SUPREME COURT OF QUEENSLAND

CITATION:	*Australia Pacific LNG Pty Limited & Ors v The Treasurer, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Sport* [2019] QSC 124
PARTIES:	**AUSTRALIA PACIFIC LNG PTY LIMITED** **ACN 001 646 331** (first applicant) **AUSTRALIA PACIFIC LNG (CSG) PTY LIMITED** **ACN 099 577 769** (second applicant) **AUSTRALIA PACIFIC LNG CSG MARKETING PTY LIMITED** **ACN 008 750 945** (third applicant) **AUSTRALIA PACIFIC LNG (MOURA) PTY LIMITED** **ACN 064 989 813** (fourth applicant) **v** **THE TREASURER, MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER PARTNERSHIPS AND MINISTER FOR SPORT** (respondent)
FILE NO/S:	SC No 1027 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	24 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2018; 20 November 2018; 21 November 2018; 22 November 2018
JUDGE:	Bond J
ORDER:	**The orders of the Court are:** **1. It is declared that the respondent's petroleum royalty decision dated 16 December 2015 was invalid and of no effect.** **2. The respondent's petroleum royalty decision dated 16 December 2015 is set aside with effect from the**

date it was made.

3. **The matter to which the respondent's petroleum royalty decision dated 16 December 2015 relates is referred back to the respondent for further consideration and determination according to law.**

4. **I will hear the parties on the question of costs.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – FAILURE TO OBSERVE STATUTORY PROCEDURE – where the applicants applied to the respondent for a petroleum royalty decision – where applicant provided expert reports in support of application which supported the adoption of the Residual Price Method as a methodology to determine the amount that the petroleum could reasonably be expected to realise if it were sold on a commercial basis – where the respondent obtained competing expert advice which supported the adoption of the Adopted Netback Method – where the respondent wholly accepted the advice of the expert who supported the Adopted Netback Method – where the applicants alleged the Adopted Netback Method was not capable of being used to determine the amount that the petroleum could reasonably be expected to realise if it were sold on a commercial basis – whether the respondent misapplied the statutory test under s 148(1)(a) of the *Petroleum and Gas (Production and Safety) Regulation* 2004 (Qld) in making a petroleum royalty decision

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – OTHER CASES – where the applicant's applied to the respondent for a petroleum royalty decision – where the applicant's contended that if the first ground of judicial review was made out then the Adopted Netback Method stipulated by the respondent to calculate the market value of the petroleum had no discernable relationship with the market value of petroleum produced and instead imposed a duty of excise – where the intervenor submitted that no constitutional point arose which was necessary to be determined – whether the petroleum royalty decision imposes a duty of excise or a tax on the production and sale of LNG

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS – where the applicants applied to the respondent for a petroleum royalty decision – where the applicants alleged that the merits of the choices and assumptions made in the expert report which the respondent wholly adopted in making the petroleum royalty decision were so poor that the decision must be regarded as being made outside the bounds of legal reasonableness – where the reasons for the decision given by the respondent suggested that the respondent had rationally engaged with the competing expert evidence, had expressed a

preference for the methodology supported by one expert and had justified that choice in a coherent and intelligible way – whether the decision was made outside the bounds of legal reasonableness, having regard to the scope, purpose and objects of the statutory source of the power

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – IRRELEVANT CONSIDERATIONS – where the applicants applied to the respondent for a petroleum royalty decision – where the applicant alleged that the respondent, in making the decision, took into account the estimated revenue return to the State of the Adopted Netback Method as compared to the Residual Price Method – where the applicant alleged that the respondent, in making the decision, took into account material and comments received from an unrelated petroleum company – where it was alleged that the Office of State Revenue took the matters into account in preparing the report which was provided to, and relied upon by, the respondent – where it was admitted on the pleadings that the Office of State Revenue had taken those matters into account – where it was alleged that the consideration should be imputed to the respondent – whether the respondent took into account irrelevant considerations in exercising the statutory power to make the petroleum royalty decision

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – where the applicants applied to the respondent for a petroleum royalty decision – where the applicant alleged that the respondent failed to take into account a report produced by QTC to calculate the appropriate rate of return for petroleum royalty – where the relevant matters concerning the QTC report were identified in other material which was before the respondent for consideration — where the applicants allege that the respondent should have had regard to comparable LNG projects in Queensland and any petroleum royalty decision that applies to those projects – where it was admitted that the respondent did not have regard to comparable LNG projects – whether the respondent was bound to take into account the QTC report and the methods applied to other LNG projects in Queensland in making a petroleum royalty decision

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNCERTAIN EXERCISE OF POWER – where the applicants applied to the respondent for a petroleum royalty decision – where the respondent made a petroleum royalty decision which stipulated a formula for calculating the market value of petroleum produced using the Adopted Netback Method – where the formula provided contained variables for calculating each relevant component – where it was alleged that the decision was legally uncertain and invalid as several important variables in the formula were

left open to subjective estimates, assessment, discretionary allocation and matters of judgment – whether the petroleum royalty decision was vitiated by failure of the condition that the requisite degree of certainty be achieved

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – GENERALLY – where the applicants applied to the respondent for a petroleum royalty decision – where the respondent obtained expert evidence in relation to the application – where the respondent afforded the applicant an opportunity to respond to that material – where the respondent subsequently obtained further expert evidence – where the respondent did not provide the applicant an opportunity to respond to the further expert evidence, the final form of the proposed formula and other material – where it was alleged that the respondent breached the rules of natural justice in failing to provide the applicant with an opportunity to be heard in relation to this material – whether the procedure adopted by the respondent was consistent with the procedure which a reasonable and fair repository of the statutory power would adopt in the circumstances

Constitution (Cth), s 90

Judiciary Act 1903 (Cth), s 78B

Judicial Review Act 1991 (Qld), s 20, s 23

Petroleum and Gas (Production and Safety) Act 2004 (Qld), s 10, s 590, s 594, s 599, s 599A, s 599B, s 599C, s 599D, s 599E, s 601, s 602, s 603

Petroleum and Gas (Production and Safety) Regulation 2004 (Qld), s 146A, s 147, s 147A, s 147B, s 147C, s 148, s 148A, s 148B, s 148C, s 148C, s 148D, s 148E, s 148F, s 148G, s 149, s 149B, s 149H, s 149I

Petroleum Resource Rent Tax Assessment Regulations 2005 (Cth)

Arnold v Minister Administering the Water Management Act 2000 (No 6) [2013] NSWLEC 73, considered

Australian Conservation Foundation Inc v Forestry Commission of Tasmania (1988) 19 FCR 127, cited

Australian Retailers Association v Reserve Bank of Australia (2005) 148 FCR 446, considered

Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2) (2012) 187 LGERA 161, cited

Fraser Henleins Pty Ltd v Cody (1945) 70 CLR 100, cited

Jones v Dunkel (1959) 101 CLR 298, considered

King Gee Clothing Co Pty Ltd v the Commonwealth (1945)

71 CLR 184, considered

Kirk v Industrial Relations Commission of New South Wales (2010) 239 CLR 531, cited

McCormack v Deputy Commissioner of Taxation (2001) 114 FCR 574, considered

Minister for Aboriginal Affairs v Peko-Wallsend Limited (1986) 162 CLR 24, considered

Minister for Immigration and Border Protection v SZVFW (2018) 357 ALR 408, considered

Minister for Immigration and Border Protection v WZARH (2015) 256 CLR 326, cited

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, cited

Moolarben Coal Mines Pty Ltd v Director-General of the (former) Department of Industry and Investment NSW (Agriculture Division) [2011] NSWLEC 191, considered

Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2) (2008) 251 ALR 80, cited

Pollentine v Parole Board of Queensland [2018] QSC 243, cited

Sean Investments Pty Ltd v MacKellar (1981) 38 ALR 363, cited

TAB Ltd v Racing Victoria Ltd [2009] VSC 338, considered

Turner v Minister of Public Instruction (1956) 95 CLR 245, considered

Visa International Service Association v Reserve Bank of Australia [2003] FCA 977, considered

WB Rural Pty Ltd v Commissioner of State Revenue [2018] 1 Qd R 526, cited

COUNSEL: L F Kelly QC, with M F Johnston, for the applicants

P Looney QC, with A D Scott, for the respondent

P Dunning QC, with D Quayle, for the intervenor

SOLICITORS: Clayton Utz for the applicants

Crown Law for the respondent

Crown Law for the intervenor

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Introduction

[1] Section 590(1) of the *Petroleum and Gas (Production and Safety) Act* 2004 (**the Act**) relevantly provides that a petroleum producer must pay a royalty for the petroleum that it produces. The royalty is payable "at the rate prescribed under a regulation on the value of the petroleum at the prescribed time": s 590(2)(b). The value of the petroleum produced (and upon which the royalty is payable) is the value provided for under a regulation or worked out in the way prescribed under a regulation: s 590(3).

[2] The applicable regulation is the *Petroleum and Gas (Production and Safety) Regulation* 2004 (Qld) (**the Regulation**). Under the Regulation, the royalty is payable at the rate of 10% of "the wellhead value" of the petroleum disposed of by the petroleum producer during a "royalty return period": s 147C. Amongst other things, the Regulation authorises the respondent (**the Minister**), upon application by a petroleum producer, to state a method or formula to be used in working out one or more of the components of the "wellhead value": s 148F.

[3] Such a decision is referred to as a "petroleum royalty decision".

[4] The second, third and fourth applicants are the wholly owned subsidiaries of the first applicant (**APLNG**). Together, the four companies are involved as petroleum producers in a liquefied natural gas (**LNG**) project in Queensland. The project involves the construction and subsequent operation of the requisite infrastructure to permit the following operations to occur:

(a) extracting and processing coal seam gas (**CSG**) from reserves in central Queensland;

(b) collecting, treating and transporting the processed CSG (also referred to as **feedstock gas** or **feedstock petroleum**) through pipelines to a liquefaction facility on the coast near Gladstone;

(c) processing and converting the feedstock gas into LNG via two 'trains' at the liquefaction facility;

(d) storing the LNG in insulated tanks;

(e) marketing and selling the LNG to overseas buyers pursuant to various gas sale agreements; and

(f) loading the LNG for export at purpose built wharf facilities onto ships for transportation to foreign buyers pursuant to relevant gas sale agreements.

[5] It was common ground before me that the CSG produced by the applicants fell within the definition of "petroleum" in s 10 of the Act. It was also common ground that the relevant "petroleum" to be valued for the purpose of calculation of the royalty under the Act was the feedstock gas transferred at what is known as the first point of disposal (namely the point where the feedstock gas exit the CSG processing plants and before it gets to the liquefaction facility). An important point of conceptual distinction is between companies and operations "upstream" of this point and companies and operations "downstream" of this point.

[6] As a petroleum producer within the meaning of the Act and the Regulation, APLNG sought a petroleum royalty decision from the Minister in respect of how it should go about the calculation of one of the components of wellhead value of petroleum, namely the amount the feedstock gas "could reasonably be expected to realise if it were sold on a commercial basis" at the first point of disposal. That issue had a degree of complexity because the value chain in the project involved a number of transfers between related companies, in that the feedstock gas produced by the applicants was transferred to a related APLNG aggregator company, then transferred by the APLNG aggregator company to a

related APLNG LNG processing/export marketing company at the entry point to the LNG liquefaction plant. Thereafter the APLNG export marketing company sold the LNG on a Free On Board basis to external unrelated buyers.[1]

[7] The Minister provided his decision (**the decision**) on 16 December 2015, in the form of a document which, amongst other things, purported to state a method or formula for deciding the amount that the feedstock petroleum could reasonably be expected to realise if it were sold on a commercial basis. The formula expressed in the decision is reproduced in Annexure A to these reasons. Effectively the decision favoured a methodology proposed by an expert retained by the relevant public service department (and supported by it), and rejected criticisms of that methodology and expert's opinion made by APLNG and a raft of expert reports which APLNG had obtained and provided to the Minister, including a report by the expert economist, Professor Gray.

[8] The applicants were aggrieved of the outcome and, by application for a statutory order of review of the decision pursuant to s 20 of the *Judicial Review Act* 1991 (Qld), they sought:

(a) a declaration that the decision is invalid and of no effect;

(b) a declaration that the method of determining the market value of petroleum which was adopted in the decision is not a method which is capable of answering the market value in the way required by the Regulation;

(c) an order quashing or alternatively setting aside the decision with effect from the date it was made; and

(d) an order referring the matter back to the Minister for further consideration and determination consistent with the reasons of the Court and according to law.

[9] There were seven grounds upon which the applicants sought to impugn the decision. They were:

(a) ground 1: misapplication of the statutory test;

(b) ground 2: unlawful imposition of tax;

(c) ground 3: unreasonableness;

(d) ground 4: taking into account irrelevant considerations;

(e) ground 5: failing to take into account relevant considerations;

(f) ground 6: uncertainty; and

(g) ground 7: procedural fairness.

[10] The Minister accepted that his petroleum royalty decision was a decision to which the *Judicial Review Act* applies, but submitted that the various grounds on which the applicants sought to impugn the decision should not be upheld. Amongst other things, the Minister submitted that many aspects of the applicants' argument should be regarded as an attempt to have me embark upon the impermissible course of a review of the merits of the decision.

[11] The expert reports and other material which were before the Minister were also in evidence before me. The applicants also sought to rely on some new evidence, which had not been placed before the Minister. Objection was taken to some of this new evidence. However ultimately the only objections which were pressed were those which addressed the manner by which the applicants sought to rely on a new expert report by Professor Gray, in support of grounds 1, 3, 6 and 7. It was common ground that I should receive the report subject to

[1] There were other related companies which provide services under contracts throughout the value chain, but it is unnecessary to summarise their position in any detail.

the objections and rule on the objections in the course of these reasons. For the reasons set out in Annexure B I have concluded that the expert report of Professor Gray should be admitted for limited purposes.

[12] For reasons which follow, in my view the applicants have made out grounds 4, 6 and 7, with the result that I will make a declaration that the decision is invalid and of no effect and the ancillary orders which they seek.

The regulatory framework

[13] Section 590 of the Act imposes a petroleum royalty on petroleum producers in these terms:

> **590 Imposition of petroleum royalty on petroleum producers**
>
> (1) A petroleum producer must pay the State petroleum royalty for petroleum that the producer produces […]
>
> (2) The petroleum royalty—
>
> (a) must be paid on or before the time prescribed under a regulation; and
>
> (b) is payable at the rate prescribed under a regulation on the value of the petroleum at the prescribed time.
>
> (3) The value of petroleum for the petroleum royalty is the value provided for under a regulation or worked out in the way prescribed under a regulation.
>
> […]

[14] "Petroleum" is broadly defined by s 10 of the Act to include, amongst other things, any substance consisting of hydrocarbons that occur naturally in the earth's crust; or a substance necessarily extracted or produced as a by-product of extracting or producing such hydrocarbons; or fluid extracted or produced from coal or oil shale which consists of or includes hydrocarbons. In ordinary parlance, the definition includes oil, shale oil and, importantly for present purposes, CSG and its by-product, LNG.

[15] There follows in Chapter 6 of the Act a regime for the administration of the collection of royalties imposed by s 590. A proper understanding of the operation of the regime requires the Act to be read with the relevant parts of the Regulation. I make the following observations about the features of the regime relevant to the present case:

(a) Petroleum royalty payable by a petroleum producer is payable for the royalty return period in which the petroleum is "disposed of": s 147(1)(a) of the Regulation.[2] As to this:

(i) "Royalty return period" is the quarterly period for which a royalty return must be lodged: definition in Schedule 2 of the Act and s 146A of the Regulation.

(ii) A petroleum producer disposes of petroleum when it sells or otherwise transfers ownership of the petroleum to another person (or where it flares, vents or uses the petroleum): s 147(2) of the Regulation.

(b) The producer must, on or before the last business day of the month immediately following the royalty return period in which the petroleum was disposed of (referred to as the "ordinary due date"), lodge a written return, containing prescribed "royalty information": s 594 of the Act.[3] The requisite information is specified in s 149 of the Regulation, namely:

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[2] Where, as here, the petroleum is produced under a petroleum tenure within the meaning of the Act, s 147(1)(a) applies. In other circumstances the royalty is payable for the royalty return period in which the petroleum is produced (as opposed to "disposed of"). It is not necessary further to consider those circumstances or that possibility.

[3] Sections 594(2) and (3) give the Minister the option of requiring the provision of the royalty return at some earlier date than the ordinary due date.

(i) the wellhead value of the petroleum disposed of by the petroleum producer during the royalty return period;

(ii) a breakdown of certain prescribed expenses and other deductions which the Regulation identifies as necessary to be made for working out the wellhead value; and

(iii) for each relevant petroleum product disposed of by the producer during the royalty return period, the volume of the product disposed of and the amount of any revenue earned by the producer in relation to the product.

(c) The Minister may, by notice, allow a producer to pay the petroleum royalty payable by the producer for a royalty return period on the day a royalty return must be lodged for the royalty return period: s 147(5) of the Regulation. Otherwise, the royalty is payable in three instalments: first by the last business day of the second month of the royalty return period; second by the last business day of the third month of the royalty return period; and third on the day a royalty return must be lodged for the royalty return period: s 147(3) of the Regulation. The first two instalments are calculated as ⅓ of the total amount paid for the previous royalty return period: s 147A(2) and (3) of the Regulation. It may be inferred that the final instalment must be the balance. There is provision for a producer to elect to pay on a monthly basis in certain circumstances: ss 147A and 147B of the Regulation.

(d) Provision is made for the payment of interest on late payments at the rate prescribed for unpaid tax under the *Taxation Administration Act* 2001 (Qld): s 602 of the Act and ss 149H and 149I of the Regulation.

(e) Whilst a petroleum producer owns petroleum for which a royalty is, or could be payable, the producer must also lodge an annual royalty return for each annual return period, stating the royalty information for that period: s 599 of the Act.

(f) The Minister must make an assessment of the amount of petroleum royalty for each royalty return and annual royalty return: ss 599B(1) and 599D of the Act. The Minister may make a default assessment if satisfied that an amount is payable but the producer has not lodged a return as required: ss 599B(2) and 599D of the Act. Provision is made for reassessment in appropriate circumstances (see s 599C of the Act) namely if the Minister is reasonably satisfied that the original assessment was not, or is no longer, correct.

(g) Having made an assessment or reassessment, the Minister must give the producer an assessment notice: s 599E of the Act. Amongst other things the notice must identify whether further monies are payable consequent upon the assessment or reassessment, and, if so, the amount, the due date, and the amount of penalty which might be payable: ss 599E and 601 of the Act. Penalties on reassessments of original assessments which result in an increased amount payable are 75% of the amount of the increase: s 601(2)(c) of the Act. In other circumstances penalties can amount to 75% of the amount assessed as payable: s 601(2)(a) of the Act.

(h) Unpaid royalty may be recovered as a debt: s 603 of the Act.

(i) There is a mechanism for the Minister to require a petroleum producer to provide a royalty estimate for the petroleum producer for a stated future period: s 599A of the Act and s 149B of the Regulation. This process simply formalises a long-standing administrative practice of collecting royalty revenue estimates for the State Budget and for year-end accrual purposes.[4] There is a separate mechanism for the Minister

[4] See Explanatory Note to the *Mines and Energy Legislation Amendment Regulation (No 1)* 2011 (Qld).

to estimate the royalty return where the petroleum producer has not lodged a royalty return for the previous royalty return period as required under the Act: ss 147A(5) and 147B(2) of the Regulation. In these circumstances, the petroleum royalty payable for the first and second instalments (see [15](c) above) is the estimated amount: s 147A(5)(b) of the Regulation.

[16] It is evident that the liability to pay a royalty only starts accruing once a petroleum producer is in a position to dispose of petroleum during a royalty return period, but that once that occurs there is a complicated regime which requires regular and accurate calculation of the amounts payable and payment on or before particular dates, if imposition of default interest and very significant penalties is to be avoided.

[17] How does a producer go about the process of calculating royalties for the purpose of discharging its obligation to pay and avoiding the adverse financial imposts of default interest and royalty penalties?

[18] As I have already mentioned, s 590(2)(b) and (3) of the Act identifies two variables:

(a) the rate prescribed under a regulation; and

(b) the value of the petroleum at the prescribed time, where the value is the value provided for under a regulation or worked out in the way prescribed under a regulation.

[19] Section 147C of the Regulation identifies the rate, the value and the prescribed time. It provides:

> Petroleum royalty payable by a petroleum producer is payable at the rate of 10% of the wellhead value of the petroleum disposed of […] by the petroleum producer during a royalty return period.[5]

[20] Bearing in mind the definition of "disposed of" provided for in s 147(2) of the Regulation (referred to at [15](a)(ii) above) it can be noted that:

(a) the "rate prescribed" is 10%; and

(b) the value is wellhead value of petroleum sold, or the ownership of which is otherwise transferred to another person, used, or flared or vented; and

(c) the "prescribed time" is during a royalty return period.

[21] The next critical step is working out what is the wellhead value of petroleum disposed of during a royalty return period. In this regard, s 148 of the Regulation provides (emphasis added):

> **148 Working out wellhead value of petroleum**
>
> (1) **The wellhead value of petroleum disposed of […] by a petroleum producer in a royalty return period is—**
>
> (a) **the amount that the petroleum could reasonably be expected to realise if it were sold on a commercial basis; less**
>
> (b) the sum of the following—
>
> (i) **the expenses for the royalty return period** mentioned in subsection (2);
>
> (ii) any negative wellhead value deducted under subsection (4).
>
> (2) For subsection (1)(b)(i), the expenses are each of the following—

[5] The words encompassed by the ellipsis are "or, if section 147(1)(b) applies, produced". Where, as here, the petroleum is produced under a petroleum tenure within the meaning of the Act, s 147(1)(b) will not apply. It is not necessary further to consider that possibility.

(a) **a pipeline tariff or other charge paid or payable by the petroleum producer to a third party for transporting the petroleum through a pipeline to the point of its disposal,** if the Minister reasonably believes the amount of the tariff is reasonable on a commercial basis;

(b) **a processing plant toll or other charge paid or payable by the petroleum producer to a third party for processing the petroleum before it is disposed of**, if the toll is calculated—

(i) on a commercial basis; or

(ii) if the Minister reasonably believes that use of the plant by other petroleum producers or for other purposes makes another basis for charging the most practicable basis—on the other basis;

(c) **depreciation of capital expenditure by the petroleum producer on a petroleum facility or pipeline used for processing the petroleum or transporting it from the wellhead of the well in which it was produced to the point of its disposal**, allocated over—

(i) 10 years; or

(ii) a shorter period decided by the Minister, if the Minister reasonably believes the shorter period is reasonable having regard to the expected potential for production of the natural underground reservoir from which the petroleum is produced;

(d) **an operating cost** incurred, or to be incurred, by the petroleum producer that **directly relates to**—

(i) **treating, processing or refining the petroleum before it is disposed of**; or

(ii) **transporting the petroleum to the point of its disposal**;

(e) **another expense incurred, or to be incurred**, by the petroleum producer **in relation to the operation of the site at which the petroleum was produced that is approved** by the Minister for the purpose of this subsection.

