to Queensland Alumina Limited. Paragraph 3 of the subpoena addressed to this applicant calls for all contracts for the sale of gas to Queensland Alumina. The only contract seems to be the one just discussed. Paragraph 3, and paragraph 7 which refers only to it, should be deleted.

[121] The subpoena also seeks contracts with other parties being BP Refinery (Bulwer Island) Pty Ltd, Adelaide Brighton Cement Limited, OneSteel Limited, Mobil (SA) and AGL Wholesale Gas. It is submitted that the subpoena in relation to these contracts should be set aside because they are "delivered price" contracts with no identified ex-plant component. According to the evidence for this applicant, it normally sells gas at delivered prices, not ex-plant prices, and that in determining its delivered price, it does not simply add the price of transportation to an ex-plant price. A number of variables, including its own margins, affect its delivered price. Further, as an aggregator it supplies gas which it sources from different producers but for which it is impossible to identify the extent to which a particular delivery to a customer has been sourced from a particular producer and in turn the price paid by Origin for that gas. The contracts with those various parties I have mentioned, according to Origin's evidence, are delivered price contracts with no ex-plant price component identified in the contract.

[122] The submission is that contracts which do not in themselves identify an ex-plant price attributable to the stated delivered price cannot be relevant. At least on one view, cl 10.12, in its reference to customers paying a delivered price, is not limited to customers whose contracts identify an ex-plant component of that delivered price. On another view which is at least arguable, the clause refers to customers whose delivered prices are in fact a function of ex-plant prices. The contracts they have mentioned may or may not prove to be relevant even upon that interpretation. In my view they are apparently relevant. The contracts would at least be relevant in showing what large industrial customers did pay as a delivered price. Put with other evidence, they could be relevant in identifying on ex-plant price.

[123] What I would describe as the "aggregation" point, which is that the gas sold to a particular industrial customer cannot be traced to a particular supply to the aggregator (a submission made by other aggregators such as Energex) is not a sufficient answer to what is otherwise the apparent relevance of supply documents. It could be relevant for the arbitrators to look at something of an average of the ex-plant prices paid by an aggregator, along the way of ascertaining where possible an (average) ex-plant price attributable to a delivered price. The prospect of that being relevant is not so small as to deny apparent relevance to contracts "upstream" from an aggregator.

[124] Paragraph 11 of this subpoena is in the "all invoices" etc form and should be struck out. I accept that locating documents described within paragraph 10 could also be an excessive burden, having regard to what is said about the system of archiving of "variations and side letters". With the deletion of paragraphs 10 and 11, this should be a manageable task. The subpoena will be struck out as to paragraphs 3, 7, 10 and 11.

Origin Energy CSG Marketing Pty Ltd

[125] Again, it is said that certain contracts to which this applicant is a party are delivered price or aggregator's contracts with no ex-plant price component assigned to the delivered price. For similar reasons that is not a sufficient answer.

[126] There is a contract between this applicant, Origin Energy Retail and the Producers which is said to be irrelevant. If it is relevant, the Producers should supply it. It is appropriate to exclude that contract. It will be ordered that the subpoena be varied by excluding the contract referred to in paragraph 18(b) of the affidavit of Mr Giaouris filed 7 October 2005. For reasons already given, the contract with Incitec Pivot should be excluded (paragraph 4). Similarly, the contracts referred to in paragraph 5 of the subpoena provide for the supply of gas no earlier than May 2007. Paragraph 5 should be struck out. Paragraphs 7 and 8, similar to paragraphs 10 and 11 of the Origin Retail subpoena, will be struck out.

Adelaide Brighton Ltd and Adelaide Brighton Cement

[127] These companies acquire gas from Origin Energy Retail. It applied to set aside the subpoenas addressed to them, upon the basis that the contracts did not within themselves disclose an ex-plant price referable to the agreed delivered price. That submission has been rejected. But paragraphs 4 and 5 of each subpoena (the users' paragraphs) will be struck out.

Oil Company of Australia (Moura) Pty Ltd

[128] It is said that there is no contract of the kind referred to in paragraph 2 of its subpoena. In that case nothing need be produced. Paragraph 3 is in the "all invoices" form and will be struck out but otherwise the subpoena will stand.

Osborne Cogeneration Pty Ltd

[129] This is a customer whose subpoena is in the Pelican Point form; paragraphs 4 and 5 will be struck out. Otherwise, for reasons already given, the subpoena will stand.

Queensland Nitrates Pty Ltd

[130] This is another customer of Energex and other suppliers. Again, paragraphs 4 and 5 of the subpoena will be struck out. For reasons already given, and in particular in relation to Energex, the other challenges to the subpoena fail. It is said that there are no documents within paragraph 2. Again, if that be the case it should cause no difficulty.

Comalco Aluminium Ltd

[131] This is another purchaser from Energex. Paragraphs 4 and 5 of its subpoena will be struck out. For reasons already given, the other challenges to it fail.

