# SUPREME COURT OF QUEENSLAND

CITATION: *Glencore Coal Queensland Pty Limited v Aurizon Network Pty Ltd & Ors; Yarrabee Coal Company Pty Ltd & Ors v Aurizon Network Pty Ltd & Ors* [2020] QCA 182

PARTIES: **In Appeal No 7857 of 2019:**

**GLENCORE COAL QUEENSLAND PTY LIMITED**
ACN 098 156 702
(appellant)
**v**
**AURIZON NETWORK PTY LTD**
ACN 132 181 116
(first respondent)
**CALEDON COAL PTY LIMITED (IN LIQUIDATION)**
ACN 120 967 839
(second respondent)
**YARRABEE COAL COMPANY PTY LTD**
ACN 010 849 402
(third respondent)
**CORONADO CURRAGH PTY LTD (FORMERLY WESFARMERS CURRAGH PTY LTD)**
ACN 009 362 565
(fourth respondent)
**WASHPOOL COAL PTY LTD**
ACN 139 976 819
(fifth respondent)
**COLTON COAL PTY LTD (ADMINISTRATORS APPOINTED)**
ACN 140 768 636
(sixth respondent)

**In Appeal No 7859 of 2019:**

**YARRABEE COAL COMPANY PTY LTD**
ACN 010 849 402
(first appellant)
**CORONADO CURRAGH PTY LTD (FORMERLY WESFARMERS CURRAGH PTY LTD)**
ACN 009 362 565
(second appellant)
**WASHPOOL COAL PTY LTD**
ACN 139 976 819
(third appellant)
**v**
**AURIZON NETWORK PTY LTD**
ACN 132 181 116
(first respondent)
**GLENCORE COAL QUEENSLAND PTY LIMITED**
ACN 098 156 702
(second respondent)

**CALEDON COAL PTY LIMITED (IN LIQUIDATION)**
ACN 120 967 839
(third respondent)
**COLTON COAL PTY LTD (ADMINISTRATORS APPOINTED)**
ACN 140 768 636
(fourth respondent)

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|---|---|
| FILE NO/S: | Appeal No 7857 of 2019<br>Appeal No 7859 of 2019<br>SC No 2880 of 2016 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane – [2019] QSC 163 (Jackson J) |
| DELIVERED ON: | 1 September 2020 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 10 March 2020; 11 March 2020; 12 March 2020 |
| JUDGES: | Fraser and McMurdo and Mullins JJA |
| ORDERS: | **In Appeal No 7857 of 2019:**<br>**1. Appeal against the orders made on 27 June 2019 be dismissed.**<br>**2. The order made on 11 October 2019 be set aside.**<br>**3. The appellant pay the costs of the first respondent of the appeal and of the first respondent's case against the appellant in the Trial Division.**<br>**In Appeal No 7859 of 2019:**<br>**1. Appeal against the orders made on 27 June 2019 be dismissed.**<br>**2. The order made on 11 October 2019 be set aside.**<br>**3. The appellants pay the costs of the first respondent of the appeal and of the first respondent's case against the appellants in the Trial Division.** |
| CATCHWORDS: | CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the first respondent to each appeal operates a rail network for shipping coal from mines to several port facilities in Queensland – where the appellants are coal mining companies which use the network – where each of the appellants contracted with the first respondent for the first |

respondent to upgrade the capacity of the network to facilitate the transport of coal to the Wiggins Island Coal Export Terminal ("WICET") – where one of the appellants gave a notice, purportedly under cl 6.1(c) of the deed, that would have reduced its liability to pay certain fees to nil, and required the other parties to pay for its share – where the other appellants served notices the next day, which would have put all the liability for the fees, which were estimated to total $480 million, onto one company – where the first respondent argued that upon the proper construction of the deeds or as a result of an implied term, a notice could not be given under cl 6.1(c) unless it was given because the Customer would not be using that part of the rail network in order to transport its coal to WICET – whether, on the correct construction of the text or as a result of an implied term, the notices were valid

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the first respondent argued that the appellants could give a notice under cl 6.1(c) only if acting in good faith, and none of the appellants had done so – whether there was an implied term of good faith, and if so, whether it was breached

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the deeds provided that a notice under cl 6.1(c) could be given prior to the date on which a certain milestone in the development of WICET, measured by the capacity of its facilities, was reached – whether the capacity of WICET had reached that milestone before the date on which the notices were given

*BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266; [1977] UKPC 13, applied
*Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101; [2009] UKHL 38, cited
*Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337; [1982] HCA 24, applied
*Jireh International Pty Ltd v Western Exports Services Inc* [2011] NSWCA 137, cited

COUNSEL:

J D McKenna QC, with S Cooper QC and S B Hooper, for the appellant in Appeal No 7857 of 2019 and for the second respondent in Appeal No 7859 of 2019
D Clothier QC, with S Webster and E Doyle-Markwick, for the first respondent in Appeal No 7857 of 2019 and Appeal No 7859 of 2019
D O'Sullivan QC, with J O'Regan and A C Stumer, for the third, fourth and fifth respondents in Appeal No 7857 of 2019 and for the appellants in Appeal No 7859 of 2019
A J Trevor (*sol*) for the second respondent in Appeal No 7857 of

2019 and for the third respondent in Appeal No 7859 of 2019
No appearance for the sixth respondent in Appeal No 7857 of 2019 and the fourth respondent in Appeal No 7859 of 2019

SOLICITORS: Holding Redlich for the appellant in Appeal No 7857 of 2019 and for the second respondent in Appeal No 7859 of 2019
Quinn Emanuel Urquhart & Sullivan for the first respondent in Appeal No 7857 of 2019 and Appeal No 7859 of 2019
Norton Rose Fulbright for the third, fourth and fifth respondents in Appeal No 7857 of 2019 and for the appellants in Appeal No 7859 of 2019
Clayton Utz for the second respondent in Appeal No 7857 of 2019 and for the third respondent in Appeal No 7859 of 2019
No appearance for the sixth respondent in Appeal No 7857 of 2019 and the fourth respondent in Appeal No 7859 of 2019

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of McMurdo JA. I agree with those reasons and with the orders proposed by his Honour.

[2] **McMURDO JA:** The effective respondent to these appeals (Aurizon) operates the Central Queensland Coal Network, which is a rail network for shipping coal from mines to several port facilities on the Queensland coast (the Network). Aurizon is the lessee of the land used for the rail corridor and it provides what is described as the track infrastructure. There are some privately owned lines or spurs that connect to the Network, but otherwise it is Aurizon's track which is used to transport coal, from approximately forty mines to five shipping terminals including the Wiggins Island Coal Export Terminal ("WICET").

[3] The appellants are four coal mining companies which use the Network. They do so under the regime provided by Part 5 of the *Queensland Competition Authority Act* 1997 (Qld) ("the QCA Act"). Relevant elements of that regime are discussed below, but the issues in these appeals do not include any question of the proper interpretation of that Act. The issues are contractual questions involving the proper construction of relevantly identical contracts, made between each appellant and Aurizon, and their effect in circumstances which were common to them.

[4] Each of the appellants contracted with Aurizon under a so-called Wiggins Island Rail Project Deed (2011), which I will call the WIRP Deeds or Deeds.

[5] There were another four mining companies which made such a contract with Aurizon. Two of them, Caledon Coal Pty Limited (in liquidation) and Colton Coal Pty Ltd (in liquidation), were respondents in these appeals but not active participants, having gone into liquidation. The other two, Cockatoo Coal Pty Ltd and Springsure Creek Coal Pty Ltd ("Springsure") were not parties to this litigation.

[6] At the time when the Deeds were executed, these eight companies or their related entities were developing the WICET, as a new port facility for the shipping of their coal. The purpose of the Deeds, each of which was made on 5 September 2011, was to have Aurizon upgrade the capacity of the Network to facilitate the anticipated levels of transport of their coal to the WICET. In consideration for Aurizon doing so, and within certain timeframes and to a certain budget, each

company agreed to pay Aurizon a so-called "WIRP Fee" and, potentially, a so-called "Optimisation Fee". The WIRP Fee was to be paid monthly, for a period of 234 months. The amount to be paid was not the same for each company. The WIRP Fee was to be calculated according to the company's anticipated use of the upgraded sections of the Network, and that anticipated use differed from one company to another. In particular, some parts of the Network which were to be upgraded would not be used by some of the companies, because of the location of that part of the corridor and their mine. Under each Deed, the parts of the upgraded Network which were to be used by a company, described in the Deed as "the Customer", were called the "the Customer's Segments".

[7] The upgrade to the Network involved six segments. Where a segment was to serve more than one Customer, each Deed specified that "Customer's Proportion" for that Segment. This apportionment between Customers reflected the consensus between the eight Customers as to the different levels of anticipated use of the Segments, and thereby quantified their respective contributions to the upgrade, commensurately with their respective benefits from it.

[8] Subject to certain conditions, this agreed apportionment was able to be varied, by a Customer giving a notice that a Segment was to cease being that Customer's Segment. Each Deed, by cl 6.1(c), provided for such a notice, which could not be given if, when the notice was given, the Customer was the only Segment Customer for that Segment. And the notice could be given only before a certain milestone in the development of the WICET.

[9] The consequence of such a notice, if validly given, was that the Customer would not be liable to contribute towards the upgrade of that Segment. A further consequence, by cl 6.1(d) of each Deed, was that the burden of what had been that Customer's contribution, was to fall upon the remaining Customer or Customers, for that Segment. Consequently, a notice given under cl 6.1(c) prejudiced Other Customers, and also exposed Aurizon to a risk that it would not recover from them for that part of the upgrade.

[10] In September 2015, the upgrade to the Network was largely completed, and the WICET had been built. At that time, the total WIRP Fees, to be paid over the duration of the Deeds, were estimated to total about $480 million.

[11] On 30 September 2015, one of the appellants, Glencore Coal Queensland Pty Ltd ("Glencore"), gave a notice, purportedly under cl 6.1(c) for each of its Customer's Segments. The effect of its notice, if valid, was to relieve Glencore of its obligation to pay any WIRP Fee which would have amounted to about $185 million, and to cause the Other Customers for those Segments to become liable for that share.

[12] On the following day, the other appellants, as well as Caledon Coal Pty Limited and Colton Coal Pty Ltd, served notices purportedly under cl 6.1(c). If valid, those notices would have caused Springsure, which by then was the remaining Customer, to be liable for those Segments.[1]

[13] The trial judge, Jackson J, described the giving of these notices as "a superficially bizarre game of musical chairs".[2]

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1 Except for Segments #3 and #8, for which Cockatoo Coal Limited was the only Customer.

2 *Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd & Ors* [2019] QSC 163 ("the Judgment") at [12].

[14] Aurizon immediately disputed the validity of the notices, and brought the present proceeding in which, ultimately, it claimed declarations that the notices were invalid and of no effect.

[15] Aurizon made three arguments for the invalidity of the notices. The first was that upon the proper construction of the WIRP Deeds, a notice could not be given under cl 6.1(c) unless it was given because the segment was "to cease being a Customer's Segment", meaning that the Customer would not be using that part of the Network in order to transport its coal to the WICET. This was said to be the effect of the text of cl 6.1(c), or alternatively, an implied term. As that was not the intention of any of the defendants, when it gave its notice, none of the notices were valid. I will refer to this as the construction issue.

[16] Secondly, Aurizon contended that by an implied term, a Customer could give a notice under cl 6.1(c) only if acting in good faith, and that none of the defendants had done so in the circumstance that they were intending to use, or continue to use, those segments of the Network. I will call this the good faith issue.

[17] Thirdly, it was argued that the notices, if otherwise valid, were invalid because they were given too late. By cl 6.1(c), a notice could be given only "prior to the First Milestone Target Date" which, in broad terms, was the date on which a certain milestone in the development of WICET, measured by the capacity of its facilities, was reached. This is an extensive factual issue, and I will call it the timing issue.