(3) [This subsection identifies certain expenses not to be included under subsection (2).]

(4) [This subsection permits of the possibility that if the calculation in one royalty return period gives rise to a negative wellhead value, that may be carried forward to be deducted in a later royalty return period in the same annual return period.]

(5) To remove doubt, it is declared that a petroleum producer is not entitled to receive any payment in relation to a negative wellhead value.

[22] The evident goal of the calculation under s 148 of the Regulation is to establish a value for a product (namely petroleum) disposed of by sale or other ownership transfer during a particular period, for the purpose of the royalty calculation. At a conceptual level, the calculation is essentially a revenue figure less an expenses figure. Many, but not all, of the deductions are of expenses which are actually incurred or to be incurred for the royalty return period. However the revenue figure from which the expenses are deducted is not an actual revenue figure for the royalty return period. Rather, it is a hypothetical figure, namely "the amount that the petroleum could reasonably be expected to realise if it were sold on a commercial basis". Identifying that figure requires some form of valuation process.

[23] How does a producer go about the process of performing that valuation?

[24] A producer might simply do a valuation on what it conceived was a correct first-principles basis for each quarterly royalty return and annual royalty return, and pay the amount of royalty based on those valuations. Such a course would involve accepting the financial consequences of getting the valuations wrong, in the sense that a different view might be taken on assessment or reassessment by the Minister, leading to potential interest and penalty consequences.

[25] Chapter 6 Part 5 Division 4 Subdivision 2 of the Regulation specifies a means by which the producer may obtain guidance from the Minister.

[26] Pursuant to s 148B(1)(b) of the Regulation one avenue by which the subdivision applies is if:

> a petroleum producer applies to the Minister for a decision (a ***petroleum royalty decision***) about how 1 or more of the components of the wellhead value of petroleum disposed of or produced by the petroleum producer must be worked out for a particular transaction or particular period.

[27] The process of a petroleum producer applying for a petroleum royalty decision may also be initiated by the Minister. Section 148C of the Regulation empowers the Minister to ask the petroleum producer to apply for a petroleum royalty decision. If that occurs, the producer is obliged to comply with the request and thereafter the Minister responds as if the petroleum producer had applied for the decision without being asked to do so.

[28] The term "component" to which reference is made in the definition of "petroleum royalty decision" is itself defined at s148A of the Regulation in a way which refers to the revenue and expenses elements referred to in s 148 of the Regulation, identified at [21] above. Section 148A provides as follows:

> ***component***, of the wellhead value of petroleum disposed of or produced by a petroleum producer in a royalty return period, means—
>
> (a) an element used to work out the amount under section 148(1)(a) that the petroleum could reasonably be expected to realise; or
>
> (b) an expense, or an amount contributing to an expense, under section 148(2)(a), (b), (d) or (e).

[29] The contemplated application to the Minister for a decision about how one or more of the components of the wellhead value of petroleum must be worked out is enabled by s 148D of the Regulation, which provides:

> **148D Application by petroleum producer for petroleum royalty decision**
>
> (1) The petroleum producer may apply to the Minister for a petroleum royalty decision.
>
> (2) The application must be made—
>
> (a) before the petroleum is produced; or
>
> (b) before, or as soon as practicable after, a material change of circumstances that may affect whether a component of the wellhead value of the petroleum is based on an arms-length transaction at market value.

[30] The requirements for making the application are specified in s 148E of the Regulation. Amongst other things the application for a petroleum royalty decision must:

> […]
>
> (c) state why the petroleum producer is seeking the petroleum royalty decision; and
>
> (d) include a statement about how the petroleum producer proposes a component of the wellhead value of the petroleum should be worked out for a particular transaction or particular period; and
>
> *Examples—*
>
> • a fixed value with adjustments in particular circumstances
>
> • a formula for deciding the market value
>
> […]

[31] By s 148F(1) and (3) of the Regulation, the Minister is obliged to make a petroleum royalty decision if an application is made and is also obliged to notify the producer of the decision and the reasons for it. Section 148F(2) of the Regulation provides that the petroleum royalty decision may state:

> (a) a method or formula—

(i) for deciding the market value of the petroleum; or

(ii) for working out particular tolls or tariffs paid or payable by the petroleum producer; or

(iii) for adjusting the market value of the petroleum or the tolls or tariffs in particular circumstances; or

(iv) to be used for working out any other component of the wellhead value of the petroleum; and

(b) the period for which the petroleum royalty decision applies; and

(c) when the petroleum royalty decision is to be reviewed.

[32] Section 148G of the Regulation sets out an open-ended list of the criteria that the Minister may consider in making the petroleum royalty decision:

(a) the amount for which petroleum has been sold in similar circumstances;

(b) how the value of the petroleum can be adjusted to reflect changes to the market value of the petroleum;

(c) the expenses likely to be incurred by the petroleum producer in arms-length transactions at market value;

(d) the period for which the petroleum royalty decision, or aspects of the decision, will apply;

(e) the need for any future adjustment of the petroleum royalty decision or aspects of the decision;

(f) any submissions made to the Minister by the petroleum producer in relation to a component of the wellhead value of the petroleum;

(g) any other relevant matter.

The petroleum royalty decision

[33] In this case what was sought and obtained, and what the applicants now seek to impugn, was a petroleum royalty decision of the Minister which stated a method or formula for working out only one of the components of wellhead value, namely a method or formula for deciding the market value of the petroleum concerned.

[34] I turn now to record in broad outline the way in which the decision was sought and ultimately made.

Transfer pricing methodologies

[35] The problem to be addressed by the petroleum royalty decision was relatively obvious. How do you state a method or formula for working out the market value of feedstock petroleum at the first point of disposal, where the transfer itself is between parties who are related and who, *ex hypothesi*, are not transferring the feedstock petroleum in consideration of the payment of an arm's length market price?

[36] The difficulties involved in establishing a valuation for taxation purposes where a commodity is being transferred between associated enterprises is a problem well-known in international trade. For decades now, the Organisation for Economic Co-operation and Development (**OECD**) has promulgated various iterations of its *Transfer Pricing Guidelines* for the purpose of providing guidance for OECD member countries in relation to such issues, both in relation to members' domestic transfer pricing practices and in relation to proceedings inter se.

[37] The guidelines became widely accepted. Indeed, in 2010 the Queensland government department then responsible for administering the petroleum royalty scheme, the Department of Employment, Economic Development and Innovation, had promulgated guidelines which suggested that the Minister might have regard to some of the principles enunciated in the OECD *Transfer Pricing Guidelines* 1995, because those principles were

so regarded. However, it is apparent that even under those guidelines there was no "one size fits all" methodology or formula.

[38] Material placed before the Minister for the purposes of the making of the decision identified and evaluated the appropriateness of a number of potentially applicable methodologies. At a conceptual level, they may be described in the following way:

(a) The "Comparable Uncontrolled Price Method", which would ascertain market value of a commodity by comparing the price for a commodity transferred in a controlled transaction (i.e. a transaction between related entities) to the price charged for a commodity transferred in a comparable uncontrolled transaction in comparable circumstances. It will appear that this method had no application to feedstock gas because, at least at the relevant times, there were no comparable uncontrolled transactions.

(b) The "Netback Method", in which the question of market value of the feedstock petroleum at the first point of disposal would be approached from the downstream side of the disposal. The method would identify the ascertainable market price of the LNG when sold externally and would deduct from that price an appropriate gross margin to reflect the amount which the seller would seek (1) to cover its selling and other operating expenses and (2) to make an appropriate return on its capital, taking into account the capital expenditure it had incurred and the risks it had assumed. The theory would be that such a calculation would derive the maximum price that the seller would be prepared to pay the upstream producer for the feedstock gas which it had sold externally.

(c) The "Costs Plus Method", in which the question of market value of the feedstock petroleum at the first point of disposal would be approached from the upstream side of the disposal. The method would identify an appropriate gross-profit mark-up for the upstream producer, and then add the mark-up to the costs of producing the feedstock petroleum. The theory would be that such a calculation would derive the minimum price for which the upstream producer would be prepared to sell its feedstock petroleum.

(d) The "Residual Price Method" (also referred to as RPM, which was the methodology prescribed under the *Petroleum Resource Rent Tax Assessment Regulations* 2005 (Cth) (**PRRT Regulation**), and which was graphically depicted in one expert report by the diagram below[6]), in which market value of the feedstock petroleum would be ascertained by a combination of the Netback Method and the Costs Plus Method by –

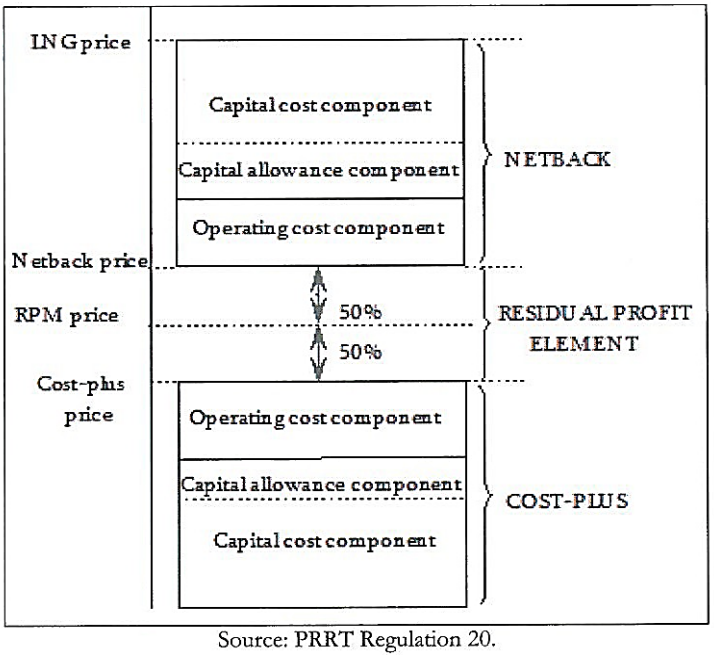
(i) making a cost plus calculation to determine the price for which a seller of feedstock gas at the first point of disposal would sell its gas for in order to cover its upstream costs;

(ii) making a netback calculation to determine the maximum price that would be paid for the feedstock gas by the buyer at that point to allow the buyer to cover its downstream costs taking into account the price which would be obtained for the sale of LNG; and

(iii) then assuming that the market value of the feedstock gas at the first point of disposal would be the point half way between those two figures, on the basis that profit would be allocated equally between the upstream and downstream points and the market value would be treated as the price so identified.

[6] The diagram is taken from SFG Consulting report dated 30 January 2015 which was provided to OSR by APLNG in January 2015.

Figure 8. PRRT description of RPM pricing



Source: PRRT Regulation 20.

(e) The "Residual Profit Split Method" (which was a method identified in the OECD *Transfer Pricing Guidelines*), in which market value of the feedstock petroleum would be obtained in a manner similar to the Residual Price Method, but instead of the identification of market value based on an arbitrary 50:50 profit split, profit would be allocated to the upstream and downstream producers based on an analysis of their relative contributions to the overall supply chain profit. Such a method would involve two stages, namely:

(i) each party would be allocated sufficient profit to provide it with a basic return appropriate for the routine functions undertaken, assets utilised and risks assumed in relation to the transaction; and

(ii) any residual profit or loss would be allocated based on an analysis of the facts and circumstances that might indicate how the residual profit or loss would have been divided by independent companies.

[39] The selection of the appropriate methodology was inevitably a matter of judgment. One expert report[7] put the issue in this way:

> The choice of adopting an appropriate arm's length transfer pricing methodology and the way that methodology is able to be applied to demonstrate the arm's length nature of transfer prices will depend on the circumstances of each transaction. However, in accordance with the OECD and ATO guidelines the choice of the most appropriate methodology is to be based on a practical weighting of the evidence having regard to:
>
> - the nature of the activities being examined;
> - the availability, coverage and reliability of the data;
> - the degree of comparability that exists between the controlled and uncontrolled dealings or between enterprises undertaking the dealings, including all the circumstances in which the dealings took place; and
> - the nature and extent of any assumptions.
>
> Further, in assessing the degree of comparability that exists between the controlled and uncontrolled dealings, the ATO and the OECD list the following five factors which need to be considered:

[7] Ernst & Young report of June 2011, submitted with APLNG's application for a petroleum royalty decision.

- characteristics of the property or services;
- functions performed, assets contributed and the risk assumed by each party;
- contractual terms, e.g. duration, rights, payments;
- business strategies, e.g. market positioning and strategic direction; and
- economic and market circumstances.

Whilst there is no formal hierarchy of transfer pricing methodologies, the OECD and the ATO will generally seek to use the transfer pricing method that is best suited or most appropriate to the circumstances of the particular case.

The application

[40] By application dated 8 September 2011, APLNG applied to the Minister for Employment, Skills and Mining, and then on 10 February 2012 applied to the Minister for a petroleum royalty decision pursuant to s 148D of the Regulation. It advised the Minister that the integrated nature of the APLNG Project, with common ownership of the companies involved across the gas chain, meant that there would not be an arm's-length value of gas negotiated in respect of the feedstock petroleum. Accordingly, it sought a petroleum royalty decision in respect of how it should go about the calculation for the purposes of s 148(1)(a) of the Regulation of the amount that the feedstock petroleum could reasonably be expected to realise if it were sold on a commercial basis.[8]

[41] The relevant parts of the application were:

(a) an executive summary;

(b) a summary of the applicant's submissions by reference to the criteria referred to in s 148G of the Regulation;

(c) sections entitled "Background" and "Overview of the APLNG project", which explained the way in which the project was structured, differentiated between upstream and downstream operations, and explained how the LNG ultimately produced by the project would be sold;

(d) sections entitled "Application for petroleum royalty decision", "Proposed method for deciding the market value of petroleum" and "Example RPM calculation", which contained material which dealt with the requirements of s 148E of the Regulation and which also continued to present the arguments in favour of the applicant's proposed methodology; and

(e) various appendices, including the report of an independent expert (namely Ernst & Young).

[42] It is convenient to start with the latter document. The following observations may be made about the report.

[43] First, the question which it addressed was the appropriate transfer pricing methodology to be used in determining the amount that the feedstock petroleum could reasonably be expected to realise if it were sold on a commercial basis at the first point of disposal.

[44] Second, it posited as an evaluative framework the discussion I have quoted at [39] above, concluding with the following observation:

> Accordingly, whichever transfer pricing method is chosen as the most appropriate for determining the wellhead value of the CSG, it must have regard to the functions, assets and risks that are present across the upstream and downstream operations, including the valuable intangible assets present in the downstream operations. Should a particular transfer pricing method not have regard to this, that transfer pricing

[8] The application was limited to the revenue side (i.e. s 148(1)(a)) of the overall wellhead value calculation and explicitly did not relate to the calculation of the expenses required to be deducted by s 148(1)(b).

methodology would not be considered an appropriate transfer pricing methodology in accordance with the OECD and ATO guidelines.

[45] Third, it identified and evaluated the methodologies which I have identified at [38] above, ultimately concluding that –

(a) the Comparable Uncontrolled Price Method would be the most appropriate methodology, if appropriate data existed;

(b) in the absence of data which permitted the use of the Comparable Uncontrolled Price Method, the Residual Profit Split Method would be appropriate as it specifically took into consideration and attributed value to the respective key functions performed, intangible assets utilised and risks borne by both the upstream and downstream operators; and

(c) the Residual Price Method could be used as a more simplified version of the Residual Profit Split Method.

[46] Based on the information contained in the Ernst & Young report, APLNG contended that the **only** appropriate methodology for working out the amount that the feedstock petroleum could reasonably be expected to realise if it were sold on a commercial basis was the Residual Price Method. Amongst other things, APLNG contended in its application for a petroleum royalty decision:

(a) Appropriate data did not exist to permit the utilisation of the Comparable Uncontrolled Price Method.

(b) The Residual Price Method would –

(i) calculate a price that returns capital plus a set return for each field comprised within the APLNG Project;

(ii) give a single price for the integrated operations downstream of the transfer point that returns capital plus an equivalent set return; and

(iii) take the midpoint to evenly split the profit and determine a price for each field.

(c) The Residual Price Method incorporated what was suggested to be the main OECD accepted principle, namely that of profit-split. It also incorporated elements of "the two other OECD approved transfer pricing principles, being 'cost plus' and 'netback' calculations".

(d) On the other hand, a simple Netback Method, based on the integrated downstream operations receiving solely a set return on investment, was not an appropriate methodology for the APLNG Project as a means to approximate an arm's length transaction because it failed to:

(i) reflect from the perspective of the downstream party its significant investment/commercial risks;

(ii) recognise the technical contributions made by the downstream party;

(iii) reflect the intangible assets developed and utilised by the downstream operator; and

(iv) recognise the market access opportunities and international global knowledge that would be provided by the downstream entity.

(e) In summary, it contended that the Residual Price Method would, in accordance with the Act and the Regulation and having regard to the particular features and circumstances of the APLNG Project, deliver the best approximation of the commercial or arm's-length value that would be reached if there was an independent

transaction between unrelated parties, each acting in their own self-interest and neither with undue influence. It contended that other approaches did not have sufficient regard to the circumstances of an integrated gas-to-liquid project and, if they were to be adopted, would not reflect the amount that the petroleum could reasonably be expected to realise if it were sold on a commercial basis.

[47] The specific decision sought was that the method or formula be that which is described as "the RPM on a field by field basis" and in which the operation and mechanics of the Residual Price Method would be as prescribed under the existing method contained in the PRRT Regulation and calculated by applying 5 specified components as follows:

1. That the LNG "free on board" export price will set the starting value for the Netback price formula. Where sales are "delivered at terminal", the DAT [Delivered at Terminal] export price will be netted back to the FOB price which will then be used to set the starting value for the Netback price formula.
2. The upstream formula as prescribed in the RPM for PRRT purposes will be applied on a field by field basis, to determine the aggregate minimum return that each upstream operation would receive as consideration for gas sales which occur at the outlet of each gas processing facility.
3. The downstream price formula as prescribed in the RPM for PRRT purposes will be applied to determine the minimum return of the downstream operations post the outlet of each gas processing facility.
4. The transfer price for the purposes of section 148(1)(a) of the […] Regulation on the sale of the gas to the Aggregator Company will be determined by using an equal split of the combined value of the Netback and Cost Plus prices. Where the Cost Plus price is greater than the Netback price (i.e. a notional economic loss situation for the project overall), the transfer price for the purposes of section 148(1)(a) of the … Regulation will be equal to the Netback price.
5. A separate transfer price will be calculated for each field based on a field specific Cost Plus calculation and the common facility downstream Netback calculation.

[48] The applicant requested that the decision apply for the life of the project such that it would not need to be reviewed during the life of the project.

Steps taken after the application and before the decision

[49] The Commissioner of State Revenue has responsibility for the administration and enforcement of certain revenue laws in Queensland, including having delegated authority from the Minister for the administration and enforcement of petroleum royalties under the Act and the Regulation. She acts through the Office of State Revenue (**OSR**). OSR is a business unit within Queensland Treasury, which is the public service department for whom the Minister has portfolio responsibility.

OSR obtains expert opinion evidence and gives the applicants opportunity to be heard

[50] OSR commissioned a report from Lonergan Edwards & Associates Limited (**Lonergan**) for the purpose of obtaining that firms' advice on determining a method or formula to assess the market value of the feedstock gas at the first point of disposal. Lonergan's report dated 23 September 2014 (**the first Lonergan Report**) addressed that question.

[51] By letter dated 8 October 2014, OSR provided to the applicants a draft report (**the draft OSR report**) prepared by OSR and invited the first applicant to make any submissions on the draft report before it was finalised and submitted to the Minster. A copy of the first Lonergan report was annexed the OSR draft report.

[52] The relevant parts of the executive summary in the draft OSR report summarised the advice which OSR proposed to give the Minister:

6. OSR has obtained advice on your behalf from [Lonergan], valuation experts. Lonergan [sic] advice is that:

a. a formula based on a netback method (**netback**) is the appropriate basis in the circumstances to determine the value of APLNG feedstock gas at the first points of disposal;

b. certain value inputs used in calculating the notional tolls that form part of the netback formula should be determined as part of your decision; and

c. your decision should be reviewed every 5 years from the commencement of commercial production of LNG feedstock gas (or earlier in certain circumstances) […]

7 APLNG, supported by a report by Ernst & Young (**E&Y**), submits that the Residual Pricing Method […] as set out in the [PRRT Regulation], is the only appropriate method you should adopt in your decision. Further that your decision should apply for a 21 year period subject to review only upon material changes occurring, as permitted under the Regulation. **Lonergan advise that the RPM is not an appropriate method in the circumstances and would likely understate the market value of the APLNG feedstock gas.** Further, that there are technical flaws in the proposed RPM.

8. OSR recommends that, consistent with the Lonergan advice, you decide to adopt the netback formula and certain value inputs in calculating the notional tolls in the netback formula for the APLNG application. Further that your decision be reviewed every 5 years or earlier in certain circumstances.

[53] The draft OSR report summarised and expressed support for the formula supported in the first Lonergan report (**the Adopted Netback Method**) in this way:

Conceptual framework

35. The method/formula to establish the market value of APLNG feedstock gas should be derived in a context where the expected positive value created from the entire value chain needs to be hypothetically apportioned between the upstream segment and the downstream segment, given the relative risks involved and the alternative uses of the gas.

36. The appropriate point in time at which a hypothetical arm's length developer of the upstream assets and a hypothetical arm's length developer of the downstream assets would negotiate on the method/formula to establish the value of the LNG feedstock gas would be at, or as at the time just before, the final joint development decision, because this is a relevant and important consideration for both parties before making their final decision on the hypothetical joint development.

37. In this setting, the netback method/formula under which the price of LNG feedstock gas at the first point of disposal is set based on deducting the correctly calculated downstream costs from the ascertainable market value of LNG (eg. free-on-board [FOB] basis), is the method/formula that would be acceptable to both parties in the absence of material adverse circumstances (eg. material changes in LNG export prices and/or foreign exchange [FX] rates or in upstream gas reserves and resources, with consequential adverse changes in the expected economic life of the upstream and downstream assets).

38. If material adverse circumstances arise, both the netback method/formula and the upstream cost plus benchmark (reflecting the upstream costs of extracting and delivering the feedstock gas to the first point of disposal) should be considered, mirroring rational commercial negotiations between two arm's length knowledgeable parties, which endeavour to maintain a long-term symbiotic relationship.