BP Refinery (Bulwer Island) Pty Ltd

[132] This subpoena is challenged by Energex and Arrow Energy. This is a customer of Origin Energy Retail. For reasons discussed in relation to Origin, paragraph 1 of this subpoena seeks apparently relevant documents. Arrow Energy and Energex are concerned about paragraph 2 which seeks the production of all other contracts pursuant to which natural gas was or will be sold. The submissions in that respect have already been discussed. Paragraphs 4 and 5, the users' paragraphs, will be struck out.

THE PRODUCERS' SUBPOENAS

Energex Retail Pty Ltd

[133] This seeks the production of contracts for the supply to Austral Bricks and variations to those contracts. It also seeks invoices for two periods. The first is described as "the first six months of supply of natural gas pursuant to the contract or during the six months commencing 29 July 1996 and ending 29 January 1997". The second is "the last six months of supply … or during the six months commencing 17 April 2005 and ending 17 October 2005".

[134] It is submitted that there is no reason to believe that Austral Bricks is a large industrial customer as that term is used in the Xstrata Agreement. Mr Hackett from Santos says that in his experience a large industrial customer would include a customer which consumed about 0.5 PJ-1 PJ of natural gas per annum. The arguments in the arbitration are likely to differ as to where the line should be drawn in identifying such customers. Energex's witness says that it has supplied two Austral Bricks sites in Brisbane since January 2003, and says some other things about that customer but does not refer to the level of its consumption. At present there is a sufficient possibility that the arbitrators would see Austral Bricks as a large industrial customer that this point should not be upheld.

[135] Energex has not supplied Austral Bricks in any capacity any earlier than 1999. It is appropriate to delete the requirement for invoices for the first of those six months periods. Clause 10.12 calls for a comparison of 1996 prices with (speaking broadly) current prices. Energex should not be required to locate its invoices for a six month period beginning in about 1999.

[136] Subparagraph (a) of paragraph 3 of the subpoena will be struck out. Otherwise it will stand.

Esso Australia Resources Pty Ltd

[137] This is a supplier to TRUenergy and Gascor Pty Ltd. The subpoena seeks copies of contracts for the supply of gas to each of those companies. It seeks variations to those contracts. And it seeks invoices, again for two six month periods in the same terms as the Energex subpoena.

[138] Gascor and TRUenergy are aggregators, which Esso says makes its contracts with them irrelevant. Again, the contracts could be relevant when considered with other evidence. It is said that a request for variations to the contracts is too wide and should be limited to variations that relate to price. But other terms could be relevant in the overall importance given by the arbitrators to the evidence of this price. For

example, if there was a variation to double the quantity of supply, that might make the price more important to the arbitrators' decision.

[139] Again, criticism is made of the request for invoices, at least in the specification of the respective periods of six months. Subparagraphs 3(a) and 6(a) will be amended by in each case deleting the words: "During the first six months of supply of natural gas pursuant to the contract or". The subpoena will also be amended, in paragraphs 3 and 6, by inserting after the word "issued" the words "for gas supplied". That is to meet this applicant's concern that there could be invoices which were issued for other things.

Esso Australia Pty Ltd

[140] This subpoena is in relevantly the same terms as the one just discussed. When this was served, it was said that it was Esso Australia Resources Pty Ltd which holds relevant documents. There will be orders that this subpoena be varied in the same way. If this company has nothing to produce, no extra costs should follow from letting the subpoena stand.

BHP Billiton Petroleum (Bass Strait) Pty Ltd

[141] This is a supplier to BlueScope Steel and OneSteel. There will be amendments to paragraph 3 and 6 of this subpoena in identical terms to the amendments to the Esso Australia subpoena.

BHP Billiton Limited

[142] This subpoena seeks contracts in relation to the supply to BlueScope Steel, OneSteel and BHP Lysaght, and contracts for the purchase of gas from Energex for use at the Cannington mine. In each case the contracts are sought, together with copies of variations to them, and invoices are sought for two periods defined in the same terms as discussed for these other Santos subpoenas. Paragraphs 3, 6, 9 and 12, which refer to those invoices, will be amended in terms identical to the amendments to the subpoena to Esso Australia.

BHP Billiton Minerals Pty Ltd

[143] The subpoena was obtained on the basis of evidence that there was a contract under which this applicant is a purchaser from Energex. That seems to be challenged. If there is no contract, then there will be nothing to be produced. As this company's representatives are also involved for other BHP and Esso companies, there is no particular disadvantage by someone appearing in response to this subpoena although there may be nothing to produce. In case there is, there will be amendments to paragraph 3 of this subpoena, corresponding with those made to the Esso Australia one.

The Australian Gas Light Company

[144] This subpoena seeks contracts involving the supply to BHP Steel, TRUenergy and OneSteel and contracts for the purchase from the Natural Gas Authority of South Australia. In relation to OneSteel, it is said that the subpoena is unnecessary because AGL buys from the Producers, so that their documents would show an ex-plant price. A similar point is made against Xstrata. In response it is said that the relevant suppliers to AGL are related but different companies from the Producers.

That may not be a conclusive answer to the point. But the cost of exploring the matter to its end is not warranted there. This applicant will have to produce documents in any case.