[18] Jackson J rejected Aurizon's case on the construction issue, but accepted its case on the good faith issue. Had it been necessary to consider the timing issue, his Honour concluded, after an extensive factual assessment, that he would have rejected Aurizon's case on the timing issue.

[19] Each of those issues is contested in this Court. The appellants say that the declarations should not have been made, because on the proper construction of the WIRP Deeds, they were entitled to give notices under cl 6.1(c), and they were not constrained by a duty of good faith. Aurizon argues that it ought to have succeeded on the construction issue, or on either of its alternative arguments, at the trial.

**The regime under the *Queensland Competition Authority Act* 1997**

[20] The regulatory regime is provided by Part 5 of the QCA Act, the object of which is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, in order to promote effective competition in upstream and downstream markets.[3]

[21] Part 5 provides for a declaration by the relevant Minister of a "service".[4] The Central Queensland Coal Network was declared a service, with the consequence that Division 4 of Part 5 applied. Under Division 4, an "access provider", in this case Aurizon, if required by an "access seeker" (each of the coal companies), was required to negotiate an agreement between them for the provision of access to the declared service.[5]

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3 QCA Act, s 69E.
4 QCA Act, s 84.
5 QCA Act, s 99.

[22] Under Part 5 Division 7, provision is made for an "access undertaking" to be given by an owner or operator of a declared service to the Queensland Competition Authority ("the Authority").[6] An access undertaking for a service may include, amongst other things, details of how charges for access to the service are to be calculated and how contributions by users to the cost of establishing or maintaining the facility will be taken into account in calculating charges for access to the service, and the other provisions which should be included in an Access Agreement between the provider and the user.[7] An access undertaking which is given to the Authority, and approved by it, may be enforced by an order of a court, including an order for the compensation of anyone who has suffered loss or damage because of a breach of the undertaking.[8]

[23] On 1 October 2010, the Authority approved an access undertaking by Aurizon, then called QR Network Pty Ltd. The trial judge noted that this was one of a series of access undertakings for the Network, and that this had become superseded by the trial. But this was the relevant undertaking, to which reference was made in the WIRP Deeds.[9]

[24] The access undertaking thereby established a framework by which Aurizon was to provide access to users. The undertaking provided that a grant of access would be the subject of an Access Agreement, between Aurizon and a user, which would require the payment of Access Charges according to certain standard pricing principles. Aurizon was not to differentiate between users in its Access Charges. By the standard pricing principles as set out in s 168A of the QCA Act, the price was to generate expected revenue for the service that was at least enough to meet the costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved.[10]

[25] The access undertaking provided for increases in the available capacity of the Network, by an enhancement, expansion, augmentation, duplication or replacement of all or part of it. In general, it was Aurizon which was to fund such work. But an exception to this was a "Major Expansion"[11] of the Network. There is no challenge to the trial judge's finding that this upgrade of the Network, occasioned by the development of the WICET, was a Major Expansion which Aurizon was not required, by the access undertaking, to fund or to undertake.[12]

[26] The access undertaking provided that Aurizon could require a user to agree to additional terms, called "Access Conditions", by which the user might be required to make payments to Aurizon in addition to the Access Charges payable under an Access Agreement. One circumstance in which this might occur was where Aurizon could demonstrate to the Authority that it could not provide the access without making a "Significant Investment", meaning an investment in a Major Expansion projected to cost more than $300 million.[13] In that event an Access Condition, by which Aurizon would receive revenue beyond the Access Charges payable under an Access Agreement, was required to be negotiated as a separate agreement.

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6 QCA Act, s 133.
7 QCA Act, s 137(2)(a), (i) and (j).
8 QCA Act, s 158A(3).
9 Judgment [26]-[27].
10 QCA Act, s 168A(a).
11 As defined in cl 12.1 of the access undertaking.
12 Judgment [41].
13 As defined in cl 12.1 of the access undertaking.

[27] Clause 6.5.2(a) of the access undertaking provided as follows:

> "(a) QR Network may require an Access Seeker to agree to Access Conditions before being granted Access Rights, to the extent that this is reasonably required in order to mitigate QR Network's exposure to the financial risks associated with providing Access for the Access Seeker's proposed Train Service."

[28] Clause 6.5.2(b) provided as follows:

> "(b) For the purposes of Clause 6.5.2(a), Access Conditions are deemed to be reasonably required:
>
> …
>
> (iii) where QR Network demonstrates it cannot provide the Access sought unless it invests in a Significant Investment, and the QCA approves the Access Conditions through the process set out in Clause 6.5.4."

[29] Clause 6.5.2(d) required certain terms to be negotiated, as part of an Access Condition, in the circumstance where:

> "… an Access Condition results in QR Network earning *revenue from the Access Seeker's Access* that is in addition to the ongoing Access Charge …".

(Emphasis added.)

[30] In such a case, cl 6.5.2(d)(iii) required QR Network to include in the Access Conditions an obligation on QR Network to transfer to an Access Seeker any "tax or other financial benefit accruing to QR Network as legal owner of the Rail Infrastructure covered by the Access Condition, where the risks have been transferred to the Access Seeker … as a result of the Access Condition."

[31] His Honour said that the terms of the WIRP Deeds constituted Access Conditions of this kind.[14] The WIRP Deed for each customer contained Aurizon's agreement to fund and construct the upgrade to the Network, in consideration for the payment to it of the WIRP Fee and (potentially) the Optimisation Fee.[15]

[32] The capital which Aurizon spent in upgrading the Network was relevant, under this regime, in two ways. Firstly, the cost of providing the upgrade became part of the cost of providing access to the service in the quantification of the price, according to the standard pricing principles, which Aurizon would be able to charge under Access Agreements with these users of the service. Secondly, because this upgrade constituted a "Significant Investment", Aurizon was entitled to receive a further payment beyond the revenue from Access Charges payable under the Access Agreement, by so-called "Access Conditions". Importantly, there is no suggestion that the WIRP Deeds, and Access Agreements made pursuant to them, were non-compliant with the regulatory regime. But it is submitted, by the appellants other than Glencore, that the WIRP Deeds would have been at risk of non-compliance if they were to be construed in the way for which Aurizon contends.

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14 Judgment [45].

15 Judgment [46].

[33] In May 2011, Aurizon provided a so-called Access Conditions Report to the Authority and prospective Customers, in respect of proposed Access Conditions for this upgrade. The Report anticipated costs of approximately $900 million and access being granted to eight Customers for a period of 20 years.

**The WIRP Deeds**

[34] I will refer to the WIRP Deed between Aurizon and Glencore. The differences between the WIRP Deeds are immaterial.

[35] Aurizon was referred to as "QR Network" and Glencore was referred to as the Customer.

[36] Other coal companies, which were parties to other WIRP Deeds, were referred to as the Other Customers.

[37] The Deed recited that the Customer and the Other Customers had entered or would enter into long term arrangements to use the Port Facilities, which meant the proposed WICET.

[38] The Deed further recited that:

- The Customer needed to secure access to infrastructure to enable it to have coal transported by rail to the WICET;
- The Customer wished QR Network to deliver "the Extension" so as to meet the needs of the Customer;
- QR Network wished to deliver the Extension to meet those needs, and those of Other Customers;
- If QR Network delivered the Extension, the use of the infrastructure enhancements arising from the Extension would be regulated under the Access Undertaking and the QCA Act;
- At the request of the Customer and Other Customers which wished to secure rights of access to infrastructure which would include the Extension, QR Network had agreed to deliver the Extension upon the Customer entering into the Deed and subject to its terms and conditions.

[39] The term "Extension" was defined to mean:

> "[T]he new Infrastructure, and/or modifications and/or upgrades of and/or additions to existing Infrastructure, generally described in schedule 3."

Schedule 3 to the Deed described the work to be done in six Segments, varying from the construction of further rail line, the formation strengthening of existing rail infrastructure and the construction of things such as bridges and level crossings.

[40] Clause 2.2(b) recorded the belief of each party that the Extension and QR Network's other infrastructure would be able to provide:

> "(i) the Customer with its Aggregate Access Rights … and each Other Customer with its 'Aggregate Access Rights' [as defined in that Customer's WIRP Deed] from the 'Commitment Date' …; and

(ii) QR Network's existing customers with their access rights under their access agreements with QR Network."

[41] The term "Aggregate Access Rights" was defined to mean:

"(a) for a period, the Access Rights specified in schedule 9 for that period; or

(b) otherwise, the total Access Rights specified in schedule 9 for the whole of the period specified in schedule 9."

*Access Rights*

[42] The term "Access Rights" was defined to mean:

"[T]he rights of access granted, or to be granted, under an Access Agreement."

[43] An "Access Agreement" was defined to mean, in the case of the Customer, an "Access Holder Access Agreement", which was defined to mean:

"[A]n access agreement entered into or to be entered into between QR Network and the Customer under clause 9 in the form of the Pro Forma Access Agreement …"

[44] Clause 9.1 provided that QR Network and the Customer were to enter into an Access Holder Access Agreement for the whole of the Aggregate Access Rights for a term not exceeding 10 years after the Commitment Date, and that they were to do so by the date which was three months prior to the First Specified Milestone Target Date.

[45] Clause 9.2 provided that if the parties had not done so, then a document in the form of the Pro Forma Access Agreement would be taken to be enforced as an agreement between them, which would include provisions which were consistent with the Deed including the principles and requirements set out in schedule 8.

[46] By item 7 of schedule 8, that agreement was to contain provisions to ensure that all relinquishments and transfers under the agreement were to be subject to and conditional upon satisfaction of the requirements in clauses 15.3 and 21.3 of the Deed.

[47] Clause 15.3 of the Deed applied where access rights were relinquished by the Customer pursuant to the terms of an Access Agreement.[16] In that event, by cl 15.3(b)(iii), QR Network was able to give a notice to the Customer, reducing the Aggregate Access Rights "by the amount equivalent to … the Access Rights … relinquished". A further consequence of that notice would be that "the amount of the WIRP Fee and any Optimisation Fee payable for each Month after such notice is given" would be reduced by the same proportion as the Aggregate Access Rights were reduced. As a further consequence, the Customer would pay to QR Network an amount equal to the present value, as at the date such notice was given, of the aggregate of the amount of the WIRP Fees and Optimisation Fees which QR Network estimated would have been payable but were not payable under the Deed,

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16 Cl 15.3(b)(B).

as a result of the reduction under cl 15.3 in the amount of the WIRP Fees and Optimisation Fees.[17]

[48] If a valid notice under cl 6.1(c) were given, the WIRP Fee and any Optimisation Fee would not be payable. Consequently, the relinquishment, under the Access Agreement, of the rights to access to that part of the Network would not require the payment of any amount of the present value of the WIRP Fees and Optimisation Fees. In this way, the provisions of the Deed, in particular cl 6.1(c) and cl 15.3, and the provisions of an Access Agreement for the relinquishment by the Customer of access rights to the Segment, would operate in tandem.

[49] Aurizon had entered into an Access Agreement with each appellant by 30 September 2015. Clause 13 of the WIRP Deeds provided that the provisions of the Deed were in addition to, and not in substitution for or variation of, any conditions contained in any Access Agreement. Clause 13 was as follows:

> "13 Conditions additional to Access Agreement
>
> (a) The provisions of this Deed are in addition to, and not in substitution for or variation of, any conditions contained in any Access Agreement.
>
> (b) The Parties acknowledge and agree that nothing in this Deed:
>
> (i) grants or confers upon the Customer any right to use all or part of the Aggregate Access Rights (it being acknowledged and agreed that Access Rights are only conferred by an Access Agreement and not by this Deed);
>
> (ii) comprises a payment or other consideration for or in respect of the provision of Access Rights; or
>
> (iii) limits or affects the operation of any Access Agreement or QR Network's rights under any Access Agreement.
>
> (c) Any WIRP Fee, Termination Fee or Optimisation Fee that becomes payable by the Customer under this Deed:
>
> (i) is an amount in addition to and independent of any Access Charges payable under the Access Agreement(s) from time to time; and
>
> (ii) does not form part of any amount payable by the Customer for the Access Rights (or, in any other way, for access to any rail transport infrastructure for which QR Network is the owner or the operator), and are payable:
>
> (A) irrespective of the Customer's … access to and use of the Customer's Segments; and
>
> (B) even if the Commitment Date has not occurred, or never occurs, due to Required Mine Specific Infrastructure not having been completed (however, the Parties acknowledge that the WIRP Fee for

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17 Cl 15.3(b)(v).

a Month and any Optimisation Fee for a Month may not be payable under clause 11.5)."