[54] Consistently with that description of the conceptual framework of the first Lonergan report, the draft OSR report summarised and expressed support for the following criticism expressed in the first Lonergan report of the Residual Price Method:

82. Lonergan advise that the RPM proposed by APLNG is conceptually not an appropriate method to value APLNG feedstock gas in the circumstances.

83. The RPM is effectively based on the midpoint of a calculated incremental upstream cost plus based price (as a floor price) and a calculated netback based price (as a ceiling price). Thus, the RPM produces an outcome which is inherently lower than the netback based price.

84. As at the date of a hypothetical joint development decision, the RPM would not be an appropriate method to establish the market value of LNG feedstock gas at the first point of disposal for the following reasons.

a. At the time of the joint development decision, a hypothetical knowledgeable arm's length developer of the upstream assets would not accept a method that produces a price for the feedstock gas at the first point of disposal, which is lower than the price based on the netback method. This is because the netback price is what the hypothetical developer of the upstream assets would obtain in developing the downstream facilities themselves, or by negotiating with a potential downstream owner B, C, etc., rather than the potential downstream owner in the proposed joint development.

b. Under the RPM the upstream cost plus based price is calculated with reference to the incremental upstream cost plus, rather than the inherently higher (and theoretically correct) absolute upstream cost plus benchmark. The absolute upstream cost plus benchmark reflects not only the incremental upstream cost plus, but also the value of the economic developable CSG resource base (ie. the value of the production rights and mining information) at the time of the joint development decision.

c. Due to the floor price under the RPM proposed by APLNG being inherently understated, the midpoint price under RPM is effectively shifted downwards and further away from the netback based price. The gravitation away from the netback based price is further exacerbated by under-estimation of the incremental cost plus benchmark caused, for example, by the failure to allow for the return of capital element with respect to the upstream capex.

d. RPM effectively transfers value downstream for no apparent capital investment or accepting any material additional risks and costs over and above what the hypothetical owners of the downstream assets are already being compensated for under the 'building block' approach.

[55] The ‘building block’ approach last referred to was a reference to the manner by which the downstream costs were calculated for the Adopted Netback Method. The costs were regarded effectively as particular tolls charged for the use of the downstream assets. The tolls were calculated based on the revenue which it was calculated the downstream operator would require for a period, which revenue was in turn calculated as the sum of the following components:

(a) return on capital;

(b) return of capital;

(c) operating costs; and

(d) cost of tax.

[56] The draft OSR report summarised the other key aspects of the first Lonergan report, and the Adopted Netback Method. The netback formula was summarised in this way:

39. For each royalty period and each of the first points of disposal (as gas exits the processing facilities), the netback formula produces a value in A$ per GJ of gas. It is this per GJ value that is applied to the volume of gas sold by the APLNG producers to the APLNG aggregator to calculate the amount upon which (after allowing for statutory deductions) royalty is calculated. The formula derives the per GJ value by:

- multiplying the volume of LNG exported in a royalty period by the export price of the LNG;
- from that amount, deducting notional transport, processing and loading tolls; and then
- dividing the resulting amount by the volume of gas exiting the processing facilities in the royalty period.

[57] The formula itself and other salient details for its operation were set out in appendices E, F and G to the draft OSR report. The appendices do not seem to have been reproduced in the material before me.

APLNG provides further expert opinion and further submissions

[58] By a document dated 30 January 2015 APLNG responded to the invitation from OSR to make further submissions. The response was contained in a detailed covering written submission which attached the following six expert reports:

(a) a further Ernst & Young report dated January 2015;

(b) a Deloitte Tax Services Pty Ltd report dated 30 January 2015;

(c) an SFG Consulting report dated 30 January 2015;

(d) a Competition Economist Group report dated January 2015;

(e) a Poten & Partners report dated January 2015; and

(f) a Frontier Economics report dated January 2015.

[59] The six expert reports each maintained that the Residual Price Method was the preferred method and were critical of various aspects of the first Lonergan report. It is not presently necessary to delve into the detailed arguments presented against the Adopted Netback Method and in favour of the Residual Price Method. Together with the expert reports, the APLNG submission comprised more than 430 pages of detailed criticism of the Lonergan approach from the point of view of economic theory and in relation to the factual assumptions underpinning the approach. Sufficient idea of the factual and theoretical critique of the first Lonergan report advanced by APLNG may be gleaned by noting that it was advanced under the following 14 headings:

(a) Lonergan fails to recognise the history and structure of the APLNG Project;

(b) Lonergan fails to recognise the range of project risks that are borne by the downstream operator;

(c) Lonergan fails to recognise the intangible assets that are contributed by the downstream operator;

(d) Lonergan incorrectly concludes that an integrated CSG to LNG project has the same project risks as a coal/iron ore project;

(e) The Lonergan conclusion that a downstream operator would accept a regulated return is inappropriate and incorrect;

(f) The Lonergan conclusion that an upstream operator would have a range of viable commercial alternatives is inappropriate and incorrect;

(g) The Lonergan rates of return are inappropriate and incorrect;

(h) The building block methodology proposed by Lonergan contains a number of material errors;

(i) The Lonergan methodology is uncertain when the netback price falls below the cost-plus price;

(j) Lonergan's recommendation for a five year review period is inappropriate;

(k) Lonergan inappropriately and incorrectly dismisses the RPM;

(l) Lonergan does not give sufficient consideration to the OECD guidelines on transfer pricing;

(m) Lonergan has given insufficient consideration to the APLNG Application; and

(n) Evidence provided by Lonergan has previously been the subject of criticism.

[60] It suffices to conclude that the APLNG submission maintained the views earlier expressed that –

(a) the Adopted Netback Method was not an appropriate method and that the Residual Price Method should be adopted;

(b) inputs to the Adopted Netback Method recommended by Lonergan were flawed; and

(c) the Residual Price Method should apply for 21 years and not be subject to review after 5 years as had been recommended by Lonergan.

[61] The APLNG submission made minor amendments to the APLNG application in relation to the details of the specific determination which APLNG submitted that the Minister should make. Rather than having the netback calculation be regarded as market value in the event that it fell below the costs plus calculation, APLNG proposed altered wording, the practical effect of which was that the market value price would be determined on a simple average of the upstream cost-plus and downstream netback prices irrespective of any crossovers between the two prices.

OSR provides Minister first briefing note in June 2015

[62] On 12 June 2015, OSR provided the Minister with a first briefing note, together with certain attachments. The note also dealt with applications regarding other LNG projects than the project with which the present applicants were involved. As to the application by APLNG the briefing note merely advised of the fact of the application; the fact of the provision to APLNG of a draft report and of the first Lonergan report; and the fact of the APLNG response and further six expert reports.

[63] The briefing note advised the Minister:

> OSR is currently reviewing the APLNG submission with its valuation expert and Queens Counsel, and expects to have this review finalised by mid-May. A final decision on the APLNG application is not required until mid-2015 i.e. about the time APLNG become liable for royalty on its LNG feedstock gas.

[64] At that time the briefing note merely asked the Minister to note the status of the applications.

OSR obtains further expert opinion but does not give the applicants opportunity to be heard about it

[65] OSR obtained further detailed advice from Lonergan in response to the expert opinion evidence provided by APLNG in January 2015 in the form of –

(a) a second report from Lonergan dated 11 August 2015 (**the second Lonergan report**); and

(b) a third report from Lonergan dated 26 November 2015 (**the third Lonergan report**).

[66] The second Lonergan report recorded that OSR had requested Lonergan –

(a) to provide written advice in relation to the APLNG submission in the form of responses to submissions in the APLNG submission about specific issues; and

(b) where appropriate, to include advice about the content of the expert reports insofar as such content has, or appears to have, been relied on by APLNG and relates to the particular issue.

[67] There followed over 80 pages of detailed refutation by Lonergan of the criticisms advanced in the APLNG submission and the APLNG expert reports. The refutation was formulated by reference to the following 16 issues which, as will be apparent, largely replicated the headings (recorded at [59] above) by which APLNG's written submissions had formulated APLNG's critique of the first Lonergan report):

(a) the risks borne and the returns that will be sought by a hypothetical upstream operator and a hypothetical downstream operator (Issue 1)

(b) that we do not recognise the history and structure of the APLNG Project (Issue 2)

(c) that we do not recognise the range of project risks that are borne by the downstream operator (Issue 3)

(d) that we do not recognise the intangible assets that are contributed by the downstream operator (Issue 4)

(e) that we incorrectly conclude that an integrated CSG to LNG project has the same project risks as a coal / iron ore project (Issue 5)

(f) that we incorrectly conclude that a downstream operator would accept a regulated return (Issue 6)

(g) that we incorrectly conclude that an upstream operator would have a range of viable commercial alternatives (Issue 7)

(h) that our assessed rates of return are inappropriate and incorrect (Issue 8)

(i) that the building block methodology adopted by us contains a number of material errors (Issue 9)

(j) that our methodology is uncertain when the netback price falls below the cost-plus price (Issue 10)

(k) that our recommendation for a five-year review is inappropriate (Issue 11)

(1) that we inappropriately and incorrectly dismiss the RPM (Issue 12)

(m) that we do not give sufficient consideration to the OECD guidelines on transfer prices (Issue 13)

(n) that we have given insufficient consideration to the APLNG Application (Issue 14)

(o) that APLNG's claim that the RPM is the most appropriate method to determine the commercial value of petroleum is flawed (Issue 15)

(p) APLNG's amendments of its original application (Issue 16).

[68] The third Lonergan report recorded the matters which it addressed in the following terms:

4 The APLNG Submission, particularly the SFG Consulting report and the CEG report contain comments on, inter alia, our assessment of the pre- and post-production required rates of return for the downstream infrastructure assets and the upstream assets of the APLNG Project as at 29 October 2013 in the [first Lonergan report].

5 In response to your request, we provided [the second Lonergan report]. In [the second Lonergan report], we considered and responded to various issues raised in the APLNG Submission, including those in relation to our assessment of the pre- and post-production required rates of return as at 29 October 2013.

6 There has been a significant time lapse between this date and the date on which the PRD is to be issued by the Minister. Thus, you have requested that we provide a supplementary report setting out our opinion as to:

(a) the pre- and post-production required rates of return for the downstream infrastructure assets of the APLNG Project which would be used as direct value inputs to the formula included in the PRD to be issued by the Minister

(b) the pre- and post-production required rates of return for the upstream assets, which are used in calculating the incremental cost plus benchmark to cross-check the reasonableness of the assessed netback value of gas at the first point of disposal and monitor the movement of the assessed netback value relative to the incremental cost plus benchmark over time.

[69] As part of its discussion of the background to the issues with which it dealt, the third Lonergan report summarised the opinions which had been presented in the previous two reports in this way:

10 In [the first Lonergan report] and [the second Lonergan report] we opine that:

(a) the basis upon which the method / formula to determine the market value of LNG feedstock gas at the first point of disposal should be derived is one where a hypothetical arm's length owner / developer of the upstream assets and a hypothetical arm's length

owner / developer of the downstream assets enter into commercial negotiations on the joint development of the upstream and downstream segments of an integrated LNG project whose overall economic viability is underpinned by long-term LNG export agreements with LNG buyers

(b) the method / formula should be determined at the time just before the final joint development decision (practically at FID1, being July 2011)

(c) the appropriate method / formula to determine the market value of the LNG feedstock gas at the first point of disposal is the netback method / formula under which the market value of the LNG feedstock gas at the first point of disposal is determined by deducting from the ascertainable market value of LNG on a free on board basis the correctly calculated downstream costs including capital costs (comprising return on and return of capital), operating costs and costs of tax.

In cases where the continued use of the netback method / formula may cause the hypothetical owner / developer of the upstream assets to cease operation, jeopardising the symbiotic relationship between the hypothetical upstream owner / developer and the hypothetical downstream owner / developer, the netback method is subject to review, mirroring a commercial re-negotiation to maintain the symbiotic relationship

(d) the appropriate arm's length risk-sharing arrangement between the hypothetical upstream owner / developer and hypothetical downstream owner / developer is one where volume risk, price risk and foreign exchange (FX) risk are passed upstream. Under this adopted arm's length risk-sharing arrangement, the hypothetical owner / developer of the downstream infrastructure assets is shielded against volume risk, price risk and FX risk, which are borne by the hypothetical owner / developer of the upstream assets.

[70] The report noted that a key value input to the Adopted Netback Method was the pre- and post-production required rates of return for the downstream infrastructure assets. It then stated that, having considered the APLNG submission, it had determined to alter two value inputs (which, upon analysis, reveals that Lonergan accepted at least some parts of criticisms which had been advanced in two of the APLNG expert reports[9]) and then presented revised pre- and post-production required rates of return for the upstream assets and the downstream infrastructure assets.

[71] The applicants were not afforded an opportunity to be heard with respect to either the second Lonergan report or the third Lonergan report.

The OSR identifies revenue impact of the competing methodologies

[72] Although it was common ground that the question of which method would maximise revenue to the state was a consideration which was irrelevant, the evidence before me demonstrates that the OSR specifically considered that issue shortly before presenting its final report to the Minister. In fact, as will appear in my consideration of ground 4, it had been a specific purpose of OSR's advisory panel since at least July 2012 that OSR would look at the comparable revenue impacts of the methods under consideration.

[73] On 23 October 2015, the under-Treasurer (who is a public servant within the Minister's department) requested the OSR to provide him with some royalty revenue estimates.

[74] The OSR advised the under-Treasurer in the following terms by a note dated 26 October 2015 (emphasis added):

> On 23 October 2015, **you requested the Office of State Revenue (OSR) provide a comparison of petroleum royalty revenue estimates (estimates) for the APLNG project under different methodologies to be considered by the Treasurer in making a petroleum royalty decision** […]
>
> The OSR valuation expert has recommended the Treasurer adopt a Netback formula for the decision, while APLNG has requested the Treasurer adopt the Residual Pricing Method (RPM).

[9] The third Lonergan report at [13] *et seq* reflects adoption of the SFG Consulting report dated 30 January 2015 at [177] and the Competition Economist Group report dated January 2015 at [149].

> […]
>
> **OSR and its valuation expert have developed comprehensive spreadsheets for the Netback formula, which can be used for estimates and sensitivity analysis purposes.** However, it is difficult to determine equivalent estimates using APLNG's RPM method, primarily because information and inputs provided by APLNG for the RPM are either unreliable and/or dated.
>
> [The note referred to an attached table which showed some illustrative royalty revenue figures.]
>
> […]
>
> **The figures show that, other things being equal, Netback will produce a higher revenue outcome than RPM**.
>
> […]

[75] The note attached a table of "illustrative revenue" for the years 2015 to 2018 which showed Netback producing revenue $85 million higher than RPM for that three-year period based on certain assumptions and variables.[10]

[76] The note recommended that the under-Treasurer note that more reliable estimates for the APLNG project under RPM for comparison with Netback should be available by 30 October 2015.

[77] As had been foreshadowed, further information was provided to the under-Treasurer by a further note dated 30 October 2015. That information replaced the illustrative royalty revenue information provided with the 26 October 2015 note, but confirmed the proposition earlier advised that Netback would provide a higher revenue outcome than RPM. In particular, it suggested that for the three-year period of 2016 to 2018 revenue would be in the range of $143.5 million to $232 million higher under Netback than under RPM.[11]

OSR provides Minister second briefing note dated 27 November 2015

[78] The Commissioner approved that a second briefing note be provided to the Minister on about 26 November 2015. OSR then submitted a second briefing note to the Minister dated 27 November 2015. That briefing note requested the Minister to consider an attached OSR report (**the final OSR report**) and the attachments to it and, after considering that material, to approve OSR preparing for the Minister's consideration a draft formal decision on the application. The applicants were not afforded an opportunity to be heard with respect to the final OSR report.

[79] Amongst other things, the attachments to the final OSR report which was provided to the Minister with the second briefing note included:[12]

(a) the APLNG application (see [40] *et seq* above);

(b) the first Lonergan report (see [50] *et seq* above);

(c) the APLNG submission and the six APLNG expert reports which it had contained (see [58] above);

(d) the second Lonergan report (see [66] to [67] above); and

(e) the third Lonergan report (see [68] to [70] above).

[80] The final OSR report was a development of the draft OSR report in light of the further expert opinion evidence which had been received since the draft OSR report had been

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[10] The precise figures presented in the illustrative table have been made the subject of a confidentiality order, but the proposition I have recorded was particularised by the applicants and admitted by the Minister.

[11] The precise figures presented in the information provided have been made the subject of a confidentiality order, but the proposition I have recorded was particularised by the applicants and admitted by the Minister.

[12] See affidavit of Goli sworn 24 September 2018 at [17].

prepared. It continued to express support for the Adopted Netback Method and for the methodological approach explained in the first Lonergan report and the second Lonergan reports. It embraced the Lonergan approach for the reasons Lonergan gave.

[81] The conclusion to the final OSR report was expressed in these terms (emphasis added):

> 102. **This matter involves considerable complexity with differing experts' views regarding the appropriate valuation methodology — RPM as advocated by APLNG and its advisers or netback as advised by Lonergan.** Also, regarding some value inputs to the netback methodology and the periods for review, with APLNG advocating that you should approve a methodology that would apply for 21 years or effectively the life of the project and Lonergan recommending five yearly reviews.
>
> 103. **In respect of the methodology, OSR respectfully prefer netback for the reasons advised by Lonergan.** In particular, that there is objective evidence to support the hypothesis that arm's length parties would use netback to determine arm's length pricing of LNG feedstock gas in these circumstances. Further, that RPM does not properly recognise the highly valuable CSG reserves owned by the hypothetical upstream owner/operator, effectively sharing 50 percent of the value with the hypothetical downstream operator without any corresponding value provided or risk assumed by the downstream operator.
>
> 104. **A useful summary of Lonergan's advice in relation to netback and RPM is provided in Appendix S under APLNG issue 5.1 - Why the RPM is the most appropriate method to determine the commercial value of petroleum**.
>
> 105. In respect of the value inputs, the differing experts' opinions reflect their underlying difference of views on risk-sharing, which, inter alia, inform the approaches of the experts to the question of whether RPM or netback is the appropriate method. Accordingly, it is not surprising that there are different opinions on the [Weighted Average Cost of Capital (**WACC**)] inputs that should be adopted. Nevertheless, **Lonergan has adjusted some inputs to its WACC after consideration of the APLNG submission**.
>
> 106. In relation to review periods, OSR considers that five years strikes a reasonable and appropriate balance between the desirability of certainty while recognising, […] arrangements more broadly in similar industries, and the dynamic nature of the LNG and gas markets.

[82] I have earlier mentioned that the OSR had advised the under-Treasurer on 30 October 2015 that royalty revenue would be in the range of $143.5 million to $232 million higher under Netback than under RPM. As to this:

(a) The information given to the under-Treasurer was not replicated in the material given to the Minister.

(b) It may be noted, however, that the first and second Lonergan reports had specifically stated that RPM would produce an outcome which was inherently lower than the Netback Method price. However that factual observation did not form any part of the reasons Lonergan gave for favouring the Adopted Netback Method and rejecting RPM.

(c) That said, it would have been clear to an intelligent reader of the Lonergan reports that the Adopted Netback Method would produce more royalty revenue than RPM.

(d) The final OSR report specifically dealt with the matter by advising the Minister that royalty revenue outcomes were irrelevant and should not be taken into account:

> 46. In making your decision there is the potential risk of administrative law error. For example, if you were to take into account an irrelevant consideration, or not take into account a relevant consideration, in making your decision. **In particular, the royalty revenue outcomes for the State from application of a particular valuation method is not a relevant consideration and should not be taken into account in making your decision.**

(e) The Minister's reasons recorded that the Minister adopted Lonergan's advice for the reasons expressed by Lonergan, and that the Minister preferred and adopted the

> Lonergan and OSR advice in full. That fact does not provide an evidentiary basis for the conclusion that revenue outcomes were influential in the Minister's thinking. There is nothing in the Minister's reasons which supports any inference that the Minister did not follow OSR's advice that revenue outcomes should not be taken into account in making the decision. As will appear in my consideration of ground 4, it does not form part of the applicants' pleaded case that the Minister's personal decision making was affected by the irrelevant consideration of the royalty revenue outcomes. The applicants' case is that it was the OSR which took into account the irrelevant consideration of revenue outcome and that the Minister's decision may be impugned because the OSR's error may be imputed to him.

[83] I have also earlier mentioned that neither of the second or third Lonergan reports had been provided to APLNG. In this regard, two matters should be particularly noted in relation to the conclusion to the final OSR report, quoted above.

[84] First, the reference at [104] of the final OSR report was the second reference to Appendix S. The final OSR report had earlier (at [91]) stated that Appendix S was "a summary of the APLNG submission and the [second Lonergan report] advice and should be read for a complete understanding of the submission and advice, together with the various reports that are referred to and appended to this report." The appendix itself comprises a 16 page summary which proceeded by broadly following the issues which had been dealt with in the second Lonergan report, and summarising the APLNG view and the contrary views expressed by Lonergan. This demonstrated the significance of the expression of views in the second Lonergan report.

[85] Second, the reference at [105] of the final OSR report to Lonergan having adjusted some inputs to its WACC after consideration of the APLNG submission was a reference to the third Lonergan report.[13]

[86] As will appear, the Minister's eventual decision specifically recorded that it was based on the final OSR report and the facts recorded in that second briefing note. However, the Minister's response to the second briefing note simply did that which he had been requested to do. On 9 December 2015, he wrote:

> I approve OSR preparing for my consideration the APLNG petroleum royalty decision, which would give effect to a netback methodology with the decision for a period of five years.

OSR provides Minister third and final briefing note dated 14 December 2015

[87] OSR proceeded in the way that the Minister had approved.

[88] OSR prepared a third briefing note to the Minister dated 14 December 2015. The third briefing note had the following attachments:

(a) the second briefing note;

(b) the third Lonergan report; and

(c) a draft "Notice of Petroleum Royalty Decision and Reasons" and covering letter.

[89] The third briefing note –

(a) identified its purpose as being:

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[13] Paragraph 17 of Ms Goli's first affidavit, sworn 24 September 2019, suggests the third Lonergan report was provided with the second briefing note (because that report was contained within the parts of the affidavit of Mr Perrett referred to by Ms Goli). On the other hand, as will appear, later in the same affidavit she suggests that the third Lonergan report was provided at the time of the third briefing note. Accordingly, it appears to be possible that the report was in fact not provided at the time of the second briefing note even though the outcome of the report was referenced in the conclusion at [105]. It is unnecessary to resolve this factual ambiguity.

> To obtain your approval of the attached 'Notice of Petroleum Royalty Decision and Reasons' under the *Petroleum and Gas (Production and Safety) Regulation 2004* (Regulation) (the Decision), by you signing the Decision and covering letter to be issued to Australia Pacific LNG Pty Limited (APLNG).