[145] Its subpoena will be amended in paragraphs 3, 6, 9 and 12, in terms corresponding with the amendments to the Esso Australia subpoena.

AGL Energy Sales and Marketing Limited

[146] There will be like amendments to paragraph 3 of the subpoena.

AGL Wholesale Gas (SA) Pty Ltd

[147] The copy of their subpoena which is in evidence is incomplete. It will have to be the subject of a further order.

TRUenergy

[148] This seeks contracts for the supply of gas to Alcoa, Shell, BlueScope Steel and Australian Paper at particular places. The paragraphs dealing with invoices, which are 3, 6, 9 and 12, should be amended in the same way.

Origin Energy Retail Ltd

[149] The subpoena seeks contracts for the supply of gas to BHP Integrated Steel and ACI at certain premises and the purchase of gas from the Natural Gas Authority of South Australia. It is said that the sale contracts are delivered price contracts. For reasons given earlier, that does not put paid to their apparent relevance.

[150] Again, there will be the same amendments to the paragraphs dealing with invoices which are 3, 6 and 9.

Origin Energy LPG Ltd

[151] This applicant supplies to Norske Skog for its operations at Albury. Again, the fact that it is a delivered price contract is not a sufficient basis for challenging its apparent relevance.

[152] Paragraph 3 deals with invoices and will be amended in the same way.

Origin Energy (Vic) Pty Ltd

[153] This is a supplier to ACI. A particular objection here is that the price paid has not changed and will not change by 1 April 2006. But if so, that is a relevant fact for the arbitrators. Paragraph 3 dealing with invoices should be amended in the same way.

Gascor Pty Ltd

[154] Until September 2003, this applicant was owned by the State of Victoria. In 1994 it took over the distribution and marketing operations of the former Gas & Fuel Corporation of Victoria. In 1997, it ceased supplying gas directly to customers and commenced to supply through three State owned companies. After the State privatised the gas distribution and retail businesses, Gascor has supplied Origin Energy (Vic) Limited and TRUenergy in their capacity as gas retailers. It is now

privately owned and its shareholders are Origin Energy (Vic) Limited, TRUenergy and AGL Victoria Pty Ltd. I accept that these three shareholders are also its only customers. The subpoena seeks copies of contracts of supply to Origin Energy (Vic) and TRUenergy. They were not supplied by Gascor until well after July 1996. But the prices at which they are currently supplied are relevant, having regard to what I have said about the "same customer" submission in relation to cl 10.12. It is said that the prices at which they are supplied by Gascor are irrelevant, because they are not industrial customers. As it presently appears, and again without the evidence in the arbitration and the documents themselves, there is a sufficient prospect that these contracts could be relevant to the proof of an ex-plant price.

[155] Gascor once supplied, but no longer supplies, gas to Alcoa, Shell, Australian Paper and ACI. In a letter from Gascor's solicitors to the Producers' solicitors it is said that Gascor does not have any documents falling within the scope of the subpoena with respect to any of these parties and that to the best of its knowledge, any contract with any of these parties "would have been transferred by statutory allocation" to one of Origin, TRUenergy and AGL Victoria (or their predecessors) in about December 1997. That is not sworn to in Gascor's general manager's affidavit, but there seems no reason to seriously doubt it. Paragraphs 7 to 18 deal with these other parties and will be struck out. There will be amendments to paragraphs 3 and 6 in terms the same as those made to the other subpoenas obtained by the Producers (see Esso Australia).

COSTS OF COMPLIANCE

[156] The costs of each of these applications will require (brief) submissions in the light of these reasons. Each party is directed to deliver to my associate within seven days a written submission as to those costs. For each of Xstrata and the Producers, the submissions are not to exceed, in total, four pages. Any submission by any other representative, is not to exceed two pages.

[157] As to compliance with a subpoena, pursuant to r 418, it will be ordered that each party required to do so will have its loss and expense, including its legal costs on an indemnity basis, incurred in responding properly to the subpoena, to be agreed or failing agreement, to be assessed.

DATE FOR PRODUCTION

[158] During the hearing of these application, I extended the date for compliance until 14 days from my judgment or as further ordered. I was informed that the arbitrators would be in Brisbane for this matter on 22 November. Having regard to the amendments to each of the subpoenas, the 15 days from this judgment until then is a reasonable period. Should that become an impossibility for any party, it will have to make a further application. In the case of each subpoena which has been the subject of an application to set it aside, the subpoena will be varied so as to require production on 22 November 2005 or such later date as permitted by the arbitrators.

CONFIDENTIALITY

[159] In each case it will be ordered that any document produced to the arbitrators under the subpoena will not be inspected by any person, other than the arbitrators and lawyers who are nominated by the arbitrators, except by leave of the arbitrators given no less than seven days after notice to the party which produced the document

of a proposal that leave be given. The arbitrators may authorise nominated lawyers to receive copies of a document on such terms as the arbitrators think appropriate to ensure that only nominated lawyers, and other persons authorised by them to see the document, will have a copy.