*A Customer's Segment*

[50] Clause 4.1 was as follows:

> "4.1 Acknowledgment
>
> The Parties acknowledge that:
>
> (a) the Customer's Segments are necessary in order to enable QR Network to provide the Aggregate Access Rights; and
>
> (b) the Customer agrees to the obligations imposed upon it under this Deed (including under clause 11) in consideration for QR Network undertaking to deliver the Customer's Segments in accordance with this clause 4."

[51] Clause 4.2 provided:

> "4.2 Scope of Works
>
> QR Network must carry out the Works for each Segment in accordance with the Scope of Works for the Segment."

[52] The word "Segment" was defined to mean:

> "[F]or each section of railway corridor described in schedule 3,[18] that part of the Extension which relates to that section of railway corridor."

[53] The term "Customer's Segments" was defined to mean:

> "[E]ach Segment specified as such in item 1 of schedule 2."

[54] Schedule 2 was a table which set out, for each of the six Segments, details of whether this Segment was a Customer's Segment, the anticipated usage by that Customer of the Segment, the names of the Other Customers which would use the Segment, the total usage by those Other Customers, what was described as the "total incremental capacity" and what was called the "Customer's Proportion".

[55] For the Segment described as the Balloon Loop, the Customer's requirements, and the total requirements of Other Customers for that Segment, were expressed by two measures, namely a number of train services per annum, and what was called the GTK, meaning the gross tonne kilometres attributed to the relevant train service. Segment 1 was essential to meet the requirements of every Customer. Apart from the Balloon Loop, no Segment was required by every Customer. For those Segments, schedule 2 identified whether the Segment was required by the Customer and if so, the number of train services per annum which it required, as well as the number of train services required by any Other Customers.

[56] Clause 6.1, containing the critical cl 6.1(c), was as follows:

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18 As referred to above at [39].

"6.1 Variation to Segments

(a) The Parties acknowledge that in conjunction with any variation to the Scope of Works for a Segment sought in accordance with this clause 6, it may be desirable to:

(i) create a new Segment;

(ii) remove a Segment; or

(iii) divide an existing Segment into more than one Segment.

(b) If, in conjunction with a variation to the Scope of Works for a Segment in accordance with the provisions of this clause 6 or clause 19.5, the Parties propose to:

(i) create a new Segment;

(ii) remove a Segment;

(iii) divide an existing Segment into more than one Segment; or

(iv) change the Segment Customers for a Segment so that the Customer and/or an Other Customer is either:

(A) removed as a Segment Customer for the Segment; or

(B) included as a Segment Customer for the Segment,

then such variations will only take effect if QR Network, the Customer and each Other Customer agree to vary their respective WIRP Deeds to give effect to such variations.

(c) Prior to the First Milestone Target Date, the Customer may notify QR Network and each Other Customer that a Segment is to cease being a Customer's Segment provided that:

(i) the Customer is not the only Segment Customer for the Customer's Segment at the time such notice is given; and

(ii) after the Segment would, but for this clause 6.1(c)(ii), cease being a Customer's Segment in accordance with this clause 6.1(c), there is at least one remaining Segment Customer for the Segment,

in which case, as at the date such notice is given to QR Network:

(i) item 1 of schedule 2 will be taken to be varied to specify that the Segment is not a Customer's Segment;

(ii) for the avoidance of doubt:

(A) the Segment will cease being a Customer's Segment;

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

(C) the Customer will cease having a Customer's Proportion for the Segment; and

(iii) this Deed will not otherwise be varied.

(d) If an Other Customer (Former Segment Customer) ceases to be a Segment Customer for a Segment under clause 6.1(c) of the Former Segment Customer's Other WIRP Deed, then as at the date the Former Segment Customer ceases to be a Segment Customer for the Segment under the Other WIRP Deed:

(i) item 1 of schedule 2 will be taken to be varied to remove the Former Segment Customer as a Relevant Other Customer for the Segment;

(ii) for the avoidance of doubt, the Former Segment Customer will cease:

(A) being a Relevant Other Customer for the Segment;

(B) being a Segment Customer for the Segment; and

(C) having a 'Customer's Proportion' (as defined in the Former Segment Customer's Other WIRP Deed) for the Segment;

(iii) if the Segment is a Customer's Segment, the Customer's Proportion for the Customer's Segment will be taken to be varied to be the proportion (expressed as a decimal) calculated in accordance with the following formula:

$$CPn = \left[\frac{\text{CPi}}{1 - \text{CP}^{\text{FSC}}}\right]$$

where:

$CPn$ = The varied Customer's Proportion for the relevant Customer's Segment from the date the Former Segment Customer ceased to be a Segment Customer for the relevant Customer's Segment (expressed as a decimal)

| | | |
|---|---|---|
| CPi | = | The Customer's Proportion for the relevant Customer's Segment immediately prior to the Former Segment Customer ceasing to be a Segment Customer for the relevant Customer's Segment (expressed as a decimal) |
| $CP^{FSC}$ | = | The "Customer's Proportion" (as defined in the Former Segment Customer's Other WIRP Deed) for the relevant Customer's Segment immediately prior to the Former Segment Customer ceasing to be a Segment Customer for the relevant Customer's Segment (expressed as a decimal)." |

[57] The Deed required the payment each month of the WIRP Fee and any Optimisation Fee. Clause 11 provided for the calculation of the monthly WIRP Fee, to be paid throughout the WIRP Fee payment period and to commence on the first day of the "First WIRP Fee Month", which was effectively six months after the later of the First Milestone Target Date and the First Milestone Achievement Date. As already noted, the WIRP Fee was to be paid for a period of 234 months.

[58] The initial WIRP Fee was to be calculated according to cl 1 of schedule 7. It is unnecessary to set out those detailed provisions. It is sufficient to say that a Customer's Proportion was a factor in the calculation of the Customer's WIRP Fee for the Segment, so that no fee would be payable for a Segment which was not that Customer's Segment.

[59] Clause 11.4(c) provided that the WIRP Fee was payable notwithstanding that an Access Agreement was not entered into for any reason, an Access Agreement or a transaction or obligation in connection with it was or became wholly or partly void or unenforceable, or any trains using the Access Rights were not operated. However, cl 11.5 provided that the Customer was excused from the payment of a monthly WIRP Fee and Optimisation Fee if the Customer was unable to use the Access Rights during that month because of a delay caused by QR Network acting in bad faith and unreasonably.

[60] Clause 21 provided for the assignment by the Customer of its rights and obligations under the Deed. By cl 21.2(c)(iv), the Customer's interest under the Deed could be assigned only with the contemporaneous assignment of the Customer's interest in the Access Agreement.

[61] Clause 24.12 provided that the Deed contained the entire understanding between the parties as to its subject matter. By cl 24.13, it was recorded that the Deed was not intended to create a partnership, joint venture or agency relationship between the parties.

**The notices**

[62] On 30 September 2015, Glencore wrote to Aurizon as follows:

"Re: Wiggins Island Rail Project Deed (2011) as varied ("Agreement")

> We refer to the above agreement between Glencore Coal Queensland Pty Limited (ACN 69 098 156 702) ("formerly known as Xstrata Coal Queensland Pty Ltd") ("Glencore") and Aurizon Network Pty Ltd ("Aurizon"). Terms defined in the Agreement have the same meaning in this letter.
>
> Glencore hereby gives notice to Aurizon that in accordance with clause 6.1(c) of the Agreement that the following Segments are to cease being a "Customer Segment" for Glencore:
>
> • Segment #1
> • Segment #2
> • Segment #4
> • Segment #5
>
> We are currently also advising the Other Customers of this change."

[63] On 1 October 2015, each of the other appellants gave a notice in the same terms. In each case, Glencore and the other appellants specified each and every Segment for which it had agreed to contribute.

[64] No reason was given by any Customer, in its notice under cl 6.1(c), any subsequent correspondence or in evidence, for this action. There was no indication by any Customer that it would not use the Segment or Segments. It was not then, and has never been, the case of any Customer that any Segment had become unnecessary to provide the rail corridor from its mine to the WICET. Clearly, there was then no alternative corridor available to any Customer. In each case, the Customer's stance was and remains that it was entitled to avoid payment for the upgrade to the Network, although the Network, as upgraded, remained necessary for the transport of its coal.

**The trial judge's interpretation of the WIRP Deeds**

[65] The trial judge discussed at some length the principles affecting the admissibility of evidence for the interpretation of a commercial contracts.[19] However ultimately, his Honour said that he did not have to further consider the effect of conflicting authorities if he concluded that something had gone clearly wrong with the text.[20] As he understood the argument for Aurizon, it was not that the text of cl 6.1(c) was capable of more than one ordinary meaning; rather, its argument was that the operation of the ordinary meaning of the text should be curtailed or conditioned, because an unconstrained operation would lead to an absurd commercial outcome.[21]

[66] Before discussing individual terms of the Deeds, his Honour said that the collective operation of the WIRP Deeds had to be considered by reference to two facts. The first was that the Deeds were the result of a collective bargaining process towards a standard form contract. The second was that their subject was the provision of an increase in capacity of the Network, with proportionate allocation of Access Rights relating to the Customer's demand under each of the Deeds and liabilities relating to those proportions.[22]

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19 Judgment [59]-[122].
20 Judgment [122].
21 Judgment [113].
22 Judgment [123].

[67] After referring to other provisions of the Deeds, his Honour noted two effects of the Customer invoking cl 6.1(c), which were:

> "[159] …First, the Customer's liability to pay the WIRP Fee for any Segment which the Customer has not notified under cl 6.1(c) is unaffected, as are the liabilities of the Other Customers for those Segments. Second, the agreement between the plaintiff and the Customer to enter into an Access Agreement for the Aggregate Access Rights and for the Customer to pay Access Charges for those rights and the obligation of the Customer to take all reasonable steps to encourage the QCA to include the Project Costs in the [Regulatory Asset Base][23] for the calculation of those Access Charges remains."

[68] His Honour referred to cl 6.1(d) as part of the "immediate context" of cl 6.1(c). He noted that a notice under cl 6.1(c) would relieve the customer from liability for the WIRP Fee and any Optimisation Fee.[24] He described a notice given under cl 6.1(c) as a "self-executing variation of contract".

[69] The trial judge then considered the potential circumstances which could explain the commercial purpose of cl 6.1(c). He observed that the appellants' case was that the commercial purpose was simply to allow Customers to avoid paying the WIRP Fee and any Optimisation Fee for a Segment. His Honour said that "[t]here is no denying that if the clause operates as the defendants say, it provides for a possible game of musical chairs", by which each of the Customers could give a notice whilst there was another standing.[25]

[70] His Honour noted that under the appellants' argument, Aurizon would be exposed to the risk that all of the WIRP Fees would come to fall on a party which might not have the commercial capacity to pay those fees.[26] He rejected submissions for the appellants, as to an evident commercial purpose of cl 6.1(c):

> "[175] One submission by the defendants is that, viewed as at the time when the WIRP Deeds were made, the plaintiff's exposure to risks, including the credit risk, was not as great as might be thought otherwise, because the Customers would risk a loss of commercial reputation if they were to give notice at the last minute merely to avoid paying their WIRP Fees. In my view, no weight should be given to that submission, as an explanation for the commercial operation of cl 6.1(c).
>
> [176] Another submission is that if the WIRP Fees were payable in consideration of the provision of the Aggregate Access Rights, the plaintiff would have been exposed to the risk of non-approval by the QCA of the WIRP Deeds as access conditions. This submission raises a couple of potential points. First, there is no evidence that any such risk was a mutually known fact, so whether or not that was the view of any of the plaintiff's officers, internally, would be a subjective fact, not usually

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23 Discussed below at [117].
24 Judgment [161]-[162].
25 Judgment [165]-[168].
26 Judgment [169].