(b) made brief cross-reference to the background expressed in the second briefing note and in the final OSR report and its attachments;

(c) referred to the third Lonergan report:

> Also attached is a further report from Lonergan dated 26 November 2015, which merely updates the rates of return on capital to be used in the netback formula in the Decision. Lonergan were required to update the rates of return because they are a key input into the netback formula and were last calculated by Lonergan in September 2013 […]

(d) concluded by recommending that the Minister approve the decision by signing the attached decision and covering letter.

[90] The draft "Notice of Petroleum Royalty Decision and Reasons" was in the form which, it will appear, was signed.

The decision

[91] The Minister made the decision on 16 December 2015, by signing a 5 page document entitled "Notice of Petroleum Royalty Decision and Reasons for the Decision under section 148F" **(the notice**).

[92] Four schedules were cross-referred to in the body of the notice and attached to it, namely:

(a) Schedule 1: Glossary;

(b) Schedule 2: Formula;

(c) Schedule 3: Material on which the decision is based; and

(d) Schedule 4: Reasons.

[93] The notice provided as follows:

(a) the petroleum royalty decision was made on 16 November 2015: notice at [1];

(b) the decision was made by the Minister under s 148F of the Regulation: notice at [2] and [3];

(c) the decision related to the first applicant's application and applied to all four applicants as the petroleum producers under the Act and the Regulation: notice at [4] and [5];

(d) a description and a summary of the petroleum royalty decision which had been requested by the first applicant, including its component parts: notice at [6] to [9];

(e) definitions of the petroleum to which it applied and that the Relevant Periods to which it applied were each quarterly royalty return period under the Regulation commencing with the quarter ending 31 December 2015 and ending with the quarter ending 31 December 2020: notice at [10] to [20];

(f) at [12] to [15]:

> **SCOPE OF DECISION**
>
> 12. The Decision relates to components of the wellhead value of the Petroleum being the elements used to work out the amount that the Petroleum could reasonably be expected to realise if it were sold on a commercial basis (**Market Value**) (**Components**).
>
> 13. The Decision is as to:
>
> a. what those elements are; and

b. how each of those elements is to be worked out for each of the Relevant Periods.

THE DECISION AS TO ELEMENTS AND HOW THEY ARE TO BE WORKED OUT

14. The Components are each of the elements contained in the formula for deciding the Market Value of the Petroleum stated in Schedule 2 (**the Formula**).

15. The elements are to be worked out in accordance with the Formula.

(g) the decision applied for the period commencing 1 October 2015 and ending 31 December 2020: notice at [16];

(h) that reviews could occur to determine whether there was a basis for amendment of the decision and that the Minister considered certain listed circumstances to be fundamental to the decision: notice at [17] and [18];

(i) by notice at [19] and schedule 3, that the decision was based on the following material:

(i) the OSR Final Report (recorded wrongly as having been submitted in September 2015) which enclosed the APLNG application;

(ii) the first Lonergan report;

(iii) the APLNG submission and the six APLNG expert reports which it had contained;

(iv) the second Lonergan report; and

(v) the third Lonergan report; and

(j) the reasons for the decision were those stated in Schedule 4: notice at [20].

[94] The structure of the Minister's reasons as stated in Schedule 4 was as follows.

[95] First, under the heading "Material facts", the reasons recorded the material facts, stating that the Minister did not understand them to be controversial.

[96] Second, under the heading "Method/Formula", the reasons summarised the submission made in favour of RPM by the applicants. Having done that the reasons then summarised the recommendations in the second and third Lonergan reports for favouring the Adopted Netback Method over RPM in the following terms:

12. Following is a summary of the Lonergan 2014 report and Lonergan 2015 report regarding the method or formula that should be adopted for the Decision.

a. The [*Spencer v The Commonwealth* (1907) 5 CLR 418 (***Spencer***)] valuation principles require the hypothesising of a price that would be negotiated in an open and unrestricted market between a hypothetical knowledgeable willing but not anxious buyer and a hypothetical knowledgeable willing but not anxious seller acting at arm's length within a reasonable time. In this hypothetical setting, Netback, under which the price of LNG feedstock gas at the notional first points of disposal is set based on deducting the correctly calculated downstream costs from the ascertainable market value of LNG (e.g. on a FOB basis), is the appropriate method/formula because it –

i. appropriately reflects the significantly greater bargaining position of the hypothetical upstream owner/developer as at the relevant time [APLNG final investment decision (FID1) on LNG Train 1, made on 28 July 2011] due to its ownership of the highly valuable portfolio of large scale long-lived CSG assets, its possession of expertise and ability related to CSG-LNG conversion and LNG marketing and the presence of competing downstream developers;

ii. is based on an arm's length risk sharing arrangement, which is supported by objective empirical evidence;

iii. is based on a risk and return package that would be acceptable to both a knowledgeable hypothetical upstream owner/developer and a knowledgeable

hypothetical downstream developer. It is noted that the Netback calculation includes an appropriate reward for the contribution of downstream intangible assets by the hypothetical downstream developer;

iv. is devoid of the inherent circularity in assessing the market value of the CSG resource base and the return on capital and return of capital in respect of that market value;

v. can be applied using objectively verifiable data;

vi. maintains the consistency between the specific risk sharing arrangement between a hypothetical upstream owner/developer and a hypothetical downstream developer and the practical periodic application of Netback where the LNG sales proceeds are based on actual prevailing Japan Customs-cleared Crude oil prices;

vii. is based on a transparent framework (i.e. the 'building block' framework) which can deal with issues, including:

(a) the risk of downstream asset stranding and other project specific risks;

(b) the risk reduction impacts of the long-term off-take LNG supply agreements; and

(c) the arguably additional 'complexities' of the downstream operations of a gas-to-liquids project compared to those of a bulk commodity export project; and

viii. can be modified to allow for renegotiations between hypothetical independent parties in a symbiotic relationship, which are warranted in material adverse circumstances, mirroring commercial realities.

b. The RPM proposed by APLNG is conceptually not an appropriate method to value APLNG feedstock gas in the circumstances because the RPM adopted -

i. is incorrectly based on a superimposition of the characteristics of Origin (as the actual upstream owner/developer) on a hypothetical upstream owner/developer and a superimposition of the characteristics of ConocoPhillips (as the actual downstream developer) on a hypothetical downstream developer, which is an incorrect application of the Spencer valuation principles;

ii. ignores the significantly stronger bargaining position of the hypothetical upstream owner/developer (relative to the hypothetical downstream developer);

iii. is incorrectly based on a risk sharing arrangement between a hypothetical upstream owner/developer and a hypothetical downstream developer, which is not supported by objective empirical evidence;

iv. incorrectly and artificially inflates the 'combined profits' expected to be achieved by a hypothetical upstream owner/developer and a hypothetical downstream developer/operator by excluding the return on capital and return of capital components in respect of the market value of the upstream CSG resource base in calculating the so-called residual profit to be split between the two parties:

v. relies on an implicit, unproven and incorrect hypothesis that the market value of the CSG-LNG conversion intellectual property and LNG marketing expertise (over and above those already allowed for in the calculation of the Netback amount via the capital costs and operating costs/inputs to the building block framework), which APLNG does not assess, is basically equal to the market value of the upstream CSG assets plus the market value of the upstream intangible assets. As a result, the RPM proposed by APLNG effectively transfers 50 percent of the economic benefits (i.e. the return on capital and return of capital) in respect of the substantial market value of the CSG resource base from the hypothetical upstream owner/developer to the hypothetical downstream developer for nothing:

vi. incorrectly adopts a residual profit split of 50:50, which is -

i. arbitrary;

ii. not supported by objective market evidence; and

iii. economically neither fair nor reasonable to a hypothetical upstream owner/developer and should be rejected by that party;

vii. double counts the allowance for the purported downstream 'intangible assets' (in the downstream capital costs and operating costs used to calculate the Netback amount and also in a 50 percent share of the substantially inflated so-called residual profits);

viii. is based on a proposition that the hypothetical upstream owner/developer and the hypothetical downstream developer are exposed to the same level of risk and would expect to earn the same rates of return on the capital employed, which would be considered unrealistic under the OECD Transfer Pricing Guidelines;

ix. is subject to an inherent circularity in assessing the market value of the CSG resource base and the return on capital and return of capital in respect of that market value, even assuming that the incorrect exclusion of the CSG resource base in calculating the 'combined profits' from the whole project is reversed; and

x. is inconsistent in several aspects with the recommendations in the OECD Transfer Pricing Guidelines on the application of the transactional profit split method, of which the RPM is claimed by APLNG to be a subset.

13. For the reasons expressed in the Lonergan advice, as summarised above, and the reasons explained further at paragraph 22 and following below, I consider that the Formula, adopting the Netback method, is the appropriate basis for working out each of the elements.

[97] Third, under the heading "Inputs to Formula", the reasons recorded that there had been differences of opinion on the WACC inputs to the formula and suggested that they reflected the experts' underlying difference of views on risk-sharing which, among other things, informed their approaches to the question of whether RPM or Netback was the appropriate method/formula. The reasons then adopted the Lonergan assessment of risk and the Lonergan view of the appropriate WACC inputs, as expressed in the third Lonergan report.

[98] Fourth, under the heading "Period", recorded the applicants' submission that the decision should apply for 21 years without being reviewed for the life of the project. The Minister identified three considerations as relevant to his assessment. First was the Lonergan advice that a 5 year period was more appropriate and that a longer period might result in value parameters used in the formula deviating from those warranted by market conditions. Second, the OSR advice that relevant markets were dynamic and uncertain over the short to medium terms. Third, the OSR advice that information from three major Queensland LNG projects was likely to become available, thereby providing a more reliable basis for determining the market value of the feedstock gas. The reasons recorded the Minister's conclusion, having regard to those matters that it was appropriate that the decision be for a 5 year period, commencing on 1 October 2015 and concluding on 31 December 2020.

[99] Fifth, under the heading "Criteria", the reasons then considered specifically each of the matters listed in s 148G of the Regulation.

[100] Finally, the reasons concluded by stating that the Minister preferred and had "adopted the Lonergan and OSR advice in full for the purposes of this Decision".

The Minister's jurisdiction

[101] The key to the resolution of many of the arguments advanced by the applicant lies in a clear understanding of what, on the proper construction of the statutory framework, was the scope, purpose and real objects of the decision which the Minister had jurisdiction to make.

[102] The relevant operation of the legislative regime may be summarised in this way:

(a) Under the Act and the Regulation, the liability to pay royalty only starts accruing once a petroleum producer is in a position to dispose of petroleum during a royalty return period, but once that occurs there is a complicated regime which requires regular and accurate calculation of the amounts payable and payment on or before particular dates if imposition of default interest and significant penalties is to be avoided.

(b) The amount payable is a function of two variables, namely rate and wellhead value. The calculation of the second variable has the potential to be one on which minds might easily differ, especially when one has regard to the nature of the components of which wellhead value is comprised.

(c) The Regulation provides a mechanism for a petroleum producer to seek (or, given the Minister's power to require an application to be made, the Minister to impose) instruction as to how the variable of wellhead value is to be worked out for a particular transaction or a particular period, in the form of a petroleum royalty decision.

(d) When the process for obtaining such a decision is initiated by the petroleum producer, the producer must include in its application a statement about its proposal, including, where appropriate, the formula which the petroleum producer proposes for whatever component of wellhead value of petroleum is the subject of the application. The Minister responds to the application by making a decision about how the component(s) the subject of the application must be worked out.

(e) In making such a decision, the Minister is permitted to state a "method or formula" for "working out" any of the components used in determining the wellhead value of petroleum, including, in particular, a method or formula "for deciding" the market value of petroleum.

[103] Two important observations may be made in relation to the Minister's jurisdiction to make a petroleum royalty decision.

[104] **First**, where the particular component of the wellhead value of petroleum at issue is that referred to in s 148(1)(a) of the Regulation, the value of petroleum which is of concern is an arms-length market value, namely "the amount that the petroleum could reasonably be expected to realise if it were sold on a commercial basis".

[105] **Second**, the Minister is authorised to make the choice as to the methodological solution appropriate for working out the relevant component(s) of the wellhead value of petroleum, having regard to particular specified criteria.

[106] I should justify each observation.

<u>The value which was of concern for royalty purposes is an arms-length market valuation.</u>

[107] One relevant component of the wellhead value of petroleum is "the amount that the petroleum could reasonably be expected to realise if it were sold on a commercial basis": s 148(1)(a) of the Regulation.

[108] The term "commercial basis" is not defined in the Regulation, however the connection with arm's length market value is clear from other parts of the text of the Regulation.

[109] Thus:

(a) Section 148C(1)(a) (under the heading "Minister's power to decide component of wellhead value of petroleum") provides that the Minister may ask the petroleum producer "to demonstrate that a component of the wellhead value of the petroleum is based on an arms-length transaction at market value […]"

(b) Section 148C(4)(b)(ii) also refers to "an arms-length transaction at market value";

(c) Section 148D(2)(b) (under the heading "Application by petroleum producer for petroleum royalty decision") refers to a component of the wellhead value "based on an arms-length transaction at market value";

(d) Section 148F(2)(a) permits the Minister to state "a method or formula […] for deciding the market value of the petroleum; or […] to be used for working out any other component of the wellhead value of petroleum"; and

(e) Section 148G (under the heading "Criteria for decision") refers to "the amount for which petroleum has been sold in similar circumstances"; to the "market value of the petroleum"; and to expenses likely to be incurred by the petroleum producer in "arms-length transactions at market value".

[110] Although the transfer pricing involved in sales between associated enterprises could, literally, be said to be sales on a commercial basis, because they would, *ex hypothesi*, be sales between entities engaged in commerce, it could not seriously be contended that that was with the contemplation of the Regulation. The value which was of concern for royalty purposes was an objective arms-length market value.

[111] It was common ground before me – and I think it is the proper construction of the Regulation – that the reference to "market value of petroleum" in s 148F(2) is to be understood as a reference to the amount under s 148(1)(a) that the feedstock gas could reasonably be expected to realise if it were sold on a commercial basis.

The Minister is authorised to choose the appropriate methodological solution

[112] One difficult problem of valuation (among many) which it must be assumed the petroleum royalty decision mechanism was intended to provide the means to solve, was the difficulty of establishing a valuation for royalty purposes where the petroleum product concerned is being transferred between associated enterprises, or where there is no real comparable market for the petroleum product concerned.

[113] One way in which the drafters of the Regulation could have dealt with the issue would have been to follow the course taken by the Commonwealth, and actually to specify a particular methodology in its terms. For example, the PRRT Regulation employed a version of the Residual Price Method.

[114] But that was not the course chosen.

[115] As has been demonstrated, the Minister could ask a petroleum producer to apply for a petroleum royalty decision, or a petroleum producer might do so of its own volition. Under s 148B(1)(b) of the Regulation, such a decision would be a decision "about how [one] or more of the components of the wellhead value of petroleum disposed of or produced by the petroleum producer must be worked out for a particular transaction or particular period".

[116] Where the component with which the particular petroleum royalty decision was concerned was the component specified in s 148(1)(a) of the Regulation, the decision which the Minister had jurisdiction to make was a decision, to use the language of s 148F(2)(a)(i), to "state a method or formula for deciding the market value of the petroleum".

[117] The essential statutory task for the Minister was not, as the applicants' written submissions suggested, to decide "the amount that the petroleum could reasonably be expected to realise if it were sold on a commercial basis" under s 148(1)(a) of the Regulation.[14] Rather the decision which the Minister was given jurisdiction to make was a decision as to an

[14] see the applicants' written submissions at [13].

antecedent step, namely what was the method or formula which must be used to reach an answer on that question of fact. That is a qualitatively different task, even though the goal of each decision would be the same.

[118] If the method or formula stated by the Minister was a formula which could not properly be characterised as "a method or formula for deciding the market value of the petroleum", it would not be a proper exercise of jurisdiction. But, importantly, the converse must be true. If the method or formula stated by the Minister was a method or formula which could properly be so characterised, then it would be a proper exercise of jurisdiction. The Regulation must be taken to have given the Minister a wide latitude in exercising the choice he was given.

[119] In *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, the High Court[15] referred with approval to the following observations by Hayne J in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 141:

> The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision-maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision-maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.

[120] The material placed before the Minister for the purposes of his decision revealed that there were a number of methods or formulae suggested by relevant literature and expert opinion evidence. It must be thought that that possibility (although not necessarily the particular methods or formulae eventually presented) must have been contemplated by the Regulation. On a theoretical basis, arguments were in fact advanced for and against the appropriateness of potential methodological solutions. That possibility too must be thought to have been contemplated by the Regulation. The question of which was the most appropriate methodological solution would inevitably be a live one, on which reasonable minds could differ. But in my view the choice as to which was the most appropriate solution was the choice which the Minister had jurisdiction to make, so long as the solution chosen could properly be characterised as "a method or formula for deciding the market value of the petroleum". Of course, the administrative decision had to be made in accordance with the law, and it was thereby open to review according to the usual administrative law calculus, including that it be decided within the bounds of legal reasonability. But, subject to that qualification, any factual errors (or errors as to what was the appropriate way to make allowance for risk, profit or cost) which the Minister made in making the choice as to the appropriate methodology would be errors within jurisdiction.

[121] It is not for a judge on a judicial review application under the *Judicial Review Act* to substitute the judge's own judgement as to what was the appropriate methodological solution.

Ground 1: Misapplication of the statutory test

Discussion

[122] The applicants advanced three essential contentions justifying the proposition that the Minister must be regarded as having "misapplied the statutory test". In the applicants' written submissions these reasons were characterised as three "fundamental problems" with the way in which the Minister applied the statutory test.

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[15] per French CJ, Gummow, Hayne, Crennan, Kiefel And Bell JJ at 571 [66].

[123] The three fundamental problems were said to be as follows:

(a) First, the Adopted Netback Method, properly analysed, did not replicate or hypothesise a sale of feedstock gas at all, which was the essential task of s 148(1)(a) of the Regulation by reference to the words "if it were sold".

(b) Second, the Adopted Netback Method involved a legal error in treating the mere potential of the feedstock gas as being realised as LNG, and for not allowing for a hypothetical purchaser's profit on the sale of its LNG and the associated risks and effort.

(c) Thirdly, the Adopted Netback Method could not be regarded as a sale on a "commercial basis" as is required by s148(1)(a) of the Regulation including because it operates as a disincentive for the hypothetical downstream operator to act in a commercially rational manner.

[124] In truth the various ways in which the applicants approached this ground of review were just variations on a single theme, namely that the method or formula stated by the Minister was not capable of being used to derive an answer to the critical question, namely the amount that the petroleum could reasonably be expected to realise if it were sold on a commercial basis.

[125] I do not think that is the right way to consider the issue of error under this ground. It is informed by: (1) the mischaracterisation by the applicants of the essential statutory task of the Minister, to which I have referred at [117] above, and (2) failure to have sufficient regard to the peculiar context which informs the nature of the hypothetical "sale" which is being modelled.

[126] As to the former issue, as I have sought to demonstrate, the essential statutory task was that of stating an appropriate method or formula. So long as the method or formula stated could be characterised as a method or formula for deciding the market value of petroleum or, which is presently to be regarded as the same thing, as a method or formula for deciding the amount that the petroleum could reasonably be expected to realise if it were sold on a commercial basis, the Regulation must be taken to have given the Minister a wide latitude in exercising the choice he was given. So long as the choice was made within the bounds of legal reasonability, any factual or non-legal judgmental errors which the Minister made in making the choice would be errors within jurisdiction.

[127] As to the latter issue, it is true that the method did not model a spot sale taking place pursuant to a transaction between an arms' length seller and an arm's length buyer entered into for the first time at the first point of disposal during the royalty period concerned.[16] But that because is no such transaction could ever exist. There was no spot market for feedstock gas at the first point of disposal. No sale of feedstock gas could take place until the requisite infrastructure had been constructed for the transmission of the feedstock gas and for that to have occurred the putative seller and putative buyer would have already entered into a contractual arrangements such that they would not be acting at arm's length by the time the disposal of the feedstock gas occurred.

[128] That is why in order to model the requisite arm's length sale on a commercial basis of feedstock gas at the first point of disposal in the royalty period sufficient to identify the amount which could reasonably be expected to be realised on such a sale, it was necessary to adopt a conceptual framework which posited that the hypothetical arm's length

[16] For completeness, I note that the Minister sought to persuade me that the "sale" contemplated in s 148(1)(a) of the Regulation was not necessarily a sale in the royalty period. I do not think that proposition is arguable, bearing in mind the terms of the chapeau to s 148(1) and the fact that the deductions mentioned in s 148(1)(b) were all specifically of expenses for the royalty return period.

developer of the upstream assets and the hypothetical arm's length developer of the downstream assets would have negotiated on a mechanism for establishing the value of the feedstock gas as at the first point of disposal, but would have done so at an earlier occasion. That negotiation would have been at, or as at the time just before, the final joint development decision as between the two sides of the negotiation: see the discussion at [53] and [69] above which describes how Lonergan and the OSR expressed the concept.[17] The position was not expressed differently by one of the applicants' experts, Professor Gray, in his report which was put before the Minister (emphasis added):

> 18. In the present case, I note that the upstream gas producer and the downstream LNG operator are not independent parties, so there is no commercial arm's length transaction capable of being observed or analysed between independent buyers and sellers of gas at the first point of disposal. **Consequently the required task is to consider the likely terms (including the price) of a hypothetical arm's length transaction between an upstream gas producer and a downstream LNG operator**.
>
> 19. In this regard, the Lonergan report states that:
>
> > The basis upon which the method/formula should be derived is one where a hypothetical arm's length developer of the upstream assets and a hypothetical arm's length developer of the downstream assets enter into commercial negotiations on the joint development of the upstream segment and downstream segment of an integrated LNG project whose overall economic viability is underpinned by long-term LNG export arrangements and expected substantial Asian demand for LNG. **In simple terms, the method/formula to establish the market value of gas should be derived in a context where the expected positive value created from the entire value chain needs to be hypothetically apportioned between the upstream segment and the downstream segment, given the relative risks involved and the alternative uses of the gas**.
>
> 20. **I broadly agree that the statement contained in the last sentence of the quotation above sets out the nature of the task involved. In my view, the task can be described as being to determine how the revenues from the sale of LNG to the ultimate customer would be apportioned between the hypothetical arm's length upstream gas producer and downstream LNG operator.** While there is agreement between my view and the Lonergan report as to the nature of the task involved, as I elaborate below, I consider that the Lonergan report is erroneous in a number of respects in its approach to this task.