> admissible in aid of construction. Second, whether or not it was considered advisable to clearly separate the consideration for the plaintiff's promises under the WIRP Deeds to construct, fund and deliver the proposed extension on time and for agreed amounts by way of WIRP Fees and any Optimisation Fees, from the entitlement to payment of the regulated access charges for the proposed additional access rights under access agreements, in accordance with the separate structures of an access agreement and an agreement for approved access conditions, as provided under the Access Undertaking, says nothing directly about any right of a proposed access holder to avoid liability for the WIRP Fee and any Optimisation Fee."

[71] His Honour concluded that "something has clearly gone wrong with the text of cl 6.1(c)", with the result that extrinsic evidence was admissible to the extent that it would inform what the parties' objective intention was at the time of the contract.[27]

[72] His Honour noted that there were two extrinsic facts which were advanced by Aurizon as relevant to the interpretation of cl 6.1(c). The first was that at the time of entering into the WIRP Deeds, the Customers were of materially varying experience from one another in mining and exporting, and were of materially varying financial means. The second was that at this time, there was a prospect that a Customer's Segment under a WIRP Deed might cease to be necessary to enable Aurizon to provide the Aggregate Access Rights under the WIRP Deed. Aurizon instanced the real possibility, at that time, that the point at which Springsure proposed to connect to the Network from its then proposed mine might change.

[73] As to that first fact, his Honour noted that the fact was admitted and he concluded that it was relevant to the interpretation of cl 6.1(c).[28] As to that second fact, the occurrence of negotiations between Aurizon and Springsure on this matter was not disputed, but the knowledge of that fact by every party to a Deed was put in issue.[29]

[74] The WIRP Deeds showed a certain Segment to be used by Glencore and Springsure, in the proportions of 67.8 per cent to 32.2 per cent. However, in the few months prior to the execution of the Deeds, negotiations between Springsure and Aurizon discussed an alternative connection point that would remove any need of Springsure for that Segment.[30] In Aurizon's case, evidence was given by Mr Ian Lock of these negotiations, and of discussions with all Customers about the prospect that if they no longer required the use of one of their Customer Segments, they could, as the trial judge described it, "drop out of that Segment and cause the readjustment of the Other Customer's Proportions on that Segment."[31]

[75] His Honour accepted that Mr Lock's oral evidence did not specifically demonstrate the knowledge of the Customers other than Glencore of a possible move of the Springsure connection point.[32] However, the evidence also included Mr Lock's

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27 Judgment [177].
28 Judgment [180], [185].
29 Judgment [188].
30 Judgment [187].
31 Judgment [191].
32 Judgment [193].

notes of discussions at meetings in July and August 2011 as to what would happen if a Customer withdrew from a Segment. His Honour inferred from that evidence that "the Customers other than the first defendant and Springsure were aware of the possibility that Springsure might propose a new connection point that did not involve it using the Segment [as was ultimately specified in the Deeds]".[33]

[76] His Honour accepted that all parties to the Deeds "were aware that the genesis of cl 6.1(c) was the question of whether Springsure would connect to the Network using [that Segment]".[34] His view was that this fact went "some way towards supporting" the construction for which Aurizon contended, "in the same way that knowledge of the mischief that a statutory provision was introduced to meet will be relevant to the proper construction of a statute."[35] His Honour rejected the appellants' argument that Mr Lock's evidence was inadmissible, as evidence of negotiations and of the subjective intention of the parties.[36]

[77] His Honour rejected other arguments made by the appellants for why extrinsic facts should not be considered. They included an argument based upon cl 24.12(b) and (c), which provided that all previous negotiations, understandings and representations were merged in and superseded by the Deed and were of no effect, and that no oral explanation or information provided by one party to the other would affect the meaning or interpretation of the Deed.

[78] His Honour then expressed his conclusions, as to the proper interpretation of the WIRP Deed as follows:

> "[213] Despite my conclusions so far, in the result, I am unable to accept that the proper construction of the WIRP Deed is or that an implied term in fact of the WIRP Deed requires that a notice may not be given under cl 6.1(c) for a Customer's Segment that is necessary to enable the plaintiff to provide the Aggregate Access Rights to the Customer.
>
> [214] In my view, both arguments fall at the hurdle of clarity that for the supply of words by construction to avoid absurdity the words to be supplied must be clear and that to imply a term in fact the term must be capable of clear expression. The required words in the present case would make clause 6.1 (c) read as if it provided:
>
> > "Prior to the First Milestone Target Date, the Customer may notify QR Network and each Other Customer that a Segment [*that is not necessary to enable QR Network to provide the Aggregate Access Rights to the Customer*] is to cease being a Customer's Segment provided that ..."
>
> [215] It is not clear enough, in my view, that the only circumstances in which the parties might have contemplated that notice could be given under cl 6.1(c) are where the Customer no longer requires the Segment to utilise the Aggregate Access Rights."

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33 Judgment [194].
34 Judgment [195].
35 Judgment [197].
36 Judgment [199], [200].

[79] The trial judge then considered whether there was an implied term of good faith and fair dealing in respect of the contractual power in cl 6.1(c). After an extensive discussion of the authorities on whether, according to the Australian common law of contract, there was an implied term of good faith in the performance of commercial contracts, his Honour said that such a term could be implied in this case as a term satisfying the requirements as enunciated in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*.[37]

[80] After discussing the arguments, his Honour concluded that the exercise of the power under cl 6.1(c) was subject to an implied term of good faith and fair dealing.[38] His Honour then turned to the question of whether that term had been breached. His Honour concluded that the term was breached, by this reasoning:

> "[261] Was the implied term of good faith and fair dealing breached? The plaintiff alleges that it was breached because the notices were given for a purpose other than the purposes for which the power under cl 6.1(c) was conferred, namely to allow removal of a Customer's Segment not necessary to provide the Aggregate Access Rights and the effect of the notices was to deprive the plaintiff of a substantial benefit.
>
> [262] The defendants submit that these facts do not amount to a breach of the implied term of good faith and fair dealing. They do not dispute that their purpose was other than to allow removal of a Customer's Segment not necessary to provide the Aggregate Access Rights, but submit that is not enough. Depending upon the circumstances, I agree.
>
> [263] Second, they submit that the notices did not undermine the substance of the benefit bargained for by the plaintiff and did not seek to withhold the benefits for which the plaintiff contracted. They expand this point by submitting that the only benefit that the plaintiff has been deprived of by reason of the issuing of notices is the benefit of not having its credit risk of receiving the WIRP Fees and any Optimisation Fees altered.
>
> [264] This characterisation is uncommercial, as the example of the effect upon the WIRP Fees and any Optimisation Fee for Segment # 1 – Balloon Loop shows. It is commercially unrealistic because no possible reason emerges as to why the Customers (except for the last Customer standing) would all seek to remove their liability for the WIRP Fees and any Optimisation Fee, except to avoid the liabilities for those fees. The proposition that the plaintiff would not be deprived of the substantial benefit of payment of the WIRP Fees because of the protection provided by the last Customer standing rule and the provision permitting the plaintiff to demand additional security from the last Customer seems far-fetched.

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37 (1977) 180 CLR 266 at 283 ("*BP Refinery*") as accepted in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 347; [1982] HCA 24.

38 Judgment [260].

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

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

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

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

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

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

> and any Optimisation Fee does not fall within the scope of the obligation of good faith and fair dealing in exercising the power under cl 6.1(c)."

**The construction of clause 6.1(c)**

[81] I have reached a different conclusion from that of the trial judge, and the result of my construction is that the notices were ineffective. It is convenient at this point to set out the essential reasons for that conclusion, before discussing why I have rejected particular arguments for the appellants on the issue.

[82] A purpose of the WIRP Deeds, in each case, was to have QR Network deliver infrastructure which was necessary to meet the needs of the Customer for the carriage of its coal to the WICET. QR Network was to deliver the so-called Extension, which was the new or improved infrastructure as described in schedule 3. The Extension was comprised of parts called Segments. Just as the Extension was to consist of physical structures, so was each Segment.

[83] Not every Segment was necessary to meet the needs of each Customer. The Customer's interest was in the delivery of the infrastructure described as the Customer's Segment (or Segments). What distinguished a Segment as a Customer's Segment was that it was necessary in order for the Customer's coal to be carried to the WICET.

[84] This was expressed in cl 4.1(a), in which the parties acknowledged that the Customer's Segments were necessary in order to enable QR Network to provide the Aggregate Access Rights. It was also acknowledged within the recitals to the Deed.

[85] Schedule 2 identified the Segments which were necessary for that Customer, and it quantified the extent of the Customer's need by the measure of an anticipated number of train services per annum. In the same way, it specified the anticipated use of the Segment by Other Customers. From those factors was calculated the Customer's Proportion, which represented the extent of the Customer's anticipated use of the Segment, relative to those, in aggregate, of Other Customers.

[86] Those specifications of the anticipated use of a Segment were consistent across all of the WIRP Deeds, reflecting the consensus of all Customers about the different contributions which they should pay, under their Deeds.

[87] In arriving at the Customer's Proportions, schedule 2 did not employ a set of fictions. Rather, schedule 2 recorded the facts of needs and anticipated uses which QR Network and the eight Customers had accepted.

[88] Clause 6.1(c) commenced by providing that, by a certain date and subject to a certain proviso, the Customer might notify QR Network and each Other Customer that "a Segment is to cease being a Customer's Segment". The information which would be conveyed, by that notification, was that the distinguishing feature of a Customer's Segment (that it was necessary to carry the Customer's coal to the WICET), no longer existed. In other words, the notice would convey that the Segment was no longer necessary for the provision by QR Network to the Aggregate Access Rights. Those rights were identified, by schedule 9, as a number

of train services between the mine and the WICET, without reference to the route or Segments involved.[39]

[89] Clause 6.1(c) continued by stating the consequences of such a notice, which were that the Deed would be taken to be varied in certain respects. Those variations were necessary so that the Deed would correspond with the fact, as conveyed by the notice, that the Segment was to cease being a Customer's Segment, in that it was no longer needed.

[90] The appellants would have cl 6.1(c) construed as if it commenced as follows:

> "Prior to the First Milestone Target Date, the Customer may notify QR Network and each other Customer that the Deed will be varied to specify that the Segment is not a Customer's Segment, the Customer will cease being a Segment Customer for the Segment and the Customer will cease having a Customer's Proportion for the Segment …"

However the text of cl 6.1(c) was different, by providing that what was to be communicated was the fact that the Segment had become unnecessary, and providing for those variations to the Deed as a consequence of the notification of that fact.

[91] Because, as was then plain to all parties, each of these Customers did need these Segments to meet their requirements for the carriage of coal to the WICET, these were not notices for which cl 6.1(c) provided. In context, what was conveyed by these notices was not that the Segment had become unnecessary, but that the Customer claimed, upon an erroneous construction of the clause, that it should not pay its contribution for the cost of it.

[92] The correct construction of this provision comes from a consideration of its text in the context of the whole of the contract, and some of its terms in particular. I have mentioned the recitals to the Deed and cl 4.1(a). There is also cl 4.1(b), by which the Customer agreed to the obligations imposed upon it, including the payment of the WIRP Fee, in consideration for QR Network undertaking to deliver the Customer's Segments.