[129] In other words, the Adopted Netback Method assumes that the "sale" at the first point of disposal in the royalty period would take place pursuant to an arrangement struck at an antecedent arm's length negotiation between the putative seller and the putative buyer which dealt with the price which would be paid for the disposal of the feedstock gas in future relevant periods. Such an assumption can be regarded as seeking to identify the amount that the petroleum could reasonably be expected to realise "if it were sold on a commercial basis" at the first point of disposal. The alternative is to say that the Regulation required the method or formula stated by the Minister to model something which was incapable of existing. I think the meaning of "if it were sold on a commercial basis" is sufficiently flexible to encompass what has been assumed by the petroleum royalty decision.[18]

[130] With that as the base assumption, in theory a Netback Method could be characterised as an appropriate solution to the problem of identifying the amount which feedstock gas would reasonably be expected to realise on such a sale. Its suitability in preference to other possible methodologies would depend upon the assessment of such considerations as those identified at [39] above, and whether the identification of the deductions from the market price occurred in such a way as would appropriately reflect the amount which downstream

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[17] Further discussion also appears at the first Lonergan report at [44] to [52] reproduced in the affidavit of Perrett sworn 29 January 2016, Exhibit RGP-1, at pp 221 – 222.

[18] The ordinary meaning of sale is the conveyance or transfer of something in return for money, although that meaning may be varied by context: *Francis v NPD Property Development Pty Ltd* [2005] 1 Qd R 240.

operator would seek in the hypothesised negotiation: (1) to cover its selling and other operating expenses, and (2) to make an appropriate return on its capital, taking into account the capital expenditure it had incurred and the risks it had assumed.

[131] It seems to me that the Adopted Netback Method must be properly characterised as a method or formula for deciding the amount that the petroleum could reasonably be expected to realise if it were sold on a commercial basis. The conceptual framework which underlines it cannot, as a matter of law, be demonstrated to give rise to a formula which is inapposite to the task for which it was stated.

[132] In my view, the alleged "fundamental problems" invited me to embark upon the impermissible course of a merits review of the Minister's decision. The "fundamental problems" did not identify legal error but only identified contestable propositions of economic theory and the modelling of behaviour which sounded on whether the Netback Method proposed by Lonergan would give rise to an appropriate apportionment of the value obtained by the external sale of LSG between the upstream segment and the downstream segment of the value chain. They assert that the Lonergan allocation is based on fundamentally flawed judgments about how upstream and downstream operators would behave, given a proper assessment of risks and other relevant considerations.

[133] However, the Minister accepted the Lonergan conceptual framework. APLNG had developed a detailed argument against Lonergan (see [59] above), Lonergan had developed a detailed refutation of APLNG's argument (see [67] above), and the final OSR report had, by Appendix S, summarised the competing views (see [84] above). The Minister plainly concluded that using the Adopted Netback Method as explained by Lonergan would give rise to the appropriate apportionment of value. He thought that appropriate allowances had been made by Lonergan in identifying the deductions from the externally obtained market price, the allowances being developed by reference to the conceptual framework to which I have referred. If errors were made on these matters they were errors within jurisdiction.

<u>The first "fundamental problem"</u>

[134] The applicants contended that a fundamental problem with the Adopted Netback Method was that the method, when properly analysed, did not actually assume a sale of the feedstock gas at all.

[135] I reject this proposition for reasons already articulated.

[136] The applicants sought to demonstrate their argument by reference to five contentions in support of the existence of the alleged first fundamental problem, namely:

(a) the downstream operator is treated as a mere infrastructure provider and not a purchaser;

(b) the building block approach is not concerned with a sale as opposed to a toll for access;

(c) the Adopted Netback Method assumes the upstream operator maintains ownership;

(d) there is no sale where there is an assumption of a possible need to "renegotiate"; and

(e) there is no sale if the upstream operator pays the downstream operator to take the feedstock gas.

[137] The applicants sought to justify their argument by reference to a further expert opinion from Professor Gray. That opinion was not a document which was before the Minister. For reasons set out in Annexure B, on this ground I would rely on that report only insofar as it elucidated the technical aspects of the operation of the formula stated by the Minister.

[138] In my view, all of the propositions advanced by the applicants depend upon contestable propositions of the nature of those to which I have referred. They do not provide any reason why the methodology chosen by the Minister should not be characterised as a method or formula for deciding the amount that the petroleum could reasonably be expected to realise if it were sold on a commercial basis.

The second "fundamental problem"

[139] The applicants contended that the Adopted Netback Method involved a legal error in treating the mere potential of the feedstock gas as being realised as LNG, and for not allowing for a hypothetical purchaser's profit on the later sale of its LNG and the associated risks and effort.

[140] The applicants correctly noted that the relevant gas the subject of the modelled sale transaction was the feedstock gas, and not LNG. Then they said that as at the date of the hypothetical sale, the feedstock gas only had *potential* to become LNG, but that potential was not then *realised*. The *potential* of the feedstock gas was only *realised* after the sale transaction, and after it had gone through the process of the downstream activities, including the negotiation and securing of long-term gas sale agreements.

[141] They then contended that the Adopted Netback Method, as applied in the formula stated by the Minister, involved an error of law in applying s 148(1)(a) of the Regulation because it had the effect of assuming the *full potential* value of feedstock gas at the first point of disposal as actually having been *realised* as LNG. That was said to be because the Adopted Netback Method took the *realisation* of the full potential as LNG and the LNG sale price as a *given*, and then it merely deducted a toll or access charge as a return on the investment for providing the downstream infrastructure and services. The applicants relied on a suggested analogy with the factual situation considered in *Turner v Minister of Public Instruction* (1956) 95 CLR 245.

[142] The problem with this contention is that it pays no regard to the conceptual framework which underlies the Adopted Netback Method. It pays no regard to the fact that the sale assumed was not a normal sale to a spot market for the sale of land, but a sale pursuant to an antecedent negotiation setting up a CSG to LNG development and allocating risk accordingly. *Turner* was irrelevant for assessing such a sale. The applicants' argument does not amount to a reason not to characterise the Adopted Netback Method as a method or formula for deciding the amount that the petroleum could reasonably be expected to realise if it were sold on a commercial basis. It is really yet another way of criticising as insufficient the ways in which the Adopted Netback Method formulated the deductions from the external market price sale. As I have said, if these were errors, they were which were within the Minister's jurisdiction to make. No error of law as alleged was made.

The third "fundamental problem"

[143] The applicants contend that the hypothetical sale on a "commercial basis" invokes the valuation principles in *Spencer v The Commonwealth* (1907) 5 CLR 418. They then contend that the Adopted Netback Method does not, and cannot, replicate a sale on a "*commercial basis*" for the reasons they advanced in relation to the previous two "fundamental problems", and for the further reason that it operates as a disincentive to the downstream operator from acting in an economically and commercially rational manner. In this regard they again rely on Professor Gray's evidence before me. I have already explained the approach I will take in relation to that evidence.

[144] The applicants contended that under the Adopted Netback Method, the hypothetical downstream operator receives no financial reward for maximising the price that it can negotiate for the sale of the LNG. That is because it does not receive any part of the

residual profits from the sale of the LNG, with 100% of the residual profits (after deducting a mere toll or access charge for the downstream infrastructure) being transferred, or netted back, to the hypothetical upstream operator. In other words, the return for the downstream operator is not affected by whether it obtains a good deal or a bad deal on the sale of the LNG (provided the LNG price is sufficient to cover the toll payments that are due to the downstream operator). The hypothetical downstream operator would not receive any economic reward for its effort, trouble and expense in seeking to maximise the LNG sale price and to get the best possible deal.

[145] I reject this contention for the same reasons I rejected the first and second fundamental problems.

Conclusion as to ground 1

[146] The applicants have failed to make out this ground of judicial review.

Ground 2: Unlawful imposition of tax

[147] No challenge was advanced on the constitutional validity of the Regulation itself.

[148] The argument ran as follows:

(a) The State was entitled to impose a royalty on the "wellhead value" in the manner and form provided in ss 147C and 148 of the Regulation.

(b) On the other hand, the power to impose "*duties of excise*" was exclusively vested in the Commonwealth Parliament by s 90 of the Constitution.

(c) The Regulation would not be construed as authorising something which did not impose a royalty but which in truth imposed a duty of excise.

(d) The decision must be regarded as beyond that which was authorised because the errors made in the application of the statutory test (as established under ground 1) resulted in a situation in which the exaction of the royalty had no discernible relationship with the value of the privilege being acquired.

[149] The applicants accepted that ground 2 could not be sustained if ground 1 was not sustained. Accordingly, they accepted that I might not need to determine this ground.

[150] The Attorney-General for the State of Queensland intervened consequent upon having been given a notice pursuant to s 78B of the *Judiciary Act* 1903 (Cth) to submit that no constitutional point arose for determination. If ground 1 succeeded, it would be unnecessary to consider ground 2. If ground 1 failed, then the applicants agreed that ground 2 must fail. The Attorney-General invited me to conclude that in those circumstances I should not embark upon any consideration of ground 2 because to do so would be to embark upon the consideration of a merely hypothetical constitutional question.

[151] The applicants advanced no submission to the contrary.

[152] I agree with the approach suggested by the Attorney-General. It is unnecessary to express a view on this ground.

Ground 3: Unreasonableness

[153] One of the grounds for a statutory order of review pursuant to s 20(2)(e) of the *Judicial Review Act* is that "the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made." In turn, s 23 provides that a reference in s 20(2)(e) to an improper exercise includes a reference to a number of things, including at s 23(g) "an exercise of a power that is so unreasonable that no reasonable person could so exercise the power".

[154] Ground 3 is that the Minister purported to exercise the power in a way that was so unreasonable that no reasonable person could so exercise the power.

Relevant legal principles

[155] Both sides relied on my identification of relevant principles in *WB Rural Pty Ltd v Commissioner of State Revenue* [2018] 1 Qd R 526. In that case I summarised the law by reference to two decisions by intermediate appellate courts in this way (at [64] – [65]):

> [64] In *Francis v Crime and Corruption Commission* [2015] QCA 218 Fraser JA observed (at [33], Morrison JA and Mullins J agreeing) in relation to the unreasonableness ground of judicial review that:
>
> (a) it involved a stringent test, and was rarely established;
>
> (b) it did not sanction a review on the merits;
>
> (c) it was not made out merely if the court disagrees with an evaluative decision or with the weight attributed to a factor taken into account in the decision;
>
> (d) in *Flegg v Crime and Misconduct Commission* [2014] QCA 42 at [3] and [16]:
>
> (i) the President had expressed the test, with reference to *Minister for Immigration and Citizenship v Li*, as being "whether the ... decision was so unreasonable that it lacked an evident and intelligible justification when all relevant matters were considered"; and
>
> (ii) Gotterson JA (Margaret Wilson J agreeing) noted that the *Wednesbury* principles did not allow a challenge to a decision "on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which the [appellate tribunal] disagrees".
>
> (e) the court's task was to examine the reasoning of the impugned decision to determine whether it was a decision that could be justified even though "... reasonable minds could reasonably differ" or whether the decision was so unreasonable that it lacked an evident and intelligible justification.
>
> [65] And, in *Minister for Immigration and Border Protection v SZVFW* [2017] FCAFC 33, Griffiths, Kerr and Farrell JJ observed at [38]:
>
> > The following general principles may be extracted from the three leading authorities [of *Li, Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1 and *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11] (further general guidance is provided by the Full Court's decision in *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28):
> >
> > • there is a legal presumption that a statutory discretionary power must be exercised reasonably in the legal sense of that word (*Li* at [63] per Hayne, Kiefel and Bell JJ; *Singh* at [43] per Allsop CJ, Robertson and Mortimer JJ; *Stretton* at [4] per Allsop CJ and at [53] per Griffiths J);
> >
> > • nevertheless, there is an area within which a decision-maker has a genuinely free discretion, which area is bounded by the standard of legal reasonableness (*Li* at [66]; *Stretton* at [56] per Griffiths J);
> >
> > • the standard of legal reasonableness does not involve a court substituting its view as to how a discretion should be exercised for that of a decision-maker (*Li* at [66]; *Stretton* at [8] per Allsop CJ) and [76] per Griffiths J);
> >
> > • the legal standard of reasonableness is not limited to what is in effect an irrational, if not bizarre, decision and an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified (*Li* at [68]);
> >
> > • in determining whether in a particular case a statutory discretion has been exercised unreasonably in the legal sense, close attention must be given to the scope and purpose of the statutory provision which confers the discretion and other related provisions (*Li* at [74]; *Stretton* at [62] and [70] per Griffiths J);

- legal unreasonableness "is invariably fact dependent" and requires a careful evaluation of the evidence. The outcome of any particular case raising unreasonableness will depend upon an application of the relevant principles to the relevant circumstances, rather than by way of an analysis of factual similarities or differences between individual cases (*Singh* at [48]; *Stretton* at [10] per Allsop CJ and at [61] per Griffiths J);
- the concept of legal unreasonableness can be "outcome focused", such as where there is no evident and intelligible justification for a decision or, alternatively, it can reflect the characterisation of an underlying jurisdictional error (*Singh* at [44]; *Stretton* at [12]-[13] per Allsop CJ);
- where reasons are provided, they will be the focal point for an assessment as to whether the decision is unreasonable in the legal sense and it would be a rare case to find that the exercise of a discretionary power is legally unreasonable where the reasons demonstrated a justification (*Singh* at [45]-[47]).

[156] I do not now think my identification of relevant principles in *WB Rural Pty Ltd v Commissioner of State Revenue* is sufficient. The second of the two cases which I cited was subsequently overturned on appeal to the High Court: see *Minister for Immigration and Border Protection v SZVFW* (2018) 357 ALR 408. Although the reasons in the High Court do not provide any occasion to conclude that summary of general principles which I quoted was erroneous, the High Court did make a number of points as to the juridical basis of the legal unreasonableness basis of challenge to administrative decisions which should be emphasised.

[157] Kiefel CJ observed:[19]

> **In *Minister for Immigration and Citizenship v Li* reference was made to what had been said in *Klein v Domus Pty Ltd* regarding the need to look to the purpose of the statute conferring the discretionary power**. Where it appears that the dominating, actuating reason for the decision is outside the scope of that purpose, the discretion has not been exercised lawfully. But this is not to deny that within the sphere of the statutory purpose there is scope for a decision-maker to give effect to the power according to his or her view of the justice of a case, without interference by the courts.

[158] Gageler J observed:[20]

> Whatever room might remain for argument about the most appropriate expression of the standard of legal reasonableness, however, the nature of legal unreasonableness should be taken to be settled by the explanation of it in *Quin*. **The requirement that a statutory power be exercised within the bounds of reasonableness is an implied condition of the statutory conferral of the power.** The implication arises through operation of a common law presumption of statutory interpretation that a statutory power is conferred on condition that the power can be exercised only within those bounds. **The presumption prevails to condition the exercise of the power on the repository complying with the standard of legal reasonableness absent statutory indication that the repository must meet some higher standard** (an example of which is where the repository is restricted to exercising the power only on reasonable grounds) **or will sufficiently comply with the statute by meeting some lower standard** (an example of which is where the statute requires no more than that the repository exercise the power in good faith and for a purpose permitted by the statute). **Where the presumption prevails so as to condition the exercise of the power on the repository complying with the standard of legal reasonableness, a decision made or action taken in purported exercise of a statutory power in breach of the standard of legal reasonableness is a decision or action which lies beyond the scope of the authority conferred by the power.**

[159] Nettle and Gordon JJ expressed themselves in this way:[21]

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[19] *Minister for Immigration and Border Protection v SZVFW* (2018) 357 ALR 408 at [12], emphasis added and footnotes omitted.

[20] *Minister for Immigration and Border Protection v SZVFW* (2018) 357 ALR 408 at [53], emphasis added and footnotes omitted.

[21] *Minister for Immigration and Border Protection v SZVFW* (2018) 357 ALR 408, italics original, emphasis added and footnotes omitted.

[78] **The task of the court, where it has been alleged that a decision is legally unreasonable, is to ask whether the exercise of power by the decision-maker was beyond power because it was legally unreasonable**.

[79] **That task requires the court to assess the quality of the administrative decision by reference to the statutory source of the power exercised in making the decision and, thus, assess whether the decision was lawful, having regard to the scope, purpose and objects of the statutory source of the power**.

[80] **Parliament is taken to intend that a statutory power will be exercised reasonably by a decision-maker. The question with which the legal standard of reasonableness is concerned is whether, in relation to the particular decision in issue, the statutory power, properly construed, has been *abused* by the decision-maker or, put in different terms, the decision is beyond power. That question is critical to an understanding of the task for a court on review**.

[81] **How that abuse of statutory power manifests itself is not closed or limited by particular categories of conduct, process or outcome**. The abuse of statutory power is not limited to a decision affected by specific errors which bring about an improper exercise of power because, for example, the decision-maker took into account an irrelevant consideration or failed to take into account a relevant consideration; or exercised the power in bad faith, or for a purpose other than a purpose for which it was conferred; or exercised the power in such a way that the result of the exercise of power is uncertain.

[82] Nor is the abuse of statutory power limited to a decision which may be described as "manifestly unreasonable", or to what might be described as an irrational, if not bizarre, decision that is so unreasonable that no reasonable person could have arrived at it. A conclusion of legal unreasonableness may be outcome focused – where, for instance, there is no "evident and intelligible justification" for the decision. **As Gageler J explained in *Minister for Immigration and Citizenship v Li*, "[r]eview by a court of the reasonableness of a decision made by another repository of power 'is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process' but also with 'whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law'".**

[83] Indeed, grievous error may result if a court on review had to identify a particular error to found its conclusion of unreasonableness. If the court approached the assessment in this way, at least one important part of the lens for assessing legal unreasonableness would be removed: namely, error identified by observing that the *result* is so unreasonable that it could not have been reached if proper reasoning had been applied in the exercise of the statutory power in the particular circumstances. In that situation, the court is not undertaking merits review of an exercise of a discretionary power by a decision-maker. Rather, the court is asking whether the decision-maker's purported exercise of power was beyond power because it was legally unreasonable.

[84] **Moreover, legal unreasonableness is invariably fact dependent and requires a careful evaluation of the evidence. That is, assessment of whether a decision was beyond power because it was legally unreasonable depends on the application of the relevant principles to the *particular* factual circumstances of the case, rather than by way of an analysis of factual similarities or differences between individual cases. Where reasons are provided, they will be a focal point for that assessment. It would be a rare case to find that the exercise of a discretionary power was unreasonable where the reasons demonstrated a justification for that exercise of power**.

[160] Edelman J observed:[22]

[131] **The reasonableness constraint that usually applies to the exercise by an administrator of statutory power is generally based upon a statutory implication**. Where the statutory implication imposes a duty of reasonableness as a condition of decision making, violation of that duty means that the decision will have been made beyond power and therefore unlawfully. […]

[…]

[134] Like other legal instruments, statutes often confer powers upon a decision-maker without any express condition as to the manner in which those powers must be exercised. **To the question:**

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[22] *Minister for Immigration and Border Protection v SZVFW* (2018) 357 ALR 408, emphasis added and footnotes omitted.

> **"how should the power be exercised?" the implication will not usually be: "in any way that the decision-maker desires". Rather, it will usually be implied that the power should be exercised reasonably**. As for the content of the duty of reasonableness, following the classic exposition by Lord Greene MR, the content of the implication of reasonableness as an independent ground of judicial review has often been expressed in this Court in terms similar to those which ask whether a decision is "so unreasonable that no reasonable repository of the power could have taken the impugned decision or action". In Canada, in a distinction now abandoned, this high standard of unreasonableness was once described as "patent" unreasonableness in contrast with "unreasonableness simpliciter". Although Lord Cooke of Thorndon presciently observed nearly two decades ago, and a majority of this Court more recently said, that **the legal standard of reasonableness is not necessarily limited to patent unreasonableness, it is not helpful to attempt to divide unreasonableness into predetermined species. Rather, the precise content of an implication of reasonableness, where it is implied, will be based upon the context, including the scope, purpose, and real object of the statute**.

[161] It is clear now that, subject to one caveat, any summary of general principle in relation to this ground of judicial review should now start with the proposition that at general law judicial review on the grounds of legal unreasonableness is concerned with: (1) the rebuttable presumption that the valid exercise of administrative power is conditioned on the repository of the power exercising it within the bounds of legal reasonableness, and (2) the discernment of the ambit of those bounds in the particular case, having regard to the scope, purpose and objects of the statutory source of the power. The various ways in which Courts have expressed the circumstances in which it might be appropriate to conclude that the bounds have been exceeded (e.g. "manifestly unreasonable", "illogical", "irrational", or "lacks an evident and intelligible justification") do not confine the manner of discernment of the bounds in any particular case, but are examples of when the appropriate conclusion might have been drawn in different cases.

[162] The caveat of course is that at least in Queensland and the Commonwealth by statute,[23] an administrative decision under an enactment must be exercised within the legal bounds created by the proposition that it must not be an exercise of a power that is so unreasonable that no reasonable person could so exercise the power. There is no reason to think that manner of determining the bounds of legal reasonableness was intended to codify the law. However, if the legal bounds so defined are exceeded in a particular case then the statutory ground of judicial review would be established.

Discussion

[163] In the present case, the Minister did not suggest that he was not required to exercise his power other than within the bounds of legal reasonableness, having regard to the scope, purpose and objects of the statutory source of the power. And, of course, he accepted that he must not have exercised his power in a way which was so unreasonable that no reasonable person could so exercise the power.

[164] As I have explained, the discernment of the ambit of the bounds of legal reasonableness must occur having regard to the scope, purpose and objects of the statutory source of power. In this regard, I have already explained the implications of that analysis: see at [112] to [133] above.

[165] I have also already examined the reasons given by the Minister: see [91] to [100]. The reasons suggest –

(a) a rational engagement with the competing expert evidence which was before the Minister;

(b) an expression of preference for a methodology supported by one expert; and

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[23] see s 20(2)(e) and s 23(g) of the *Judicial Review Act* and s 5(1)(e) and s 5(2)(g) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

(c) justification of that choice in a coherent intelligible way.

[166] The essence of the applicants' case here was that the merits of the choices and assumptions made by Lonergan were so poor that the decision of the Minister made in reliance on Lonergan must be regarded as a decision which was made outside the bounds of legal reasonableness.

[167] I disagree. In my view, the reasons evidence a rational justification for the exercise of power. Whilst a reasonable person could have been persuaded by the arguments marshalled by APLNG and the experts upon which it relied, a reasonable person could also have been persuaded by the Lonergan reports and the arguments marshalled by the OSR, so as to exercise the power in the manner chosen by the Minister. There was, when regard is had to the process by which the decision was obtained, to the material before the Minister, and to the wording of the reasons, to use the words of Gageler J in *Li*,[24] demonstrable "justification, transparency and intelligibility within the decision-making process" and the Minister's decision plainly fell within the range of possible, acceptable outcomes which were defensible in respect of the facts and law which were before him.

[168] I turn briefly to consider the four reasons which the applicants advanced to justify their submission.

[169] First, the applicants contended that the same points made under ground 1 also established that the exercise of the power to make the decision was so unreasonable that no reasonable person could so exercise the power. I reject that contention for reasons already advanced.

[170] Second, the applicants pointed to a litany of suggested inconsistencies as between the Lonergan reports and the formula stated in schedule 2 to the decision, and between the final OSR report and the formula stated in schedule 2 to the decision. The inconsistencies were identified in the report of Professor Gray at [201] and in Attachment A to the applicants' written submissions. There is no utility in examining the particular inconsistencies alleged. They were formulated to make an argument about uncertainty which was not pressed. The argument that they could justify a conclusion that the decision was outside the bounds of legal reasonableness was not developed before me. I have considered the attachment and do see how they could justify that conclusion.

[171] Third, in reliance on material which was not before the Minister, the applicants contended that the risk and profit allocation inherent in the Lonergan approach adopted by the Minister's decision was flawed because there were no real life examples of the transactions bearing the characteristics hypothesised by Lonergan. As presented, this argument must fail because it turns on evidence not before the Minister which, for reasons explained in Annexure B, I think it would be an error to use. In truth the argument could have been made by reference to evidence which was before the Minister because that criticism was advanced throughout the APLNG submission and the expert reports on which it relied; the second Lonergan report specifically dealt with the various criticisms of its risk and profit allocations,[25] the final OSR report summarised the position,[26] and the Minister must be taken to have accepted the Lonergan view. I would have rejected an argument so made for reasons already given.

[172] Fourth, the applicants contended that the decision was also inconsistent with the OECD *Transfer Pricing Guidelines* and with the accepted and well understood approaches adopted in the PRRT Regulation for valuing LNG feedstock. As presented, this argument

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[24] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [105], cited with approval by Nettle and Gordon JJ in *SZVFW* at [82].

[25] see Issue 1 at [12] to [14] and Issue 3 at [18] in affidavit of Perret sworn 29 January 2016 at pp 737 to 741 and 747 to 753.

[26] see Appendix S at [12] to [15] in affidavit of Perrett sworn 29 January 2016, Exhibit RGP-1, at pp 856 to 858.

must fail because it turns on evidence not before the Minister which, for reasons explained in Annexure B, I think it would be an error to use. In truth the point could also have been made by reference to evidence which was before the Minister. The APLNG initial application, and attached report, made reference to both documents.[27] Professor Gray's report before the Minister made this point by reference to both documents.[28] Two of the other five expert reports before the minister also referred to both documents.[29] The APLNG submission which had enclosed the six further expert reports also made it.[30] But I would have rejected an argument so made for reasons already given. The second Lonergan report specifically dealt with the criticisms,[31] the final OSR report dealt summarised the position,[32] and the Minister must be taken to have accepted the Lonergan view. There is not the slightest indication of legal unreasonableness.

[173] Finally, the applicants sought to support the argument by inviting me to accept Professor Gray's new report which explained why he thought that the Lonergan views were so wrong as to be regarded as absurd and irrational. This argument fails because it turns on evidence not before the Minister which, for reasons explained in Annexure B, I think it would be an error to use. But again, Professor Gray's new report was in many respects merely a re-expression – undoubtedly with greater emphasis – of criticisms which he had already advanced in his report which was before the Minister. Legal unreasonableness must mean something other than emphatic disagreement between experts.[33]

Conclusion as to ground 3

[174] The applicants have failed to make out this ground of judicial review.

Ground 4: Taking into account irrelevant considerations

[175] Ground 4 is that where the Minister has taken irrelevant considerations into account, the making of the Decision was an improper exercise of the power conferred by the Regulation under which the Decision was purported to be made pursuant to ss 20(2)(e) and 23(a) of the *Judicial Review Act*.

The pleaded case

[176] It is appropriate to identify the way the case was advanced in the statement of claim as particularised, not least because, as will appear, an admission of the contents of the particulars provides a large amount of the factual foundation for a consideration of this ground of judicial review.

[177] In the statement of claim at [4], the applicants pleaded that the decision was invalid and of no effect, and ought be set aside, and the other relief sought in the application granted, on the grounds as pleaded in the statement of claim. In seven following subparagraphs they set out a brief precis of each of grounds 1 to 7. In subparagraph (d), the applicants alleged that the respondent took irrelevant considerations into account in making the decision.

[178] The respondent's defence denied the allegations in the statement of claim at [4] because of the matters pleaded in the defence at [32] to [92] in respect of each of grounds 1 to 7.

[179] The statement of claim then elaborated upon ground 4 at [58] to [61] in these terms:

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[27] see affidavit of Perrett sworn 29 January 2016, Exhibit RGP-1, at p 74 *et seq*, particularly pp 77, 88, 95 – 96, 99 – 100, 121, 135, 138, 143.
[28] see affidavit of Perrett sworn 29 January 2016, Exhibit RGP-1, at p 532 *et seq*, particularly p 354.
[29] see affidavit of Perrett sworn 29 January 2016, Exhibit RGP-1, particularly Deloitte Tax Services Pty Ltd report at pp 453 – 457, 470 – 473, 484 – 486; Frontier Economics report at 700 and 719.
[30] see submission at [4.12] in affidavit of Perrett sworn 29 January 2016, Exhibit RGP-1, at p 336.
[31] see Issue 13 at [37] to [38] in affidavit of Perret sworn 29 January 2016, Exhibit RGP-1, at pp 809 to 813.
[32] see Appendix S at [36] *et seq* in affidavit of Perrett sworn 29 January 2016, Exhibit RGP-1, at p 864.
[33] cf *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 per Crennan and Bell JJ at [129].

58. Further or alternatively to the other grounds pleaded herein, the respondent took the following irrelevant considerations into account, resulting in an improper exercise of the power to make the Decision:

    (a) The Adopted Netback Method being an irrelevant consideration because as applied as the method of valuation, it does not hypothesise or replicate a sale of the feedstock gas at the first point of disposal as is required by s 148(1)(a) of the PAG Regulation (for the reasons pleaded under ground 1 above);

    (b) […]

59. Further, in providing the OSR Report[34] to the respondent, upon which the respondent relied and adopted in full, the OSR considered and took into account submissions, comments and material concerning the operation and effect of s 148(l)(a) of the PAG Regulation with respect to CSG to LNG projects (**Non-Party Material**) which the OSR had received from:

    (a) Tri-Star Petroleum Company, Tri-Star Australia Holding Company, or related entities, or their representatives;

    (b) other persons or entities.

    Particulars

    The applicants will provide further and better particulars of paragraph 59(b) following disclosure. In circumstances where Tri-Star entities made submissions to the OSR, and the OSR did not alert the applicants to this at any material time, it is reasonable to infer that other persons or entities also made submissions to either the OSR or the respondent. The Non-Party Material was irrelevant to consideration of the applicants' application for a petroleum royalty decision and it was also irrelevant to the Decision.

60. In circumstances where:

    (a) the OSR had a duty to advise the respondent in making the Decision;

    (b) the respondent adopted and relied upon the OSR Report in full without any qualification;

    the OSR's consideration of the irrelevant Non-Party Material should be imputed to the respondent's consideration of the matter and his Decision.

61. In the premises of the facts and matters pleaded under ground 4, where the respondent has taken irrelevant considerations into account, the making of the Decision was an improper exercise of the power conferred by the PAG Regulation under which the Decision was purported to be made pursuant to ss 20(2)(e) and 23(a) of the JRA justifying the relief sought.

[180] The defence to that section of the statement of claim then provided:

60. The Respondent denies the allegations in paragraph 58(a) of the statement of claim for the reasons pleaded in paragraphs 32 to 47 herein in respect of Ground 1.

61. As to the allegations in paragraph 58(b) of the statement of claim, the Respondent […]

62. The Respondent denies the allegations in paragraph 59 of the statement of claim because the OSR did not, "in providing the OSR Report to the Respondent", consider and take into account the said matters.

63. The Respondent denies the allegations in paragraph 60 of the statement of claim because the premises pleaded do not give rise to the inferences alleged.

64. The Respondent denies the allegations in paragraph 61 of the statement of claim in the premises of the matters pleaded in paragraphs 60 to 63 herein.

[181] By a document entitled "Further particulars of the statement of claim", which was dated 13 April 2018, the applicants provided "the following further and better particulars of the Statement of Claim served on 12 May 2016". The document noted that any terms used in it which were defined in the statement of claim had the same meaning as pleaded in the statement of claim. There followed the following material:

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[34] The document referred to in the pleading is the document which in these reasons I have referred to as the final OSR report.

Particulars of "Non-Party Material" pleaded at paragraph 59 of the SOC

1. The applicants provide at paragraphs 2 to 4 below further and better particulars of the "*Non-Party Material*" pleaded at paragraph 59 of the SOC […] in the following two categories:

   (a) OSR's consideration and taking into account of material and comments as to the estimated revenue outcome of the Adopted Netback Method in comparison to the RPM, in circumstances where the OSR was expressly aware that such consideration was irrelevant;

   (b) OSR's consideration of submissions, comments and material received by Tri-Star Petroleum Company, Tri-Star Australia Holding Company, or related entities or their representatives (collectively **Tri-Star**).

Category 1 - estimated revenue outcome

2. The OSR considered and took into account the following material and comments as to the estimated revenue outcome of the Adopted Netback Method in comparison to the RPM:

   (a) In an internal meeting of OSR and its consultants held on or around **19 July 2012**:

      (i) Mr Simon McKee (Director of OSR) stated to the effect that one of the purposes of OSR's advisory panel was to look at the comparable revenue impacts of the methods;

      (ii) Dr Daniel Magasanik (as an advisor to OSR) stated to the effect that the netback method would result in a higher royalty than the method given in APLNG's application for a petroleum royalty decision (being the RPM);

   (b) By PowerPoint presentation on or around **10 December 2013** by Queensland Treasury and Trade, titled "*Petroleum Royalty Decision Australia Pacific LNG Project*", at slide 21 a royalty estimate was provided with "*Netback (OSR)*" having a range of $156 million to $260 million higher than "*RPM (APLNG)*";

   (c) By PowerPoint presentation on or around **3 November 2014** of Mr Simon McKee (Director of OSR), titled "*Petroleum Royalty Decision Australia Pacific LNG Project*":

      (i) at slide 30, the budgeted forecast LNG royalties were stated for years 2013/2014 to 2021/2022;

      (ii) at slide 32, an estimated royalty revenue was provided of a total of $160,437,000 higher for Netback compared to RPM for the three years of 2017/2018 to 2019/2020;

   (d) On or around 23 March 2015, Mr Simon McKee (Director of OSR) prepared a briefing paper to the Under Treasurer which, amongst other things:

      (i) was endorsed by Ms Elizabeth Goli (the Commissioner of State Revenue);

      (ii) at Attachment G provided the forecast royalty revenue with a "*Revenue variance - APLNG-OSR A$M*" of a range of $121 million to $203 million higher under Netback than under RPM for a three-year period of 2015/2016 to 2017/2018;

   (e) By PowerPoint presentation on or around **7 July 2015** of Mr Simon McKee (Director of OSR), titled "*Queensland LNG Projects & APLNG Petroleum Royalty Decision*":

      (i) at slide 29, the budgeted forecast LNG royalties were stated for years 2013/2014 to 2021/2022;

      (ii) at slide 30, an estimated royalty revenue was provided of a range of $125 million to $207 million higher for Netback compared to RPM for the three years of 2015/2016 to 2017/2018 based on certain assumptions and variables;

   (f) On **23 October 2015**, at 8:08pm, Mr Simon McKee (Director, Queensland Treasury) sent an internal email to Mr Tony Kulpa and Ms Elizabeth Goli (the Commissioner of State Revenue):

      (i) indicating that he was "*progressing the figures*" in response to the request of the Under Treasurer for royalty revenue estimates;

      (ii) which stated, amongst other things:

"One approach we could take is to provide our revised figures but make it clear that they are 'illustrative ' rather than estimates, essentially to show that netback will invariably produce a higher wellhead value and therefore royalty revenue than RPM ..."

(g) On **25 October 2015**, at 8:03pm, Mr Simon McKee (Director, Queensland Treasury) sent an internal email to Ms Elizabeth Goli (the Commissioner of State Revenue) and Mr Tony Kulpa, which:

(i) responded to a request of the Under Treasurer attaching a table of royalty estimates;

(ii) stated:

"The purpose is to show that Netback, other things being equal, will produce a higher revenue outcome than RPM."

(iii) attached a table of "*illustrative revenue*" for the years 2015 to 2018 showing Netback producing revenue $85 million higher than RPM for that three-year period based on certain assumptions and variables;

(h) On or around **26 October 2015**, Mr Simon McKee (Director of OSR) prepared a briefing paper to the Under Treasurer which, amongst other things:

(i) was endorsed by Ms Elizabeth Goli (the Commissioner of State Revenue);

(ii) stated that the OSR and its valuation expert had developed "*comprehensive spreadsheets for the Netback formula, which can be used for estimates and sensitivity analysis purposes*";

(iii) stated that:

"The figures show that, other things being equal, Netback will produce a higher revenue outcome than RPM"

(iv) attached a table of "*illustrative figures*" for the years 2015 to 2018 showing Netback producing revenue $85 million higher than RPM for that three-year period based on certain assumptions and variables;

(i) On or around **30 October 2015**, Mr Simon McKee (Director of OSR) prepared a briefing paper to the Under Treasurer which, amongst other things:

(i) was endorsed by Ms Elizabeth Goli (the Commissioner of State Revenue);

(ii) referred to the briefing paper of 26 October 2015;

(iii) attached "Attachment B" to replace the illustrative figures in the note of 26 October 2015;

(iv) at Attachment B included a table titled "*APLNG Revenue comparisons under Netback and RPM*", showing for the three-year period of 2016 to 2018:

A. "*Revenue variance - APLNG RPM vs OSR Netback*" of a range of $143.5 million to $232 million higher under Netback than under RPM for that three-year period;

B. "*Estimated additional revenue $M per annum from $1/GJ reduction in statutory reductions*" of $130 million for that three-year period.

3. The OSR considered and took into account material and comments as to the estimated revenue outcome of the Adopted Netback Method in comparison to the RPM, notwithstanding that it expressly acknowledged that consideration of such material and comments was irrelevant as follows:

(a) In an internal briefing note dated **18 May 2012** to the Treasurer, prepared by Mr Simon McKee of OSR, it was stated at page 2:

"6 . ... DNRM considers that the netback method is appropriate.

...

8. The basis for determining wellhead value is set out in the PGR. These decisions must also be made consistent with all relevant legal and

valuation principles, having regard to the circumstances of each case, and is subject to review by the Queensland Supreme Court under the Judicial Review Act 1991. While the decisions are not made by negotiation and agreement with applicants, they are made having regard to all relevant information, including that provided by applicants. In the course of the meeting, it is therefore important that comments on determining the wellhead value are restricted to the principles set out in the PGR, and broader concepts such as the State's fiscal position, are not referred to as factors influencing your determination, or the determination of any delegate."

(b) At a meeting on or around **26 March 2014** between representatives of Tri-Star (namely; Mr James H. Butler Jr, Mr James Butler V, Mr John Sweep, and Mr Don Cleary) and representatives of the OSR (namely; Mr Simon McKee and Mr Matt Houston), Mr Simon McKee of the OSR said to the effect that the royalty revenue which would flow to the State through the application of a particular method was not a relevant consideration when making a petroleum royalty decision;

(c) In an internal briefing paper dated **23 March 2015**, prepared by Mr Simon McKee (Director of OSR) for the Under Treasurer, it was stated at Attachment A, page 2:

> *"A right of review of the Minister's decision is found in the Judicial Review Act 1991 (Qld). In making the decision there is the potential risk of administrative law error. For example, if the Minister were to take into account an irrelevant consideration, or not take into account a relevant consideration, in making the decision. In particular, the royalty revenue that may be received by the State from application of a particular valuation method or formula is not a relevant consideration and should not be taken into account in making the decision."*

(d) In an internal PowerPoint presentation of Mr Simon McKee (Director of OSR) dated on or around **26 October 2015**, Mr McKee stated at slide 7:

> "*Minister can take advice in making decision, but should only consider relevant matters and not irrelevant matters e.g. royalty outcomes of a particular method/formula is <u>not</u> a relevant matter under Regulation*" (underlining *not* added)

Category 2 - Tri-Star material

4. The OSR considered and took into account the following submissions, material and comments from Tri-Star and officers of the OSR, including:

(a) in a letter from Mr John Sweep of Tri-Star to Mr McKee of the OSR dated **23 October 2013** with respect to, amongst other things, determination of the wellhead value of petroleum;

(b) at a meeting on **28 November 2013** between Mr John Sweep of Tri-Star and Mr McKee of the OSR with respect to the way in which the Crown could determine royalties and considerations in determining wellhead value of petroleum;

(c) in a letter from Mr John Sweep of Tri-Star to Mr McKee of the OSR dated **26 March 2014** with respect to, amongst other things, determination of wellhead value of petroleum and the netback methodology;

(d) at a meeting on **26 March 2014** between representatives of Tri-Star (namely; Mr James H. Butler Jr, Mr James Butler V, Mr John Sweep, and Mr Don Cleary) and representatives of the OSR (namely; Mr Simon McKee and Mr Matt Houston) with respect to the way in which the Crown could determine royalties and considerations in determining wellhead value of petroleum;

(e) in a further letter from Mr John Sweep of Tri-Star to Mr McKee of the OSR dated **26 March 2014** with respect to the components of wellhead value of petroleum;

(f) in a letter from Mr John Sweep of Tri-Star to Mr McKee of the OSR dated **22 April 2014** with respect to the components of the wellhead value of petroleum and in seeking an opportunity to discuss with the OSR "*the pre-conditions for petroleum pricing methodologies to qualify as arms-length ...* ;

(g) at a meeting on *23 April 2014* between representatives of Tri-Star (namely; Mr James H. Butler Jr, Mr James Butler V, Mr John Sweep, and Mr Don Cleary) and representatives of the OSR (namely; Mr Simon McKee and Mr Matt Houston) with respect to considerations in determining wellhead value of petroleum, including presentation of powerpoint slides, and at which Mr Simon McKee stated to the effect that:

(i) "*OSR did not draft the wellhead value provisions, but that we [OSRJ would have drafted them differently if we [OSR] were doing so*",

(ii) he considered that "*Although not explicit ... the legislation reflected a netback method*";

(h) in an email dated **23 April 2014** of Mr John Sweep of Tri-Star to Mr Simon McKee and Mr Matt Houston of OSR attaching a publication of the Northern Territory Department of Treasury and Trade titled "*Northern Territory Petroleum Royalty Overview*";

(i) at a meeting on **22 April 2015** between representatives of Tri-Star (namely; Mr James Butler and Mr Don Cleary) and representatives of the OSR (namely; Mr Simon McKee and Ms Liz Gordon) with respect to considerations in determining wellhead value of petroleum, including purported advice of Tri-Star alleging that the netback methodology is "*well established and used in Texas, is legislated and well supported in the case law*;

(j) in an email dated **29 April 2015**, Mr Don Cleary on behalf of Tri-Star provided Ms Liz Gordon of the OSR (copied to Mr Simon McKee) "*dot points*" by way of submissions alleging the effect of Texas law and references to various cases and codes;

(k) at a meeting on **29 July 2015** between representatives of Tri-Star (namely; Mr James Butler and Mr Don Cleary) and representatives of the OSR (namely; Mr Simon McKee and Ms Liz Gordon) with respect to considerations in determining wellhead value of petroleum.

5. In a briefing note of the OSR to the Respondent dated **22 April 2014**, the OSR stated, amongst other things, that the issues highlighted by Tri-Star would be canvassed in a report of the OSR on APLNG's application for a petroleum royalty decision.

6. In a letter dated **5 May 2014** from the Respondent to the Premier, the Respondent outlined issues with respect to Tri-Star's approaches concerning valuation for royalty purposes, and advised that any future approaches from Tri-Star could be directed to Mr Simon McKee of the OSR.

7. In relation to a request of Mr Cleary from Tri-Star by email dated **23 April 2015** to meet with the Respondent (sent to the Respondent's Executive Assistant and copied to Mr McKee and Ms Gordon):

(a) someone from the Respondent's office (likely the Treasurer's Chief of Staff) wrote in hand on a copy of Tri-Star's email: "*Response in writing only, I don't think it's appropriate to meet. We have been clear that the methodology for gas royalties won't change*", to which someone else handwrote "*yes*";

(b) the Respondent's office responded to Tri-Star by letter dated **21 May 2015** stating that the Respondent would not meet with Tri-Star.

[182] By email on 18 October 2018, the Minister's solicitors provided the applicants solicitors with an amended defence. Amongst other things it amended paragraph 62 to read:

62. The Respondent admits ~~denies~~ the allegations in paragraph 59 of the statement of claim ~~because the OSR did not, "in providing the OSR Report to the Respondent", consider and take into account the said matters~~.

[183] Even though the amendment was made in the context of the statement of claim at [59] having been particularised in the way it had been, it is a trite proposition that a pleading responds to the material facts alleged, but not to the particulars of the material facts. Accordingly, the amendments to the pleading did not reveal whether the Minister disputed the truth of the matters asserted in the applicants' document entitled "Further particulars of the statement of claim" dated 13 April 2018.

[184] On the same day as the amendment to the defence was received by them, the solicitors for the applicants wrote to the Minister's solicitor in these terms:

> We note that the [amended defence] also now admits the allegation contained at paragraph 59 of the statement of claim (**SOC**). It is somewhat frustrating to only be advised of this admission today, at a point where we are well advanced in the preparation of our client's written submissions due to be served on Monday, 22 October 2018.
>
> We advise that we are proceeding on the assumption that the respondent's admission at paragraph 62 of the [amended defence] includes an admission of the "Non-Party Material" pleaded at paragraph 59 of the SOC as further particularised in the applicant's Further Particulars of the SOC dated 13 April 2018.
>
> Please inform us by close of business today if we are incorrect in our assumption.

[185] By email later that day the Minister's solicitor advised the applicants solicitors as follows:

> I confirm that your assumption is correct and the admission at paragraph 62 of the [amended defence] includes an admission of the "Non-Party Material" pleaded at paragraph 59 of the SOC as further particularised in the applicant's Further Particulars of the SOC dated 13 April 2018.

[186] Against that background, the following propositions may be advanced about the pleaded case.