[93] Importantly, there is also cl 6.1(d), by which an effective notice might cause the terms of another Deed to be varied, adversely to that Other Customer. If a notice could be given as the appellants contend, it would not only cause a potential detriment to QR Network, but also an actual detriment to another Customer or Customers.

[94] That any Customer, particularly one with a relatively small need for the Segment, would have exposed itself to the risk of an increased contribution, might have been realistic when the Customer who had given the notice no longer needed that Segment. But it is an extraordinary intention to attribute to a Customer that it would expose itself to that risk, by the unilateral action of another which still required, and therefore would still use, that infrastructure.

[95] My construction of cl 6.1(c) is derived from the terms of the Deeds. Where I respectfully disagree with the trial judge is in my construction of the text which precedes the

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39 As the trial judge observed at Judgment [201].

provisos in the clause, and more particularly, the expression "cease being a Customer's Segment". As should appear, my construction of that text does not require the addition of other words, or the assistance of any other relevant facts and circumstances, save perhaps the circumstance, which is indicated, if not stated in each Deed, that the eight Customers were agreeing with QR Network in relatively identical terms.

**Implied term**

[96] If I am wrong in this construction then I would give the same effect to the Deed by an implied term. From the express terms of the Deed, it would be presumed that the parties would have agreed upon that term had they turned their minds to it.[40]

[97] The term which would be implied is that a notice under cl 6.1(c) could not be given for a Segment which remained necessary in order to enable QR Network to provide the Aggregate Access Rights. The conditions necessary to ground the implication of a term, as summarised by the majority in *BP Refinery*,[41] would be satisfied.

[98] The trial judge concluded that the term could not be implied because it was not clear enough that the only circumstance in which the parties might have contemplated that a notice could be give under cl 6.1(c) were where the Customer no longer required the Segment to utilise the Aggregate Access Rights.[42] I am unable to agree with that conclusion. It is telling that the appellants' arguments were unable to identify any circumstance in which there could have been a reason for a Customer to opt out, whilst still requiring the Segment. In my view, it was sufficiently clear that this was the only circumstance which the parties might have contemplated a notice under cl 6.1(c), when the commercial purposes of these contracts are considered.

[99] The purposes of these Deeds were to have QR Network deliver infrastructure which was necessary to meet the needs of the Customers, in return for the Customers contributing, in agreed proportions, to its cost. On the appellants' construction of cl 6.1(c), which his Honour accepted, the express terms did not preclude a notice being given by a Customer which still needed to use that part of the infrastructure. Upon that construction, and absent the implied term for which Aurizon contended, the commercial purposes of these contracts could not be fulfilled, at least because the Customers would not be contributing (if at all) to the cost of the delivery of the infrastructure according to their anticipated use of it. In order to give business efficacy to the contract, it would be necessary to imply the term for which Aurizon contends. The contract would lack its intended business efficacy if a Customer could opt out of its obligations to contribute, whilst necessarily enjoying the benefits of the infrastructure for which it bargained. Consequently, had the parties turned their minds to it, this would have been a limitation upon which, it should be presumed, the parties would have agreed.

[100] The other conditions for an implication of this kind would be satisfied in this case. The implied term would be reasonable and equitable. Having regard to the essential purposes of the contracts, such a term would be so obvious that it would go without saying. It would not contradict any express term of the contract. And contrary to what appears to have been his Honour's view, the terms could be clearly expressed.

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40 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 346 per Mason J.

41 (1977) 180 CLR 266 at 283.

42 Judgment [215] and again at [253].

It was in that last respect that his Honour said that he was unable to conclude that such a term should be implied. He said that the argument fell "at the hurdle of clarity". I respectfully disagree.

**Submissions by the appellants on the construction issue**

[101] To a large extent, the submissions for the appellants coincide. Where necessary, I will refer to a submission by Glencore or by the "other appellants".

*External facts*

[102] There are arguments which challenge the trial judge's findings as to the background facts (or alleged facts) upon which Aurizon relied, and to his Honour's reasoning about the relevance of those facts to the construction issue. Because the construction issue may be resolved without reference to those facts, the arguments need not be considered.

[103] However there is a submission for Glencore by which it would seek to use, for the construction of its Deed, what it suggests was a relevant background fact or circumstance. It is said that except for Springsure, there was no Customer for which there was any prospect that its Segments would not be necessary to enable Aurizon to provide the Aggregate Access Rights. In the case of Glencore, it is said that its Aggregate Access Rights required access to the track and each of its Segments. Therefore, it is contended, there was no possibility that cl 6.1(c), construed in the way for which Aurizon contends, could have been engaged in the Deed of any Customer apart from Springsure.

[104] This circumstance could be relevant only if the express terms of the Deed were ambiguous. Assuming for the moment that there is an ambiguity in the terms of cl 6.1(c), the background fact to which Glencore refers could not be critical in resolving it. Even upon that factual premise, there would be an apparent explanation for the parties including the term in each Deed, which is that in the context of the collaborative relationship between the Customers in the negotiation of their Deeds, they and Aurizon may have thought that it was preferable that all parties executed Deeds in uniform terms.

[105] The effect of this argument by Glencore is that cl 6.1(c) could be given utility only by its construction of the clause, so that its construction should be preferred. But what was that utility? It could only be that cl 6.1(c) would enable the Customer to avoid, opportunistically, the burden of its Deed, to the detriment of Aurizon and Other Customers. Upon an objective view, that is a highly unlikely intention to attribute to Aurizon, and to the Other Customers in agreeing with Aurizon in the same terms.

*The "last Customer standing" proviso*

[106] The appellants emphasise that Aurizon had the benefit of the "last Customer standing" proviso, together with cl 6.1(d), which preserved its entitlement to be paid the full amount of any applicable WIRP Fee and Optimisation Fee.

[107] It is one thing to say that Aurizon would be likely to accept that risk, on what I have said was the effect of cl 6.1(c). It is another to say that Aurizon would be likely to accept that risk from the use of the clause according to the appellants' construction of it.

*Uncommerciality*

[108] It is submitted that there is a recognised danger in a judicial assessment of the commerciality of potential constructions.[43] However the uncommerciality of the consequences of the appellants' construction is demonstrated. Those outcomes would be antithetical to the expressed commercial purposes of the parties, and to the consensus between the Customers that they should contribute to the delivery of the Extension commensurately with their anticipated uses of it.

*The regulatory regime*

[109] The appellants submit that their construction of the clause is supported by relevant terms of the regulatory regime, and in particular, its demarcation between the respective areas of operation of an Access Agreement and an Access Condition (as each WIRP Deed was).

[110] Earlier, at [27], I have referred to cl 6.5.2 of the access undertaking, but at this point it is necessary to discuss it in more detail. Clause 6.5.2(a) entitled QR Network to require an Access Seeker to agree to Access Conditions before being granted Access Rights, to the extent which was reasonably required in order to mitigate QR Network's exposure to the financial risks associated with providing that access. I have set out above the terms of cl 6.5.2(d) of the access undertaking, which prescribed terms to be included in an Access Condition, where the Access Condition would result "in QR Network earning revenue from the Access Seeker's Access that is in addition to the ongoing access charge". Clause 6.5.2(d) gave the example of "an upfront contribution or Access Facilitation Charge". In such a case, cl 6.5.2(d) required the Access Condition to contain an agreement to return that contribution, or any other further revenue from the access, to the Access Seeker.

[111] Access conditions were required to be approved by the Authority under a process set out in cl 6.5.4, which required QR Network to issue a report to all relevant Access Seekers, Customers and the QCA,[44] as it did by its report dated 11 May 2011. The report detailed the relevant risks to QR Network from undertaking this investment. It provided what was described as an overview of the proposed contractual arrangements. This report, which was sent to all "8 foundation users (customer group)", as the eight Customers were described, stated that the proposed terms of the Access Condition would have the following characteristics:

> "• the User makes payments to QRNN [QR Network] which are in addition to the access revenue received through the standard (reference) access terms and conditions;

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43 *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* (2001) 188 ALR 566; [2001] FCA 1628 per Finkelstein J at [47]; *Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd* [2006] EWCA Civ 1732 per Neuberger LJ at [21]-[22]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 per Lord Hoffman at [20]; *Jireh International Pty Ltd v Western Exports Services Inc* [2011] NSWCA 137 per Macfarlan JA (Young JA and Tobias AJA agreeing) at [55]-[56]; *Arnold v Britton* [2015] AC 1619 per Lord Neuberger (Lords Sumption, Hughes and Hodge agreeing) at 1628-9, [20]; *Pipe Networks Pty Ltd v 148 Brunswick Street Pty Ltd* (2019) 371 ALR 627 per Derrington J at 645, [61]; [2019] FCA 598.

44 Cl 6.5.4(a).

- the payments mitigate against the significant additional risks to QRNN associated with an infrastructure project of the cost (~$900m), duration and magnitude of the WIRP project;
- the payments are incentive based and linked to QRNN's performance in relation to the timing, cost and delivery of the installed capacity."

[112] The report described the WIRP Fee as follows:

> "QRNN is proposing that WIRP Access Holders will pay an additional fee (the WIRP fee), that reflects compensation for risk and an allowance for a return. The WIRP fee will be payable on a monthly basis for 19.5 years after a six month period of zero fee (based on the 20 year term of the foundation agreements) and will be subject to a number of adjustment factors, as described below. It is separate to the access charge and accordingly does not form part of the revenue QRNN receives for providing access to the relevant service, nor will it form part of the revenue cap.
>
> The proposed amount of the base fee is 2.92% of the target project cost per annum. The base fee had been determined with regard to the additional risks and to ensure QR Network has a commercially reasonable fee at risk to provide an incentive for QRNN to drive significant customer value from the project. As noted previously, the WIRP fee is part of a bundled package of commercial terms and conditions and cannot be deconstructed to reconcile to individual risks."

[113] As the report explained,[45] the WIRP Fee was not part of the revenue which would be received for providing access to the relevant service.

[114] In the terms in which the Deeds were later executed, it remained the case that the WIRP Fee was not "revenue from the Access Seeker's Access that [was] in addition to the ongoing Access Charge" as referred to in cl 6.5.2(d) of the access undertaking. This was demonstrated by cl 13(c)(ii)(A) of the Deeds, by which the parties agreed that the WIRP Fee and any other fee that might become payable by the Customer under its Deed, were not part of an amount payable by the Customer for Access Rights, and were payable irrespective of the Customer's access to and use of the Customer's Segments. It was also evident from cl 15.3 of the Deed, which I have discussed earlier at [47]. Upon relinquishment of access to a part of the Network, the Customer would no longer have to pay the WIRP Fee for each month, but would have to pay an amount equal to the present value of the aggregate of the amounts of the WIRP Fees and any Optimisation Fees which would have been payable. In other words, the WIRP Fee (and other fees) were still to be paid, albeit in a discounted amount because they were to be paid immediately.

[115] The other appellants submit that the parties could not have intended that cl 6.1(c) would have the effect which is attributed to it by Aurizon, because, it is said, this would have increased the risks that the proposed fees would not be approved by the Authority on the basis that they would be regarded as fees for access. The argument does not go as far as suggesting that the WIRP Fee (and other fees) *would* have been so regarded, and *would* have been required to be refunded under cl 6.5.2(d) if

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45 In that passage and in cl 7.4 of the report.

cl 6.1(c) was construed as Aurizon contends. This argument cannot be accepted. As I have discussed, a Customer's Proportion was calculated by reference to its *anticipated* usage and the anticipated usage of Other Customers, and the Customer's Proportion was a factor in the calculation of the WIRP Fees. That was different from the WIRP Fees being revenue received for the *actual* use or access by the Customer. There was no finding by the trial judge, and nor is there demonstrated a basis for a finding by this Court, that cl 6.1(c), on Aurizon's construction, would have increased any risk that the Access Conditions would not be approved by the Authority.