[187] **First**, the pleaded case was that the Minister took into account irrelevant considerations in making the decision. However it did not form part of the pleaded case to contend that the Minister personally took the irrelevant considerations into account. Instead it was contended that the OSR did so and its consideration of the irrelevant Non-Party Material (as particularised) should be imputed to the Minister, so as to vitiate his decision.

[188] **Second**, by its amended pleading the Minister admitted that in providing the OSR Report to the respondent, the OSR considered and took into account Non-Party Material which the OSR had received from:

(a) Tri-Star Petroleum Company, Tri-Star Australia Holding Company, or related entities, or their representatives; and

(b) other persons or entities.

[189] **Third**, by his solicitor's email the Minister admitted the Non-Party Material "as further particularised in the applicants' "Further Particulars of the SOC" dated 13 April 2018".

Relevant legal principles

[190] The taking of an irrelevant consideration into account in the exercise of a power is an improper exercise of the power and gives rise to a ground of review: s 20(2)(e) and s 23(a) of the *Judicial Review Act*.

[191] Determining what considerations a decision-maker must and, conversely, must not take into account in the exercise of a statutory power is question of law which must be determined as a matter of construction of the statute which created the power, including, if necessary, by implication from the subject matter, scope and purpose of the statute: see *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 per Mason J at 39 – 40; *Underwood v Queensland Dept of Communities* [2013] 1 Qd R 252 per Muir JA, with Dalton J agreeing, at [32]. I accept the Minister's submission that, properly analysed, an irrelevant consideration is one which, as a matter of construction of the legislative provisions, cannot permissibly be taken into account.

[192] If a decision-maker relies on irrelevant material in a way that affects the exercise of power the decision-maker makes an error of law, and doing so results in the decision-maker exceeding the authority or powers given by the relevant statute: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 per McHugh, Gummow and Hayne JJ at [82].

[193] An issue of materiality may arise, such that relief could be refused on discretionary grounds. In *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 Mason J observed (at 40, citations omitted):

> Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision: […] A similar principle has been enunciated in cases where regard has been had to irrelevant considerations in the making of an administrative decision: […]

[194] And, in this regard, Burchett J noted in *Australian Conservation Foundation Inc v Forestry Commission of Tasmania* (1988) 19 FCR 127 at 135:

> It is true that a decision-maker may not take account of an irrelevant consideration; but I think he may pick up a red herring, turn it over and examine it, and then put it down, so long as he does not allow it to affect his decision […] If an insignificant irrelevant factor may not vitiate a decision (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40; 66 ALR 299), one that plays no part at all in the decision need not do so.

[195] It follows that in order to obtain the relief which they seek in respect of this ground, the applicants must demonstrate:

(a) first, the alleged irrelevant consideration was, as a matter of law, to be regarded as an irrelevant to the exercise of power;

(b) second, the decision-maker relied on the alleged irrelevant consideration in a way which affected the exercise of power;

(c) third, the proper exercise of discretion would be to set aside the decision and to order it to be re-exercised.

<u>The first irrelevant consideration: the matters argued under ground 1</u>

[196] The applicants contended that, for the reasons they advanced in support of ground 1, the Adopted Netback Method did not assume a sale of feedstock gas when properly analysed. Accordingly, it was an irrelevant consideration in determining the relevant amount "if it is sold" for the purposes of s 148(1)(a) of the Regulation.

[197] This argument fails essentially for the reasons advanced in relation to ground 1.

<u>The second irrelevant consideration: the revenue outcome for the State</u>

[198] There was no dispute between the parties that the revenue outcome for the State was an irrelevant consideration.

[199] The critical question was whether the Minister should be regarded as having taken into account the consideration of the revenue outcome for the State because the OSR should be so regarded and the OSR's conduct imputed to the Minister.

[200] The applicants asked me to accept the proposition advanced at paragraph [158] of its written submissions:

> The correct conclusion on the evidence is that the OSR considered and took into account the estimated revenue outcome of the Adopted Netback Method in comparison to the Residual Pricing Method (also referred to as RPM, which is the method that was advanced by APLNG in its submissions to the OSR) in deciding to recommend the Adopted Netback Method to the Minister, with the OSR's advice being adopted in full by the Minister.

[201] Whether that submission should be accepted turns in large part to what inferences I should draw from the facts which were the subject of the admissions.

[202] It is at least true that the Minister must be taken to have admitted that various events occurred as set out in the subparagraphs to numbered paragraphs 2, 3 and 4, and in paragraphs 5, 6 and 7 of the particulars.

[203] Further, given –

(a) the context in which the admissions were made, including, in particular, that they had been sought concerning facts which were explicitly relied on to justify ground 4 on the basis of imputing the OSR's failure to the Minister;

(b) their unqualified nature; and

(c) they were formulated by a solicitor,

it seems to me that there is a strong argument that the Minister must be taken to have admitted the truth of the categorisation of those events in numbered paragraph 1 of the particulars and the chapeaux of numbered paragraphs 2, 3 and 4.

[204] But even if that were not so, the conclusion for which the applicants contend in their written submissions at [158] is an arguable inference from the facts which were distinctly admitted and from the documentary evidence before me which was referable to the admissions.[35] As to whether I should draw the inference, I make these observations:

(a) The Minister had the applicants' written submission which asked me to draw the conclusion which I have recorded and which specifically relied on the admission since 22 October 2018.

(b) The Commissioner of State Revenue was a witness available to the Minister. Indeed, the Minister had obtained affidavits from the Commissioner of State Revenue before that date and after that date. Indeed the final affidavit from Ms Goli was sworn on 15 November 2018.

(c) There is no doubt that Ms Goli would have been in a position to shed light on whether the revenue outcome for the State had any influence on the OSR decision to recommend the adoption of the Adopted Netback Method.

(d) Yet the affidavits of Ms Goli do not touch on that topic at all. Indeed, they make no reference to either of the subject matters relied on by the applicants under ground 4.

(e) Whilst there might be some reluctance to apply the rule in *Jones v Dunkel*[36] to a failure to adduce evidence from a Minister of the Crown (see *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40 per Spender J at [313] to [324]) there is no reason not to apply it to a failure to adduce evidence from a senior public servant, especially where the senior public servant has been called to give evidence on other issues.

(f) I was invited not to apply the rule in *Jones v Dunkel* on the basis that the applicants had the opportunity to cross-examine Ms Goli and chose not to do so. I do not regard that as relevant. The applicants already had the benefit of the admissions which were made. The more natural inference in the present circumstances is that if Ms Goli's evidence on this topic would have assisted the Minister – she obviously being a witness available to the Minister – the Minister would have sought to adduce it from her.

(g) The result is that I infer that any evidence from Ms Goli on the revenue outcome issue or the Tri-Star material would not have assisted the Minister's case.

(h) I am conscious that I should not conclude from the Minister's failure to adduce evidence from Ms Goli that her evidence would have been adverse to the Minister's case. However, having regard to the admitted facts, and having reviewed the

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[35] The documents were exhibited to the affidavit of Mr McCabe sworn 16 July 2019.

[36] (1959) 101 CLR 298.

documents in evidence before me which are referable to the admissions,[37] I conclude that the inference which the applicants invite me to draw is an inference which I could draw with greater confidence in light of the failure of the Minister to adduce evidence from the Ms Goli on the question.

[205] I am prepared to accept the proposition advanced at paragraph [158] of the applicants' written submissions quoted at [200] above.

[206] However that finding would not avail the applicants unless they could make good the proposition pleaded in their statement of claim at [60] that OSR's taking into account an irrelevant consideration in formulating their recommendation to the Minister should be imputed to the Minister so as to justify the conclusion that the Minister took into account an irrelevant consideration.

[207] The authorities support the applicants' argument.

[208] In *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363, Deane J observed at 371 (emphasis added):

> **In a case where the Minister simply adopts the report and recommendation of the Committee as his own, the result will not be that the decision becomes, for practical purposes, immune from review** under the provisions of the Administrative Decisions (Judicial Review) Act 1977. In such a case, **the Minister, in simply adopting the report and recommendations of the Committee, will ordinarily also adopt any errors of law, including taking into account irrelevant considerations and failing to take into account relevant considerations, which might vitiate the Committee's report and recommendations with the consequence that the Minister's own decision can be attacked on the relevant ground under s 5 of that Act.** Where the Minister does not adopt as his own the whole of the report and recommendations of the Committee but adopts a particular conclusion which the Committee reached, a similar position will obtain as regards any errors of law which might have the effect of vitiating the relevant conclusion.

[209] And, although it focusses mostly on the consequence for a Ministerial decision of a departmental failure to take into account a relevant consideration, the approach of Deane J is supported by the cases referred to by Buchanan J and by his Honour's conclusion in *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2)* (2008) 251 ALR 80 at [91] to [95] (emphasis added):

> [91] In *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 ('Peko-Wallsend') Gibbs CJ said (at 30-3130-31):
>
> > Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. **It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department**. No complaint could be made if the departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. **But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law.**
>
> [92] Brennan J (with whom Deane J was in general agreement) said, to similar effect (at 65-66):
>
> > The Department does not have to draw the Minister's attention to every communication it receives and to every fact its officers know. Part of a Department's function is to undertake an analysis, evaluation and précis of material to which the Minister is bound to have regard or to which the Minister may wish to have regard in making decisions. The press of ministerial business necessitates efficient performance of that departmental function. **The consequence of supplying a departmental analysis, evaluation and précis is, of course, that the Minister's appreciation of a case depends to a great extent upon the appreciation made by his Department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of**

[37] The documents were exhibited to the affidavit of Mr McCabe sworn 16 July 2018.

> **ministerial function. A Minister may retain his power to make a decision while relying on his Department to draw his attention to the salient facts. But if his Department fails to do so, and the validity of the Minister's decision depends upon his having had regard to the salient facts, his ignorance of the facts does not protect the decision. The Parliament can be taken to intend that the Minister will retain control of the process of decision-making while being assisted to make the decision by departmental analysis, evaluation and précis of the material relevant to that decision**.

[93] Brennan J cited the following passage from *Bushell v Environment Secretary* [1981] AC 75 (per Diplock LJ at 95):

> To treat the minister in his decision-making capacity as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone in constitutional theory is accountable to Parliament is to ignore not only practical realities but also Parliament's intention. Ministers come and go; departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise.

[94] Earlier, Deane J sitting as a member of this Court in *Sean Investments Pty Ltd v MacKeller* (1981) 38 ALR 363 said (at 372-3):

> … the Minister was, in my view, fully entitled to decide to accept and adopt the report and recommendations of the Committee without examining for himself the evidence and the factual material upon which that report and those recommendations were based. He was also, as I see the matter, entitled to accept, as the basis for his decision, particular conclusions and recommendations of the Committee established to inquire into, and report upon applications for increases in fees.

[95] The consequence of the approach which these passages exemplify is that a Minister is not obliged to attempt personal detailed analysis of matters which, in some cases, may require a high level of expertise, as they did in the present case. **He is entitled to rely upon the advice and analysis of officers of his department. That is so whether expressly permitted by statute or not. In the present case the Minister was also expressly directed to take into account, amongst other things, the assessment report prepared by the Department. However, when a Minister relies upon advice, as he is entitled to do, and the advice is materially inadequate or misleading, any such failing may introduce legal error into the Minister's decision. Whether it does so will depend upon the significance of the error or omission in the advice tendered.**

[210] In the present case there was no doubt that the Minister adopted the final OSR report. His reasons said so. But it was clear also from my examination of the material leading up to the decision that the OSR also prepared the actual wording of his decision and his reasons. The Minister must be taken to have adopted any errors of law made by the OSR, including taking into account irrelevant considerations and failing to take into account relevant considerations which might vitiate the final OSR report and its recommendations. I do not think it matters that the OSR told the Minister he ought not take revenue into account, when this case concerns error by OSR in itself taking revenue into account and the Minister was not told about that error.

[211] The Minister submitted that even if he was to be regarded as having taken the revenue into account because of the imputation to him of OSR's conduct, I should form the view that the matter could not have affected his decision and, accordingly, I should exercise my discretion to refuse the applicants the relief they sought. Indeed, because this was a case of imputation of error made by OSR, it seemed to me that (1) I was really being asked to infer that the issue could not have affected OSR's recommendation, despite the fact that I concluded that revenue was taken into account by the OSR and (2) no possible alterations to OSR's recommendations could have affected the Minister's conclusion.

[212] I make the following observations:

(a) I do not regard it to be inherently implausible that the fact that revenue for the State would be $143.5 million to $232 million higher under the Adopted Netback Method than under RPM for the first three years of the project could have affected the decision of the OSR, or influenced the ease with which the OSR was prepared to reject the various trenchant criticisms which had been made of the expert it retained.

(b) The Minister contended that the evidence suggested nothing more than the picking up and turning over of Burchett J's "red herring" (see [194] above), but one does not set up an advisory panel one of whose purposes is to look at the comparable revenue impacts of the methods (see paragraph 2(a)(i) of the quote at [181] above), if that is all that is happening. Or, at least that is the conclusion I would reach absent some explanation which negated that conclusion.

(c) I would not be prepared to entertain an inference of immateriality the OSR in the absence of any evidence adduced on behalf of the Minister which explained the extent to which the consideration of revenue affected the OSR's decision making process.

(d) The Minister's argument would have had real strength if I had been provided with evidence which explained, for example, that the OSR took the same approach as they had suggested to the Minister that he take, namely to treat revenue as irrelevant, and which explained that the internal examination of revenue implications was done for a purpose unrelated to the formulation of recommendations to the Minister.

(e) The Commissioner of State Revenue was available to the Minister to give evidence but the Minister chose not to adduce any evidence from her on the topic, choosing instead to deal with the question on the basis of the admissions which I have recorded.

(f) And there is no basis at all to conclude that if the OSR had made any alteration to its recommendation that would have had no effect on the Minister's decision.

[213] In those circumstances I am not prepared to reach the conclusion of immateriality which the Minister invited me to reach.

[214] The applicants' argument in relation to revenue justifies the setting aside of the Minister's decision.

<u>The third irrelevant consideration: the Tri-Star material</u>

[215] The Tri-Star material was the material set out at numbered paragraphs 4 to 7 of the "Further particulars of the statement of claim" dated 13 April 2018 quoted at [181] above.

[216] The material particularised reveals that Tri-Star properly revealed to the OSR its self-interest. It held interests in a number of Queensland CSG to LNG projects, including those operated by APLNG. It received payments under overriding royalty terms which referred to components of any petroleum royalty decision, especially determination of the amount that petroleum could reasonably be expected to realise if sold on a commercial basis. In other words it received a royalty from APLNG which was a function of what APLNG paid. Tri-Star expressed it in this way: "The Queensland Government and Tri-Star share a common interest in the calculation of royalties for LNG exports."

[217] Tri-Star had sought (and received) an opportunity to consult with the OSR on the way in which the petroleum royalty regime would or should operate.

[218] The OSR made it clear to Tri-Star that it was bound by confidentiality provisions in the Act not to discuss with Tri-Star the Queensland LNG projects or royalty related issues, but

was open to receiving from Tri-Star a better understanding about how the industry operated throughout the world, in particular about how various methodologies worked to value gas.

[219] Tri-Star advanced submissions that a Netback Method was the appropriate method for calculating market value, associating that submission with the notion of defeating transfer pricing royalty avoidance mechanisms. It advanced further submissions about the desirability of the Netback Method. It submitted that the method was in fact used in Texas, citing relevant Texan legislation.

[220] The upshot of the consultation between OSR and Tri-Star was expressed by the Under-Treasurer in a briefing note to the Minister which stated that the issues highlighted by Tri-Star "would be canvassed in OSR's report to you on the APLNG application for a petroleum royalty decision". This resolution occurred more than 18 months before the Minister's ultimate decision. Then when Tri-Star sought a further meeting (more than six months before the ultimate decision) the opportunity was declined.

[221] The applicants argument was: (1) the Tri-Star material was in fact taken into account by the OSR in providing the OSR Report to the Minister, (2) the Tri-Star material was an irrelevant consideration for the purposes of the Decision, and (3) the OSR's consideration of the Tri-Star material should be imputed to the Minister's consideration of the matter and the Decision.

[222] The Minister's submission was:

> As to the Tri-Star material, there is no evidence that any of the representations were ever before the Respondent. Even if they were, the question is why would that impugn the Decision? Why should the Respondent be legally obliged to ignore the material? In the present case, the Respondent made the Decision based on what the Respondent considered was the correct statutory test. Even if the Tri-Star material had been taken into account by the Minister that would be no basis for a conclusion that the Respondent exceeded the legislative function, on its proper construction.

[223] This argument falls to be considered in the same way as I considered the revenue outcome material.

[224] For the same reasons as I expressed under the previous heading, I agree with the applicants that the proper conclusion is that the Tri-Star material was in fact taken into account by the OSR in providing the OSR Report to the Minister and that the OSR's consideration of the Tri-Star material should be imputed to the Minister's consideration of the matter and the Decision.

[225] Two issues remain. First, as a matter of law was the Minister bound not to take it into account. Second, is there any reason to form the view that it was immaterial to the Minister's decision.

[226] In light of s 148G(g) of the Regulation it is difficult to form the view that the Minister was bound not to taken the Tri-Star material into account. But even if the Minister was so bound, it is also difficult to see how the material could be regarded as justifying the exercise of discretion which the applicants seek, because in truth all it did was advance general propositions in support of the Netback Method, all of which were entirely subsumed within and overtaken by the arguments in support of the Netback Method which were in fact specifically advanced in the Lonergan reports and taken into account in the final OSR report. Unlike the revenue issue, it does seem to me that the Tri-Star material was so insignificant that taking it into account could not have materially affected the either the final OSR report or the decision.

[227] This issue does not justify the relief sought by the applicants.

Conclusion as to ground 4

[228] In consequence of the view I have taken in relation to the second irrelevant consideration, I find that the applicants have made out this ground of judicial review.

Ground 5: Failing to take into account relevant considerations

[229] Ground 5 is that the Minister failed to take into account relevant considerations, with the result that the making of the decision was an improper exercise of the power conferred by the Regulation under which the Decision was purported to be made pursuant to ss 20(2)(e) and 23(b) of the *Judicial Review Act*.

Relevant legal principles

[230] Under this ground of review, the applicants must show that the Minister was bound to take into account the alleged relevant considerations that they identified.

[231] As I have earlier stated, determining what considerations a decision-maker must take into account in the exercise of a statutory power is question of law which must be determined as a matter of construction of the statute which created the power, including, if necessary, by implication from the subject matter, scope and purpose of the statute. Moreover, the same question of materiality arises on this ground as arose in relation to ground 5.

[232] It follows that in order to obtain the relief which they seek in respect of this ground, the applicants must demonstrate:

(a) first, the alleged relevant consideration was, as a matter of law, to be regarded as an a consideration which the Minister was bound to take into account in the exercise of power;

(b) second, the decision-maker failed to take the relevant consideration into account;

(c) third, because of the materiality of the consideration, the proper exercise of discretion would be to set aside the decision and to order it to be re-exercised.

The first relevant consideration: the QTC Report

[233] The following facts were admitted on the pleadings:[38]

(a) The OSR expressly engaged the Queensland Treasury Corporation (**QTC**) to calculate the appropriate rate of return for petroleum royalty determination pursuant to the Regulation, being a matter relevant to the determination of APLNG's application for a petroleum royalty decision.

(b) The QTC in fact provided the OSR with a report for that purpose, dated December 2013 and titled "Cost of Capital for Petroleum Royalty Decision" (**the QTC Report**).

(c) The OSR expressly instructed Lonergan with the QTC Report, and expressly instructed Lonergan to address questions in relation to the QTC Report, in the context of seeking Lonergan's opinion on APLNG's application for a petroleum royalty decision.

(d) A draft report of Lonergan dated 8 April 2014 relevant to APLNG's application for a petroleum royalty decision expressly addressed the QTC Report (**Lonergan's Draft 2014 Report**).[39]

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[38] Statement of Claim at paragraph 62(b), as admitted at paragraph 65.2 of the Further Amended Defence.

[39] see a copy of Lonergan's Draft 2014 Report in the affidavit of Perrett sworn 25 July 2018, Exhibit RGP-5, at p 37 *et seq*.

(e) The opinions expressed in the QTC Report and Lonergan's Draft 2014 Report were significantly and materially different, including with respect to the appropriate rate of return and whether a single WACC should be calculated and applied to different parts of the production chain and different infrastructure.

(f) The opinions expressed in the QTC Report as to the appropriate rate of return are "significantly more favourable" to APLNG when compared to the opinions expressed in the Lonergan reports that were ultimately submitted to the Minister with the final OSR report.

(g) The Lonergan reports (as provided to the Minister) did not refer to the QTC Report notwithstanding that Lonergan's Draft 2014 Report considered the QTC Report in detail.

(h) The final OSR report (as provided to the Minister) did not refer to the QTC Report, or to the fact that the OSR had engaged the QTC or that the OSR had Lonergan review the QTC Report, or, that the QTC advice as to the appropriate rate of return was "significantly more favourable" to APLNG then the advice of Lonergan as submitted with the OSR Report.

(i) The OSR did not provide the QTC Report to the Minister for consideration.

(j) The Minister did not rely upon the QTC Report or take it into consideration for the purposes of the Decision.

[234] The principal issue argued before me was whether the Minister was bound to take the QTC Report into consideration. That is a question which turns on the proper construction of the Act and of the Regulation.

[235] But I think before that question is considered it is important to have a closer regard to the facts. Whilst it is true that the QTC Report itself was not before the Minister, the Minister was in fact told that it existed and that it was more favourable to APLNG than the Lonergan rates by virtue of other material which had been placed before the Minister. I observe:

(a) At [59](g) above I identified that the APLNG submission of 30 January 2015 advanced the criticism that "The Lonergan rates of return are inappropriate and incorrect". In the course of developing that submission, APLNG submitted as follows:[40]

> Several of the independent experts have expressed the view that the rates of return calculated by Lonergan are unreasonably low. SFG Consulting and CEG have independently assessed the appropriate rates of return at a level that is significantly higher than those developed by Lonergan. It is also noted that QTC, who was engaged by the State for the purpose of calculating a rate of return for petroleum royalty determination, had previously undertaken a WACC and rate of return analysis and put forward rates of return that were significantly higher than those proposed by Lonergan. We understand that Lonergan was briefed with the QTC reports but the Lonergan Report makes no reference to either QTC report (even though the analysis provided by QTC is materially different from that in the Lonergan Report).

(b) APLNG made further reference to the QTC Report in these terms:[41]

> 7. *Lonergan adopts a value for the equity beta that is too low*
>
> SFG Consulting in its report concludes that the equity beta ought to be 0.86 (for the hypothetical downstream LNG operator) and 0.93 (for the hypothetical upstream gas producer). SFG Consulting notes that the QTC, in their reports dated March 2010 and

[40] at [115]. Although I have not reproduced the footnotes in the quote, it is appropriate to note that they specifically identified and referenced the QTC Report.
[41] at [123], footnotes omitted.