[116] More generally, there is no tension between cl 13 and cl 6.1(c), upon its correct construction. Clause 13(c)(ii)(A), which provided that any WIRP Fee or other fee would be payable irrespective of the Customer's access to and use of the Customer's Segments, does not suggest a different construction of cl 6.1(c). The effect of cl 13(c)(ii)(A) was qualified by cl 6.1(c) under which, within certain limitations, the obligation to pay the fees could be avoided. In other words, the effect of cl 13(c)(ii)(A) was that for as long as the Segment was the Customer's Segment, the fees were payable irrespective of whether the Customer did exercise its Access Rights.

[117] The other appellants suggest that there is some relevance, in the construction of cl 6.1(c), of the fact that the cost of the Extension also affected the level of Access Charges. This is because the Access Charges were derived by applying a certain rate of return to what was called the "Regulatory Asset Base". It is said that when the WIRP Deeds were executed, it was expected that the capital required for the Extension would be included in this Asset Base (and that this subsequently happened). Therefore, it is said, Aurizon would already recover all of the capital it has spent on the Extension, plus the regulated return on that expenditure, and the WIRP Fees would be a kind of "super-profit". Precisely what relevance that fact has for the construction of cl 6.1(c) is not entirely clear, but apparently it is suggested that Aurizon would have agreed to this seemingly disadvantageous bargain (on the appellants' construction) when it was to receive such an extraordinary return upon its investment.

[118] Such an argument cannot be accepted. The WIRP Fee was the agreed compensation for QR Network's exposure to the financial risks associated with this investment. The regulatory regime, by the relevant terms of the access undertaking, permitted the payment of this compensation, by a separate agreement between the Customers and QR Network. The Customers needed the Extension, and QR Network was not obliged to provide it, absent appropriate terms in the form of Access Conditions. There is no basis to suppose that QR Network was prepared to accept an operation of cl 6.1(c) by which that compensation could become irrecoverable.

[119] The other appellants submit that the terms of cl 4.1(a) were "adapted to assist in convincing the QCA both to approve of the WIRP Deed as Access Conditions" and to accept that the cost of the project should be included in the Regulatory Asset Base. Upon that premise, it is submitted that cl 4.1(a) should not have the effect upon the construction of cl 6.1(c) which Aurizon's argument attributes to it.

[120] Perhaps cl 4.1(a) was of some assistance in procuring the approval of the WIRP Deeds by the Authority. But that provides no reason for treating cl 4.1(a) as

something of an artifice, or more generally, for diminishing its relevance in the construction of cl 6.1(c).

*Suggested inconsistencies between Aurizon's construction and other terms of the WIRP Deeds*

[121] It is said that Aurizon's construction is inconsistent with cl 6.1(b)(iv),[46] which provides for the change of the Segment Customers for a Segment. It is said that this provision does not link status as a Segment Customer to rights of access to a Segment. However there is no such inconsistency. Clause 6.1(b) was engaged if there was a variation to the Scope of Works for a Segment. In that context, it was provided that a Segment Customer might be removed or added, but only if the parties to the Deed and each Other Customer agreed to the change. However the evident intent of cl 6.1(b) was to facilitate the removal or inclusion of a Customer because of the effect of a variation to the Works upon the differing needs of Customers for that Segment.

[122] It is said that there is a tension between Aurizon's construction of cl 6.1(c), and the provisions for the involvement of an Independent Engineer under cll 6.2 and 6.5. This is because, it is said, on Aurizon's construction it would be expected that the parties would agree that an Independent Engineer would provide a report which addressed whether or not the Segment had ceased to be necessary for the provision of the Aggregate Access Rights. The matters upon which an Independent Engineer might report, in the circumstances of cl 6.2 or cl 6.5, were quite different from a question of whether a Segment had become unnecessary for a Customer and there is no reason to infer that the opinion of an Independent Engineer would have been thought to be required.

[123] Glencore submits that Aurizon's limitation upon the power under cl 6.1(c), by an implied term, would be inconsistent with cl 13, in its express provision that nothing in the Deed was to limit or affect the operation of any Access Agreement. It is said that the implied term would limit or affect the operation of Glencore's Access Agreement because Glencore could not issue a notice without first changing its Aggregate Access Rights under the Access Agreement. That submission must be rejected. The implied term would be a limitation upon the power under cl 6.1(c). That constraint would not affect the Aggregate Access Rights to which the Customer would be entitled under its Access Agreement. Where a notice could be given consistently with this limitation upon the power in cl 6.1(c), the notice would not require a change to the Access Rights.

*No limitation on the power to give a notice was necessary*

[124] Glencore submits that the appellants' construction would not encourage Customers to "rush for the doors" to give notices under cl 6.1(c), because in the circumstances which existed when the Deeds were executed, there was an ongoing commercial relationship between the Customers as parties jointly involved in developing the WICET. It is said that this disincentive was removed only when Springsure became insolvent. The effect of this submission is that the goodwill between the Customers could have been thought to provide a sufficient constraint upon the exercise of the

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46 Set out above at [56].

power under cl 6.1(c), without that constraint having any legal force. This is not a persuasive basis for rejecting Aurizon's construction.

**Good faith**

[125] In an illuminating discussion of the authorities, the trial judge considered whether there should be implied, as a legal incident of any commercial contract, a term that a party will act reasonably and in good faith, or whether the implication of such a term must satisfy the requirements for a term to be implied in fact.[47] His Honour decided that, in this case, he should consider an implied term of the latter kind, saying that he proposed "to follow the *BP Refinery* requirements."[48]

[126] The trial judge discussed arguments which the appellants had presented against the implication of that term. In substance, they were the same arguments which they had advanced against the implied term for which Aurizon argued was necessary to give business efficacy to the contract.

[127] In discussing those arguments, the trial judge postulated a scenario under which all of the Customers, except the sixth defendant (Colton Coal Pty Ltd) gave a notice under cl 6.1(c) for the Segment described as the Balloon Loop. In such a case, the sixth defendant, with a 3.2 per cent proportion of the train movements and a commensurate liability for WIRP Fees and any Optimisation Fees, would continue to enjoy only to 3.2 per cent of the train movements, but become the only Customer responsible for all of the fees. His Honour said that this would increase its original liability from approximately $3.657 million by $91.434 million, "but with no corresponding commercial benefit of significance." His Honour said of that scenario:

> "Had that possibility been raised at a meeting at the time of entering into the WIRP Deeds, in my view, all the parties would have responded: 'Of course not!'"[49]

[128] His Honour gave this scenario to explain his rejection of an argument that the terms of cl 6.1(c) evidenced a preparedness by all parties to accept such a risk. In his view, it was obvious that the parties to the WIRP Deeds could not have intended such an outcome.[50] His Honour continued:[51]

> "From that negative, the question moves to whether they should be taken positively to have intended that exercise of the power under cl 6.1(c) is constrained by an obligation of good faith and fair dealing. In this respect the first defendant submits that if there is no implied term in fact that the power may not be exercised for a Segment necessary to enable the plaintiff to provide the Aggregate Access Rights for the relevant defendant, there is no scope for the implication of an implied term or obligation of good faith and fair dealing. I do not agree. There may be other possible circumstances according to which one Customer or another might wish to alter its responsibility as a Segment Customer. An implied term of good faith

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47 Judgment [217]-[244].
48 Judgment [245].
49 Judgment [250].
50 Judgment [253].
51 Judgment [253].

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

[129] In that passage, his Honour identified the difference between this implied term of good faith and the implied term which he had rejected. He considered that there "may be other possible circumstances according to which one Customer or another might wish to alter its responsibility as a Segment Customer", whilst still needing to use the Segment. In other words, there could be circumstances where such a Customer might act in good faith in giving its notice, although it needed the Segment.

[130] His Honour concluded that the power under cl 6.1(c) was subject to an implied term of good faith and fair dealing.[52]

[131] He then turned to whether that term had been breached. He rejected Aurizon's argument that it was breached because the notices were given for a purpose other than the purposes for which the power was conferred, namely to allow removal of a Customer's Segment which was not necessary to provide the Aggregate Access Rights.[53] He accepted the appellants' argument that, although their purpose in giving their notices was other than to allow the removal of a Segment which was unnecessary to provide their Aggregate Access Rights, that purpose alone would not be sufficient to result in a breach of this implied term, because it would depend upon all of the circumstances.[54]

[132] His Honour concluded his reasoning on the issue in the passage which I have set out earlier, in [267] to [270] of the Judgment.

[133] It is unnecessary for me to express a concluded view upon that reasoning, because of what I consider to be the proper construction of cl 6.1(c) or, alternatively, the necessity for an implied term that precluded a notice by a Customer which needed the Segment to enjoy its Aggregate Access Rights.

[134] If I am correct on either of those conclusions, there would be no necessity for the implication of a term of good faith and fair dealing in the exercise of the power conferred by cl 6.1(c).

[135] However if I am incorrect in those conclusions, I would have difficulty in accepting that the Customers' exercise of the power under cl 6.1(c) was in breach of any implied term of good faith and fair dealing. With respect, his Honour said that

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52 Judgment [260].
53 Judgment [261].
54 Judgment [262].

whether the Customer was acting in good faith and fairly would depend not only upon whether it still needed the Segment, but upon all of the circumstances, and his Honour may not have identified the circumstances of this case by which the appellants' use of the power was in bad faith or unfair.

**The timing issue**

[136] A valid notice could be given only prior "to the First Milestone Target Date", which was defined to mean the date specified as such in item 1 of schedule 5. Item 1 specified the date as the later of "the First Milestone Specified Target Date" and the "Port Facilities (Initial) Available Date". It was common ground that the First Milestone Specified Target Date had been reached on 31 March 2015 (six months before the notices were given).

[137] The Port Facilities (Initial) Available Date was defined to mean the date that the:

> "(a) the Port Facilities are materially complete; and
>
> (b) capable of Handling coal at 60% or more of the Port Facilities' full design capacity."

[138] The Port Facilities were defined to mean "the proposed Wiggins Island Coal Export Terminal".

[139] It was also common ground that the terminal was materially complete by the time the notices were given. The question was whether, when the notices were given, the terminal was capable of "Handling" coal at 60 per cent or more of its full design capacity.

[140] The word Handling took its meaning from the definition of "Handle", which was defined as follows:

> "**Handle** in relation to coal at the Port Facilities means the receiving by rail, unloading, stacking, storing and reclaiming of coal and loading of vessels with coal at the Port Facilities."

The Handling of coal at the terminal therefore consisted of everything which was done by which coal was moved from a train to a ship.

[141] The facilities at the WICET consist of three components. The first is the train unloading or stacking system, whereby coal is unloaded from trains, by being dumped through the bottom of wagons onto a hopper from which it is taken to an overland conveyor belt. The second component is the stockyard or stockpile area, which is where the coal is stored until it is to be loaded onto a ship. The third component, which was the relevant component in this case, is the shiploading system, by which coal is discharged from the stockpile and fed onto a conveyor belt, before passing through a series of transfers and conveyor belts until it is loaded through a shiploader into a ship.

[142] The meaning of "the Port Facilities' full design capacity" was not defined in the Deeds. It was common ground that this capacity was to be quantified at 27 million tonnes per annum, although that figure could be derived from the Deeds. The parties accepted that in this respect, recourse could be had to another document, which was entitled "Wiggins Island Coal Export Terminal Simulation Model – Nominal Base Case Capacity Estimates", prepared by a firm named Simulation

Modelling Services Pty Ltd ("SMS") in September 2010. The trial judge said that this document, which I will call the Simulation Study, was "at least in part" the basis for that figure.[55]

[143] His Honour said that on the facts of the case, it was not relevant to consider operations which occurred "upstream" of what I have described as the third component of the terminal, the shiploading system, because it was common ground that the capability to load vessels was the "choke point" of the WICET's capability.[56]

[144] Obviously, the *throughput* of coal through the terminal is likely to be affected by things beyond the Handling capability of the terminal itself. For example, it might be affected by the rate at which coal trains arrive at the terminal and the quantities which they are carrying. In the same way, it might be affected by the rate at which ships berth at the terminal and the quantities which they carry away. In this stage of development for the terminal, only one vessel could berth and be loaded at any one time.

[145] The time within which a loaded vessel can depart the wharf and be replaced by another vessel is a factor which might affect the throughput of coal. That factor was described in the evidence and the Judgment as "the inter-vessel berthing time" or "inter-vessel arrival time". Aurizon's case was that this was irrelevant to the assessment of the terminal's capability of Handling coal. The appellants contended otherwise, and his Honour accepted that contention.

[146] For certain other purposes under the WIRP Deed, a relevant milestone was the Port Facilities (Final) Available Date, which was defined somewhat more extensively, as follows:

> "**Port Facilities (Final) Available Date** means date, consistent with the feasibility study for the Port Facilities (stage 1), which all of the following have been satisfied:
>
> (a) the high voltage electricity connection to the electricity grid has been completed to the Port Facilities;
>
> (b) load testing has been conducted on the rail receival facility, overland conveyor, gantry stacker and shiploader to the satisfaction of the superintendent of those contracts;
>
> (c) performance tests and commissioning of sub systems has occurred to the extent necessary to satisfy the Port Independent Engineer of the continued operation of the rail receival facility, overland conveyor, gantry stacker and shiploader;
>
> (d) all dredging and other ancillary works reasonably necessary to create such navigable shipping channels as may be required to accommodate the berthing with, and departure from, the Port Facilities have been completed;
>
> (e) the rail receival facility, overland conveyor, gantry stacker and shiploader have reached practical completion (howsoever described in their respective construction contracts) and the

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55 Judgment [284].
56 Judgment [281].

Port Owner has issued a punch list to the relevant contractor; and

(f) the Port Independent Engineer has certified to the senior agent and the intercreditor agent (as appointed under agreements with the Port Owner), that each requirement above has been satisfied,

provided that if the load testing referred to in **paragraph (b)** of this definition and performance tests and commissioning referred to in **paragraph (c)** of this definition have not been completed due solely to the Initial Works for the Balloon Loop not having been completed (and, as a consequence, trains being unable to arrive at the dump station for the purpose of commissioning), the Port Facilities (Final) Available Date will be the date on which all of the other requirements set out in this definition were satisfied."

[147] One of the criteria to be satisfied according to that definition was that all dredging and other ancillary works were to be completed.[57] As the submissions for Aurizon emphasise, this was a criterion which was "external" to the terminal itself, and it had an obvious relevance for the rate at which vessels would be able to come and go from the terminal. Aurizon says it is significant that this was expressly relevant for the later milestone, but not for the one which mattered in this case.

[148] His Honour's reasoning that the inter-vessel berthing time was relevant was contained in these passages:

> "[282] Nor, in my view, is it relevant to consider, generally speaking, whether there are sufficient available ships to meet WICET's ability, power or fitness to load the coal at the required rate to constitute 60 percent of the rate of 27 million tonnes per annum. Generally speaking, the expert evidence called by the parties conformed to this parameter. One exception which it will be necessary to consider is the inter-vessel berthing time between ships dictated by the physical harbour conditions and relevant marine regulations and directives. The plaintiff submits it should be ignored. The defendants submit it should be taken into account.
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> …
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> [354] First, the plaintiff submits that the inter-vessel arrival time is an externality that does not affect the capability of WICET to load vessels with coal, within the meaning of the definition of the Port Facilities (Initial) Available Date. I accept that some externalities should not be treated as going to capability in this context. For example, if there are insufficient ships arranged to make full use of the capability of WICET to load vessels with coal, in my view, that does not affect the relevant capability. But other constraints that were present when the "nominal

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57 Paragraph (d).

> capacity" and "full design capacity" of WICET of 27 million tonnes per annum was settled upon are not necessarily to be ignored, simply because they are physically external to WICET. Accordingly, in my view, the effect upon the available time for loading of coal caused by the necessity for one vessel to depart the wharf and another vessel to berth at the wharf is a matter that does go to the capability of WICET to load vessels with coal. That exchange of vessels necessarily employs the harbour and its physical attributes and restrictions in coming into and going out of the Port of Gladstone."

*The 2010 Simulation Study*

[149] As will be explained, the figure of 27 million tonnes per annum was not a measure of the Handling capability of the terminal, or any of its components. It was a measure of a throughput of coal through the terminal.

[150] The Simulation Study recorded that Wiggins Island Coal Export Terminal Pty Ltd had requested SMS to update an existing model and to carry out analysis work to identify "key drivers". Under the heading "Analysis", SMS wrote that "[s]ensitivity analysis of key drivers such as mix of train sizes, dump rates achievable due to coal "stickiness", number of coal types, mix of coal types and mix of ship types and shipment sizes will be carried out."

[151] This modelling, represented in particular by "Table 3.1 – Key Performance Indicators for Base Case", set out relevant data for nine scenarios, each defined by a hypothetical level of throughput, ranging from 22Mtpa to 30Mtpa, including one for a throughput of 27Mtpa.

[152] As the authors wrote, under the heading of "Port Capacity", critical performance indicators were the average ship queue time and the average number of ships in a queue waiting to berth. They wrote:

> "In reality it all comes back to what individual operators are prepared to accept. Ideally for the terminal operator we have a continual queue of ships sitting at anchorage so that there is always a ship to replace one at the berth as one leaves. However, given the variability in ship arrivals over time and the variability in the amount they load, this means that at times the queue can get quite long and the shippers then pay for this in terms of demurrage payments.
>
> The average ship queue time, average number in queue or even average port time all tend to remain reasonable [sic] stable as the throughput increases … until part of the system starts to become a bottleneck and then the curve can start to rise reasonably rapidly. We reach a point where if we start throwing more demand all we do is increase the size of the ship queue as there is not the capacity to get [any more] coal through the terminal – this is often described as an ever-increasing queuing situation.
>
> Ideally, the terminal will operate at a point well before this massive increase but at a point of inflexion in one of these curves (all tend to

> move in a similar pattern relative to throughput). This still gives some potential catch up capability but means we are operating at a reasonable throughput level."

[153] The modelling showed that throughputs of nearly 29Mtpa could be achieved, but at "an extremely high level of berth occupancy", a ship queue number sometimes increasing to 18 ships, and potential problems in that part of the terminal where trains would unload coal.[58] They noted that the average and maximum number of ships in a queue would stay relatively stable as the throughput increases before starting to climb "from around 26Mtpa throughputs."

[154] On this analysis, the authors wrote that the model was "clearly demonstrating that if all the assumptions and data are correct … the user data supplied at 27Mtpa is achievable" because "[a]t this level there will be a reasonable amount of queuing but some catch up capability if random actions impact on operations." They wrote that "[t]he declaration of nominal capacity will depend on the level of ship queuing (and therefore demurrage levels) that the terminal owners are prepared to accept."

[155] Clearly, the suggested "nominal capacity" of 27Mtpa was not a measure of the maximum throughput of the terminal. Rather, it was a measure of a maximum throughput for which the key performance indicators, most importantly the number of ships and the average time spent by ships in a queue, would be met.

[156] As I have said, this nominal capacity was not a measure of the Handling capability of the terminal, or any of its components. The particular demands upon those components, at that level of throughput, could be seen in the model. Most relevantly, at a throughput of 27Mtpa, the model represented that this would involve a "gross berth loading rate" of 4,619 tph. But that was not a statement of the capability of the shiploader. Instead, it was the shiploading rate which, upon the premises of the other data set out in the model, would be required in order to produce a throughput of 27Mtpa.

[157] Appendix A to the Simulation Study detailed that data. It included a maximum rate for pushing coal from the stockpile to the conveyor belts leading to the shiploader of 6,900 tph, and a maximum rate for the shipload conveyor of 8,250 tph. This illustrated that the shiploading component of the terminal was capable of transporting coal from the stockpile and loading a ship at a faster rate than the gross loading rate of 4,619 tph as shown by the model as the rate for the achievement of a throughput of 27Mtpa. In other words, the shiploading system was capable of handling more coal than was required for that outcome.

[158] The question in this case was not whether, at the time when the notices were given, the shiploading system was capable of Handling coal at 60 per cent or more of its *maximum* capacity. It was whether the Facilities, in particular the shiploading component, was capable of Handling coal at a rate of at least 60 per cent of 27Mtpa.

*The assessment of the capability of Handling coal*

[159] The terminal's capability of Handling coal was a function of what had been built, installed and commissioned at the terminal. The extent to which that Handling capability

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58 The authors noting that "Often trains cannot be scheduled as the yard is full for the coal types loaded at a load point and when a cargo is loaded trains can then deliver again."

might be utilised depended upon other factors, one of which was the inter-vessel berthing time. But those factors did not affect the rate at which the terminal itself could Handle coal. Consequently, they were not relevant to an assessment of the terminal's capability of Handling coal as at the dates on which the cl 6.1(c) notices were given.

[160] As Aurizon submits, there is some significance that the later milestone[59] was defined quite differently. It was defined by reference to, amongst other things, the completion of all necessary dredging and other ancillary works, and not by reference to the Facilities' capability of Handling coal.

[161] Therefore, I regret that I am unable to agree with the trial judge that the inter-vessel berthing time was relevant. In the passage which I have set out earlier,[60] the trial judge reasoned that some "externalities" should be disregarded, such as there being "insufficient ships arranged to make full use of the capability of WICET to load vessels with coal". Yet his Honour held that "the effect upon the available time for loading of coal caused by the necessity for one vessel to depart the wharf and another vessel to berth at the wharf is a matter that does go to the capability of WICET to load vessels with coal". This was because "[t]hat exchange of vessels necessarily employs the harbour and its physical attributes and restrictions in coming into and going out of the Port of Gladstone." The point may seem a fine one, but in my opinion, his Honour's view did not distinguish between the Handling capability of the terminal and circumstances which might affect the use of that capability. As I am about to discuss, that question affected his Honour's consideration of the evidence and his conclusion on this issue.

*The evidence*

[162] The first vessel was loaded at the terminal in April 2015.[61] By the end of that month, construction of the terminal had reached "mechanical completion".[62] From that point, there was a scheduled process of "ramp up" of the terminal, which the trial judge described as follows:

> "[292] During the ramp up period, WICET planned to increase the operation of a number of systems, including those operations for loading of vessels with coal. The planned activities included optimisation works, system testing (such as bias testing of the sample station which occurred during September 2015), assessing and inspecting work areas, completing ongoing construction work, providing contractors with access to rectify defects and finalising outstanding items.
>
> [293] At the end of the ramp up period, in May 2016, WICET planned to carry out testing intending to satisfy the requirements of the "completion test" under the Senior Syndicated Facilities Agreement for the WICET project, in order to achieve the "completion date". The proposed testing included ship loading of coal at an annualised rate equivalent

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59 Port Facilities (Final) Available Date.
60 Judgment [354].
61 Judgment [289].
62 Judgment [290].

> to at least 90 percent of 27 million tonnes per annum over a continuous period of 30 days."

[163] According to the scheduled ramp up, the terminal was to operate at 15 per cent capacity from May to July 2015, at 30 per cent capacity from August to October 2015, at 60 per cent for the next three months and at 90 per cent for the following three months.[63] Reports were produced in the period to 30 September 2015 in which the operator of the terminal assessed its performance. For the month of September 2015, a report recorded that 648,038 tonnes were loaded, against a "nominal capacity" of 675,000 tonnes (which was 30 per cent of the monthly equivalent of 27Mtpa). Of course, that report was a record of what was actually handled, and not an assessment of Handling capability.

[164] From records of the loading of coal and the departure of vessels, in September 2015, was sourced the data in this table prepared by the trial judge.[64]

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

[165] In that month, there were several shutdowns for repair or maintenance operations.[65] The first shutdown, which was planned, commenced on 5 September 2015 and continued for 136 hours. Another shutdown, which involved painting rectification work, had been scheduled to occur over four days in the period from 8 September to 19 September. His Honour said that this work was done, in part at least, during that 136 hour shutdown period. Work was also done on other machinery on various days from 6 September, although, it appears, not continuously.

[166] A document recorded the downtime in shiploading for the purpose of "Sample Plant Bias Testing", which commenced on 14 September whilst the vessel numbered 12 in the above table was at berth.[66] This shutdown caused delays totalling nearly 20 hours and ending on 15 September.

[167] These shutdowns obviously affected the throughput of coal in September 2015. But it did not follow that they affected the Handling capability as at either of the dates upon which the appellants' notices were given.

[168] As at 30 September 2015, there were shutdowns scheduled for October, November and December 2015, for work, which were to total, in those months, 96, 72 and 84 hours respectively.[67]

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63 Judgment [291].
64 Judgment [297].
65 Judgment [298].
66 Judgment [304].
67 Judgment [305].

[169] The relevant witness for the appellants, Mr Martin Oldfield, made calculations in his assessment of the Handling capability, which used 191.7 as the number of hours for which parts of the Facility were shut down in September 2015. That included an amount for Sample Plant Bias Testing of 19.66 hours, amounts for other shutdowns totalling 36 hours, and the planned shutdown of 136 hours to which I have referred. Aurizon's case challenged the use of that total of 191.7 hours, contending that it should be reduced to 114 hours. The trial judge accepted Aurizon's challenge to the inclusion of 19.66 hours for the Bias Testing. He was also unpersuaded by Mr Oldfield's evidence that the shutdown for certain work done on the jetty conveyor should be included. And as to the planned shutdown, his Honour concluded that this work could have been done in fewer than 136 hours. Ultimately, his Honour accepted that the total for routine maintenance and shutdowns should be assessed at no more than 141.7 hours.

*Aurizon's evidence*

[170] The principal witness for Aurizon, on this issue, was Mr Bruce Martin. In his opinion, the Handling capability of the Port Facilities was 18.82Mtpa. This was above the agreed threshold of 16.2Mtpa (60 per cent of 27Mtpa).

[171] Mr Martin calculated what he described as the "average annualised loading throughput capacity" by this equation:

> gross loading rate (expressed as tonnes per hour) x 8760 (the number of hours in a calendar year) x utilised hour percentage/1,000,000[68]

[172] The "gross loading rate" was calculated by Mr Martin from the data for the vessels that berthed, loaded and sailed in September 2015, as set out in the above table, apart from vessels 10 and 12. The "utilised hour percentage" was his estimate of the percentage of the total available hours for which the Port Facilities were capable of loading vessels.

[173] The trial judge was unpersuaded to accept Mr Martin's use of 80 per cent as the utilised hour percentage. He said that it was used without underlying data or reasoning, and was a mere estimate rather than the result of a calculation.[69] At least for that reason, he rejected Mr Martin's opinion of the Handling capability.

*The appellants' evidence*

[174] The appellants' case relied on the evidence of Mr Oldfield. The trial judge summarised Mr Oldfield's methodology as involving these six steps:

> "(a) Step 1: assess the actual number of hours spent at berth in September 2015, being the hours spent loading plus the periods for lines on to first coal and last coal to lines off;
>
> (b) Step 2: calculate the average actual berth time for the five vessels that berthed at WICET in September 2015;
>
> (c) Step 3: assess the actual number of hours WICET was unavailable for loading coal in September 2015 due to

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68 Judgment [307].

69 Judgment [313].

maintenance and optimisation shutdowns to the loading stream;

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

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

(f) Step 6: calculate the total tonnes that WICET was capable of loading during September 2015 by multiplying the average actual tonnes loaded per vessel by the number of vessels that could have been loaded."[70]

[175] In step 1, Mr Oldfield used the total of 300.97 hours which appears in the above table, and adjusted the time at which vessel 12 was at berth by deducting 19.66 hours from its loading and berth times, to allow for the bias testing of the sampling plant. In step 2, he then calculated the average actual berth time per vessel at 56.3 hours.

[176] In step 3 (as already discussed) Mr Oldfield assessed the actual number of hours for which the Port Facility was unavailable for loading coal in September 2015, due to maintenance and optimisation shutdowns, at 191.7 hours.

[177] In step 4, Mr Oldfield calculated that 8.6 vessels could have been loaded in September 2015. A factor in this calculation was an "inter-vessel arrival time" for each vessel of 5.38 hours.

[178] In step 5, the average actual tonnes loaded per vessel was calculated by Mr Oldfield at 135,464.4 tonnes.

[179] In step 6, the result of multiplying that average tonnes per vessel by 8.6 vessels was the calculated tonnes that WICET was capable of loading during September 2015, was an amount which was approximately 52 per cent of the monthly equivalent of 27Mtpa.

*The trial judge's assessment*

[180] The trial judge helpfully compiled a table[71] which showed his adjustments to Mr Oldfield's calculations. As noted already, he reduced the hours for planned closures for routine maintenance and optimisation shutdowns, by 50 hours to 141.7 hours. He excluded vessel 12 from the calculation of the average gross loading rate, which also affected the factors of the hours spent in loading vessels and their berth times. In turn, it affected the number of vessels which would have been possible in September 2015, for which the judge's assessment was 10.4. All up, the result, on the trial judge's calculations employing Mr Oldfield's methodology, but with those adjustments, was that an amount of 1,331,356 tonnes could have been loaded. As it

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70 Judgment [316].

71 Set out at Judgment [343].

happened, this came to 60 per cent of what he described as the full design capacity.[72]

[181] The trial judge rejected a number of criticisms by the appellants of Mr Oldfield's opinions and assumptions, which were said to be too favourable to Aurizon. What ultimately mattered was their criticism of Mr Oldfield's assumptions about the inter-vessel arrival time. Mr Oldfield had assessed an average of 5.38 hours for inter-vessel arrival times, which he had calculated by adjustments to an average period of 3.38 hours allowed in the Simulation Study. The trial judge concluded that there was sufficient force in the appellants' arguments on this point to leave him unpersuaded that as at 30 September 2015, it was reasonable to assume that there would be an average inter-vessel arrival time of 5.38 hours. For that reason, the judge concluded that he was not satisfied that by then, the WICET was capable of Handling coal by loading vessels at 60 per cent or more of 27 million tonnes per annum.[73]

[182] As can be seen, the trial judge's assessment employed a methodology for which the inter-vessel arrival time was a critical factor. Because I have concluded that this factor was irrelevant, the trial judge's employment of Mr Oldfield's methodology, and assessment of the Handling capacity, cannot be accepted. This Court must make its own assessment.

*The findings which should be made*

[183] The Handling capability was to be assessed as at 30 September and 1 October 2015. Evidence of circumstances which existed before then had to be considered according to whether those circumstances were likely to reoccur. For example, the shutdown for the bias testing of the sample plant was an event which was not expected to reoccur. Nevertheless, in general the experiences of September 2015, for the most part, provided an evidentiary basis for the assessment.

[184] On the correct interpretation of "capable of Handling Coal at 60 % or more of the Port Facilities' full design capacity", the methodology of Mr Martin was appropriate. The trial judge did not accept Mr Martin's conclusions for several reasons. One was that he preferred the methodology of Mr Oldfield, which factored in the inter-vessel arrival time, which Mr Martin considered to be irrelevant. Another reason was his Honour's rejection of Mr Martin's estimate of 80 per cent as the "utilised hour percentage". A further reason was that Mr Martin calculated the gross loading rate which was actually achieved in September 2015, by excluding the experiences of loading vessels 10 and 12, whereas his Honour saw fit to exclude only that of vessel 12.

[185] As to that third point, the trial judge found that vessel 12 should be excluded for the following reasons. Firstly, its gross loading rate was 2,103 tonnes per hour, which was less than half the rate of the preceding vessel and about half that of the vessel which had followed it.[74] Secondly, during the period in which it was berthed, the bias testing of the sample plant was carried out, and an internal report dated 30 September 2015 recorded that testing as having an adverse impact on the gross

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72 Which was an amount of 2,219,178.08 tonnes for that month, allowing for the fact that this was a month of 30 days.

73 Judgment [358].

74 Judgment [336].

loading rate. The witness Mr Anderson explained the process of bias testing, as involving taking bulk samples from a stationary conveyor belt to analyse and check the results from the plant. He described such testing as extremely disruptive and as an event which, if the test is successful, occurs only once.[75] At least for those reasons, his Honour's exclusion of vessel 12 should not be disturbed.

[186] As his Honour calculated, the exclusion of vessel 12 would result in a total of 512,708 tonnes as the quantity of coal loaded in the month.[76] And the exclusion of vessel 12 results in a total number of hours of ships at berth of 201.2.[77] (Arguably, the relevant figure would be the total hours spent in *loading* those four ships, rather than the total time for which they were berthed. But the latter may be used, it being the factor used by Mr Oldfield and which is more favourable to the appellants' case.)

[187] Applying that factor of 201.2 hours to the actual tonnage of 512,708 tonnes results in an average tonnes per hour for that month of 2,548.25.

[188] The other input is the utilisation rate, which is the percentage of the 720 hours in the month during which the terminal was able to load vessels. This may be derived by Mr Oldfield's step three, as qualified by his Honour's findings. Before going to the impact of those findings, it is illustrative first to calculate the utilisation rate, and from that the Handling capability, on the premise of Mr Oldfield's 191.7 hours of shutdowns for that month. Upon that premise, there were 528.3 hours (720 less 191.7) in which the facilities were able to be used, amounting to 73.37 per cent of the total hours for that month. On that premise, the Handling capability would be calculated as follows:

> 2,548.25 tonnes per hour x 8,760 hours x 73.37 per cent = 16,378,143 tonnes per annum or 60.66 per cent of the Port Facilities full design capacity, of 27Mtpa.

In other words, on that premise the milestone would still have been reached.

[189] Alternative calculations could be made on the basis of alternative inputs for the utilisation rate. Three examples may be given, employing 136 hours of shutdown time (being the scheduled shutdown time for that month), 141.7 hours (the trial judge's finding) and 172.04 hours (Mr Oldfield's total less the 19.66 hours spent in the process of bias testing during the loading of vessel 12). The resultant calculations using these inputs are as follows:

| Hours shutdown | Utilisation Rate | Capability | Percentage of 27Mtpa |
|---|---|---|---|
| 136 | 81.11% | 18,106,165 | 67.05 |
| 141.7 | 80.32% | 17,929,444 | 66.40 |
| 172.04 | 76.11% | 16,989,784 | 62.93 |

75 Judgment [337].
76 As set out in the table at Judgment [343].
77 Or 300.97 less 99.77, as set out in the table at Judgment [343].

[190] It can therefore be seen that, whichever utilisation rate is used, the Port Facilities were capable of Handling coal at a rate which was well in excess of the threshold of 60 per cent of the Port Facilities' full design capacity.

[191] The timing issue should have been decided in Aurizon's favour. The notices, if otherwise valid, were given too late.

**Costs**

[192] The trial judge ordered that the appellants' pay only 65 per cent of Aurizon's costs.[78] This was on the basis that Aurizon was unsuccessful on the port timing issue, which took up significant time and involved significant cost. As Aurizon submits, if it succeeds here on the port timing issue, it ought to have all of its costs of the proceeding in the Trial Division.

**Conclusions and orders**

[193] The notices given by the appellants were ineffective. The orders made by the trial judge on 27 June 2019 should stand. The costs orders made on 11 October 2019 should be varied.

[194] I would order as follows in each of Appeal No 7857 of 2019 and Appeal No 7859 of 2019:

1. Appeal against the orders made on 27 June 2019 be dismissed.
2. The order made on 11 October 2019 be set aside.
3. The appellants pay the costs of the respondent of the proceeding in the Trial Division and of the appeal.

[195] **MULLINS JA:** I agree with McMurdo JA.

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78 *Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd (No 2)* [2019] QSC 249.