> December 2013, adopt a very different approach to Lonergan and estimate a single common beta for the upstream gas production and downstream LNG operations. Lonergan's approach is inconsistent with SFG Consulting and with the QTC analysis. Lonergan is the only expert that adopts a beta for the hypothetical downstream operator that is materially lower than the beta for the hypothetical upstream operator. Lonergan's position is that upstream gas production has twice the risk of the average firm whereas downstream LNG operations have one third of the risk of the average firm.

(c) One of the APLNG expert reports (namely the Competition Economists Group report referred to at [58](d) above) specifically advanced the point that the Lonergan's WACC rates were too low, by reference to the QTC estimates.[42] The report stated:

> 22 I do not consider that Lonergan's estimate of the required WACC for the notional downstream business is reasonable in light of my own analysis and that of the Queensland Treasury Corporation (QTC). I have estimated a 'text book' post tax WACC for the JV of 12.0%. This exceeds very substantially Lonergan's estimates, which are 6.1% and 7.1% in its "low" and "high" scenarios, respectively. QTC's estimates are much closer to my own — being 11% to 12.2%, in its "low" and "high" scenarios. Lonergan's estimates do not, in my view, fall within a reasonable range for a WACC.
>
> […]
>
> 127 In this section I assess whether Lonergan's estimate of the required WACC for the notional downstream business is reasonable in light of my own analysis and that of the Queensland Treasury Corporation (QTC). I have estimated a 'text book' post-tax WACC for the JV of 12.0%. For the purpose of comparison, I have set out my parameter estimates against those of Lonergan and also the QTC — both of whom have provided estimates in this process — in Table 1 below.
>
> 128 It can be seen that my estimates are much more similar to those of the QTC than Lonergan. Both QTC's estimates of the WACC and my own significantly exceed those estimated by Lonergan in its report. I do not consider Lonergan's estimates to be reasonable and, if my own estimates — or QTC's — were used to determine downstream building block costs, the resulting annual downstream revenue allowance would be higher, and the commercial price correspondingly lower.
>
> [Table 1 not reproduced]
>
> 129 Lonergan's underestimation of the WACC consequently introduces a further downward bias into its methodology. I note also that Lonergan was aware of the QTC analysis and did not explicitly address the differences between its own estimates and those of QTC in its report. In my opinion, this is a significant omission in its advice. The detailed basis underpinning the results contained in the table above is discussed in the following sections.

(d) A second APLNG Report (namely the SFG Consulting Report prepared by Professor Gray, referred to at [58](c) above) also specifically advanced criticism of the Lonergan rates by reference to the QTC report.[43] The report stated:

> 189 I have been provided with copies of two reports prepared by the Queensland Treasury Corporation (QTC) in relation to the rate of return for LNG projects: A March 2010 report prepared for the Department of Employment, Economic Development and Innovation and a December 2013 report prepared for the OSR. Both reports were prepared for the purpose of determining a "rate of return for petroleum royalty determination." In their reports, QTC takes a very different approach to estimating beta to that adopted in the Lonergan report. Whereas the Lonergan report concludes that upstream gas production has twice the risk of the average firm and downstream LNG operation has one third of the risk of the average firm, QTC estimate a single common beta for both. That is, QTC do not even consider the possibility that upstream gas

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[42] See the Competition Economists Group Report at [22] and [127] to [129] in affidavit of Perrett sworn 29 January 2016, Exhibit RGP-1, at pp 572 and 610 – 611. There were multiple other references to the QTC Report.

[43] See the SFG Consulting Report at [189] (and see also at [191] and [201]) in affidavit of Perrett sworn 29 January 2016, Exhibit RGP-1, at pp 548 – 549 and 551 – 552.

production and downstream LNG operation would have materially different risks. For example, QTC (2013) state that:

> QTC also recommends a single WACC be calculated and applied to the different parts of the production chain and the different infrastructure, such as plant and transmission pipelines. This agrees with the principles outlined in the final report to the Department of Infrastructure and Planning titled 'Queensland LNG Industry Viability and Economic Impact Study'. The report suggests that a common cost of capital would be justified for the production, transmission and liquefaction sectors as the gas volume risks are considered very similar. That is, if the supply of gas exceeds demand, all the assets would have limited alternative domestic uses.

(e) I have already explained how the second and third Lonergan reports responded to the APLNG criticism (including specifically to the two expert reports referred to above), by adjusting WACC rates: see at [70] and [85] above.

[236] It could not be said that the Minister was not apprised of these considerations, because they were specifically before him. Accordingly, the applicants' argument really boils down to the proposition that the fact that the QTC Report itself was not before him justifies the conclusion that he failed to take into account a relevant consideration.

[237] Even if one assumes in favour of the applicants that the Minister was bound to take into account the essential points made in all relevant evidence which OSR obtained for the purpose of briefing him, so far as the QTC Report was concerned those points were in fact before him. There is nothing in the statutory framework which justifies the conclusion that the Minister was bound to consider the actual QTC Report. Even if I were wrong in that conclusion, because the critical points in the QTC Report, including (1) that it existed, (2) the rates it referenced, (3) that it was more favourable to APLNG than the first Lonergan Report and (4) that the first Lonergan report paid insufficient attention to it, were in fact before the Minister, I would conclude that it was not material that the QTC Report itself was not before the Minister.

[238] For these reasons, I conclude that this argument cannot be maintained.

<u>The second relevant consideration: methods applied to other projects in Queensland</u>

[239] In addition to the APLNG Project the subject of the decision, there are two other comparable CSG to LNG projects known as the Queensland Curtis LNG Project (**QCLNG**) and the Gladstone LNG Project (**GLNG**). The QCLNG and GLNG Projects each involved the same upstream and downstream activities as the subject APLNG Project. There are a range of close similarities in the nature, scope and commercial structure of the APLNG, QCLNG and GLNG Projects.

[240] The applicants complained that notwithstanding the similarities across the three CSG to LNG projects, the decision and the reasons makes no reference to whether or not the QCLNG or GLNG Projects have made an application for a petroleum royalty decision, whether or not there is a petroleum royalty decision that applies to the QCLNG or GLNG Projects, and whether or not there is any agreement or arrangement as to the method and parameters to determine wellhead value of petroleum as applicable to the QCLNG or GLNG Projects, and if there is a relevant petroleum royalty decision, agreement or arrangement, what method and parameters apply to the QCLNG or GLNG Projects with respect to determining wellhead value of petroleum.

[241] None of these matters were considered by the Minister, which the Minister admits.[44]

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[44] Statement of Claim at paragraphs 62(a), 62(d) and 62(e), as admitted at paragraph 65.2 of the Further Amended Defence.

[242] It is said that these facts evidence a failure to take into account a relevant consideration. I would favour the submission if the evidence revealed that petroleum had in fact been sold under those projects, in circumstances which were comparable. I accept the applicants' submission that on its proper construction s 148G(a) of the Regulation should be taken to identify a consideration which the Minister was bound to take into account because, despite its permissive phrasing, that conclusion is suggested by the context of the Regulation taken as a whole. But the evidence does not demonstrate that there were such sales in circumstances which were comparable. It does not demonstrate that there was a petroleum royalty decision in relation to the other projects. In my view the evidence before me does not demonstrate that there is in fact in existence probative material of the nature speculated.

[243] On the evidence before me this aspect of ground 5 cannot be maintained.

Conclusion as to ground 5

[244] The applicants have not made out this ground of judicial review.

Ground 6: Uncertainty

[245] I have explained why the Regulation must be taken to have given the Minister a wide latitude in stating the appropriate method or formula for the purpose(s) concerned. However, even if the decision was otherwise valid, the applicants complain that the decision was legally uncertain and invalid because several important variables were left open to "subjective estimates, assessment, discretionary allocation, and matters of judgment".[45]

Relevant legal principles

[246] There is no principle in the general law that uncertainty in an exercise of administrate power necessarily leads to invalidity: *King Gee Clothing Co Pty Ltd v the Commonwealth* (1945) 71 CLR 184 per Dixon J at 194, 195-6 and *Television Corporation Ltd v The Commonwealth* (1963) 109 CLR 59 per Kitto J at 71.

[247] Rather, the question is whether a purpose can be discerned in the provisions by which the administrative power was created, to condition the valid exercise of the administrative power on the achievement of a particular degree of certainty: see *King Gee Clothing Co Pty Ltd v the Commonwealth* (1945) 71 CLR 184 per Rich J at 189, Starke J at 190, and Dixon J at 195-6; *Television Corporation Ltd v The Commonwealth* (1963) 109 CLR 59 per Kitto J at 71; *Project Blue Sky v ABA* (1998) 194 CLR 355 per McHugh, Gummow, Kirby and Hayne JJ at 388-389, [91] and 390, [93] and *TAB Ltd v Racing Victoria Ltd* [2009] VSC 338 per Davies J at [32].

[248] As Besanko J observed in *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* (2012) 187 LGERA 161 at [43], the "extent or degree of certainty required in conditions for a lawful exercise of power depends very much on the statutory context".

[249] The cases identified by the applicants in which Courts have concluded that an exercise of administrative power was invalid on the grounds of uncertainty all confirm that the first step in establishing the argument must be to establish that the requisite legislative intention was that the relevant exercise of administrative power achieve a particular degree of certainty.

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[45] The applicants' written submissions advanced as a second category of uncertainty the proposition that there was a range of inconsistencies between: (1) the formula and the Lonergan reports, and (2) the formula and the final OSR report, but during oral argument advised me that contention was not pressed as a basis of uncertainty, although it was pressed as relevant to the "unreasonableness" ground of review.

[250] In *Vardon v The Commonwealth* (1943) 67 CLR 434, *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184, and *Cann's Pty Ltd v The Commonwealth* (1946) 71 CLR 210, the High Court examined exercises of power by the Prices Commissioner under regulation 23 of the *National Security (Prices) Regulations* to fix and declare the maximum price by which certain goods could be sold.

[251] In each case in the trilogy, the exercise of power was held by the High Court to be invalid because the Prices Commissioner had prescribed a formula for calculating the maximum price that involved discretionary or subjective integers, which meant that the maximum price was not "fixed" because there was no certainty of result from the application of the formula. The basis of the decisions was that the nature of the power "to fix" the maximum price carried with it the obligation to specify a method of calculation by which a definite price was determinable without any discretionary element, whoever applied it.[46]

[252] It suffices to extract two quotes from *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 (emphasis added):

(a) per Rich J at 189:

> If a sum of money is not expressly specified as the price, then **it is obviously necessary that the money sum forming the price should be ascertainable with certainty, and this means that the elements from which it is calculated must be definite**. The powers given by reg. 23 (1A) cannot be duly exercised unless a definite criterion or standard is stated, or a process of calculation is prescribed proceeding from some certain basis and avoiding in its course all standards which are solely subjective. "It is not necessary in order to fix a price under reg. 23 to stipulate a sum of money, but if a sum of money is not stipulated, **it is necessary for the due exercise of the powers conferred by the regulation that a definite standard or criterion should be stated whereby the price can be ascertained**" (*Vardon's Case* [(1943) 67 CLR 445, 450]).

(b) per Dixon J at 196 – 7:

> **A perusal of [reg 23(1A)] makes it quite clear that, when prices are fixed under the particular powers they confer, or, at all events, under many of them, amounts need not be named as prices**. To that extent at least greater room is allowed for uncertainty of expression. Prices may be fixed on sliding scales; on a condition or conditions; on landed or other cost with the addition of a percentage or specified amount or both; or upon or according to any principle or condition specified by the Commissioner. **The powers thus reposed in the Commissioner are very wide indeed. But, having regard to certain expressions used and to the nature of the duty to be imposed by the orders upon the subject, I think that there are limitations upon the kind of standards or criteria he may employ for building up the prices he fixes. They must, I think, be standards or criteria from which a price may be calculated. It is not enough if the price, or some element entering into its composition, can be obtained only by estimation or by the exercise of judgment or discretion, as, for instance, where apportionment or allocation is required**.
>
> […]
>
> **By the nature of the duty imposed upon the subject I mean the obligation to keep the prices at which he sells below definite limits, limits which of necessity must be clearly ascertainable. The extremely heavy punishments to which, under the *Black Marketing Act*, a sale above those limits exposes the seller illustrates the reasons for authorising only maximum prices that are clearly ascertainable**.
>
> It needs no imagination to see that in drafting an order for the fixing of prices for an important trade many difficulties must be encountered and **it would be impossible to avoid ambiguities and uncertainties which are bound to arise both from forms of expression and from the intricacies of the subject. But it is not to matters of that sort that I refer.** They depend upon the meaning of the instrument and they must be resolved by construction and interpretation as in the case of other documents. They do not go to power. **But it is another matter when the basis of the price, however clearly described, involves some matter which is not an ascertainable**

[46] In this paragraph I have adopted the words of Davies J in *TAB Ltd v Racing Victoria Ltd* [2009] VSC 338 per Davies J at [33] as a sufficient and correct summary.

> **fact or figure, but a matter of estimate, assessment, discretionary allocation, or apportionment, resulting in the attribution of an amount or figure as a matter of judgment. When that is done no certain objective standard is prescribed; it is not a calculation and the result is not a price fixed or a fixed price.** That, I think, means that the power has not been pursued and is not well exercised.

[253] In *TAB Ltd v Racing Victoria Ltd* [2009] VSC 338 Davies J considered exercises of power under the *Gambling Regulation Act* 2003 (Vic) by two racing bodies to impose fees as a condition of an exercise of their power to issue approvals to the TAB to publish race fields. The racing bodies had not specified particular amounts for the fees concerned but had imposed fee conditions by reference to certain formulae. Under the legislative regime, once the payment of a fee had been made a condition it was an offence for to publish or use race fields unless the fee was paid.[47] Her Honour concluded that it was an implicit requirement for the valid exercise of power that an actual amount could be determined from the expression of the fee, if it was expressed other than as a quantified sum.[48] In reliance on the trilogy of High Court cases, Her Honour concluded that "the imposition of fee conditions by reference to the formulas prescribed by [the two racing bodies concerned] will not be valid exercises of power, unless the amounts which TAB is required to pay by way of fees can be calculated with certainty."[49]

[254] Davies J found that the wording of the fee conditions were insufficiently certain because they failed to express a definite standard or criterion by which the amount of the fee could be ascertained with certainty.[50] As to this:

(a) The condition imposed by the first racing body was that approval was conditioned on the payment of fees based on "10% of revenue derived from betting on Victorian thoroughbred race fields […]". The problem was that TAB's revenue was derived from several sources and the determination of the revenue figure would involve having regard to a number of integers about which there might be legitimate difference of opinion between TAB and the racing body. Her Honour found that the exercise of power was vitiated on uncertainty grounds, stating, in particular, that it was "[…] not an answer that actual uncertainty ought to be capable of resolution between the parties or, failing resolution, adjudicated upon by a Court applying ordinary principles of construction and interpretation […]".[51]

(b) The condition imposed by the second racing body was that approval was conditioned on the payment of fees based on 10% of "the gross profits received by your organisation" in connection with or relating to certain stated things. Her Honour found that the exercise of power was also vitiated on uncertainty grounds, holding (footnotes omitted): [52]

> The formula prescribed in [the second racing body's letter] has a beguiling simplicity about it. The relevant integer is "gross profits" as defined. It provides a description of the items which are to make up "gross profits". However, embedded in those items are the same individual revenue items which make up the "revenue" based fee applied by [the first racing body]. Thus the same considerations apply to this fee condition as to the fee condition imposed by [the first racing body]. Unclaimed dividends, free bets and profits from a single wagering transaction involving more than one code or location form part of gross profits. No direction is given about how to allocate or apportion unclaimed dividends and free bets in so far as they relate to Victorian greyhound races. That means that no definite amount is capable of being worked out under this formula. The inclusion of amounts in gross profits referrable to those items cannot be ascertained

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[47] *TAB Ltd v Racing Victoria Ltd* [2009] VSC 338 at [29].
[48] *TAB Ltd v Racing Victoria Ltd* [2009] VSC 338 at [32].
[49] *TAB Ltd v Racing Victoria Ltd* [2009] VSC 338 at [33].
[50] *TAB Ltd v Racing Victoria Ltd* [2009] VSC 338 at [34] to [41].
[51] *TAB Ltd v Racing Victoria Ltd* [2009] VSC 338 at [36].
[52] *TAB Ltd v Racing Victoria Ltd* [2009] VSC 338 at [40].

> by an exact process of calculation because no apportionment mechanism is directed. In contrast, [the second racing body] has provided some apportionment mechanism to allocate profits from a single wagering transaction involving more than one code or location to Victorian greyhound races. However, the apportionment mechanism is expressed in terms that are vague and, in my view, unintelligible. I doubt that the apportionment mechanism is sufficiently specified to take away the matters of estimation and discretion.

[255] Having established that a purpose can be discerned in the provisions by which the administrative power was created to condition the valid exercise of the administrative power on the achievement of a particular degree of certainty, in order to invalidate the exercise of power it would still be necessary to establish that the requisite degree of certainty was absent. In this regard, as the respondent correctly submitted, a degree of ambiguity or vagueness does not necessarily equate with impermissible uncertainty.

[256] That much was made clear in one of the other wartime price fixing cases. In *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100, the High Court decided that the expressions "substantially identical goods" and "terms and conditions substantially identical", in relation to the sale of goods, were not so uncertain as to make the relevant Order invalid on the ground that it did not fix a price.

[257] In that decision, Latham CJ (at 113 – 4) encapsulated the argument and the reason for rejecting it in this passage (emphasis added and footnotes omitted):

> The appellants challenge the validity of the Prices Regulation Order No. 1015 upon various grounds.
>
> In the first place, it is said that the words "substantially identical goods" and "terms and conditions substantially identical," which appear in clause 3 and in the definition of "ceiling date" in clause 2, are so vague that the Order cannot be said to fix a price, and reference is made to the decisions of this Court in *Vardon v. The Commonwealth* [(1943) 67 CLR 434] and *Bendixen v. Coleman* [(1943) 68 CLR at 401]. It is urged that it is so difficult to determine whether particular goods are substantially identical with other goods, or whether particular terms and conditions are substantially identical with other terms and conditions, that no certain provision is made whereby persons can determine whether or not they are observing the law. The Regulations, it is said, should be so expressed that any person can determine for himself whether or not he is selling at a price greater than that fixed by the Order.
>
> **It is true that it may be difficult in some cases to determine whether goods or terms and conditions are substantially identical with other goods or other terms and conditions. But this argument only shows that questions of degree may arise in the application of the provisions in question, not that the meaning of those provisions cannot be ascertained**. It is often a difficult thing to determine whether a particular set of facts falls within a particular description, but that fact does not in itself show that the description is uncertain.
>
> I venture to refer to what I said in *Bendixen v. Coleman* [(1943) 68 CLR at 416] as to the possible difficulty of determining whether a particular liquor was whisky or not. In many cases, the legal liability of an individual depends upon whether his acts were what the law regards as "reasonable" in the circumstances. In such a case, there will be room for difference of opinion, but it does not follow that no criterion of conduct is provided in such a case.

[258] Dixon J (at 128) distinguished the other price fixing cases in this way:

> It was said that [the impugned expressions] imparted an inadmissible vagueness to the whole clause. It may be conceded, and, indeed, it appears to have been decided, that a bare power to 'fix' a price cannot be validly exercised without naming a money sum, or prescribing a certain standard by the application of which it can be calculated or ascertained definitely. Otherwise the price is not "fixed". But I am unaware of any principle relating to the interpretation of statutory powers or the judicial examination of their exercise which would disable the Commissioner from introducing this very natural qualification of the epithet "identical" in describing commodities or terms of sale in an Order made in pursuance of powers in the form of those conferred upon him by reg. 23. In my opinion the material parts of the Order are valid and effectual.

[259] Another example may be found in *Visa International Service Association v Reserve Bank of Australia* [2003] FCA 977, in which Tamberlin J considered a challenge to decisions of the Payment Systems Board of the RBA made under the *Payment Systems (Regulation) Act*

1998 (Cth) which determined an "Interchange Standard", which imposed a limit on "interchange fees", sometimes described as wholesale fees, which were charged by issuers of four-party credit scheme cards to acquirers participating in the schemes and which were required by the Standard not to exceed a cost-based benchmark to be calculated with reference to eligible costs as defined by the Standard and set in accordance with the methodology prescribed in the Standard. The Interchange Standard was effectively a control on the setting of the fee. The question raised on the application before his Honour was the extent to which it could be set aside on the ground of uncertainty. It was submitted that the Standard was invalid for uncertainty because the factors which must be taken into account were individually and cumulatively too uncertain in their content and application. His Honour considered many of the cases to which I have referred and concluded that uncertainty was not established in the case before him. In particular, he observed (at [443]):

> These cases show that there is no unanimity as to what will amount to uncertainty. It is largely a question of fact and degree. The authorities indicate the importance of the general subject matter, context, evidence, and the specific factors which have to be taken into account in relation to particular goods or services. For example, "cost" in one context, may be regarded as uncertain, whereas in another it is not. The complexity of the subject matter and the inherent difficulty and intricacy of the task of imposing controls in respect of a particular statutory context are important considerations in reaching a conclusion as to whether the provision is too vague or uncertain

[260] Of course, quite apart from the general law, under statute it would be an improper exercise of the power conferred under an enactment to make a decision of an administrative character if the power is exercised in such a way "that the result of the exercise of the power is uncertain": see ss 20(2)(e) and 23(h) of the *Judicial Review Act* and cf ss 5(1)(e) and 5(2)(h) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The question whether "the result" of the exercise of the power is uncertain, will in turn depend on an analysis of the statutory context to determine what "result" was contemplated.

Discussion

[261] The following questions arise from my examination of legal principle.

[262] First, can a purpose be discerned from the provisions by which the Minister's power to state a method or formula for deciding the market value of petroleum was created, to condition the valid exercise of that power on the achievement of the degree of certainty contended for by the applicants?

[263] Second, if so, was the exercise of power void on the grounds of uncertainty, because the allegedly requisite degree of certainty was not achieved?

[264] Third, was the result of the exercise of power to state a method or formula for deciding the market value of petroleum uncertain, such that it would be an improper exercise of power as referred to in ss 20(2)(e) and 23(h) of the *Judicial Review Act*?

[265] I will address each of those questions in turn.

Was the Minister's power conditioned on achieving certainty of the nature suggested by the applicants?

[266] Pursuant to s 148B(1)(b) of the Regulation a petroleum royalty decision is a decision about how one or more of the components of the wellhead value of petroleum must be "**worked out** for a particular transaction or a particular period". The Minister making such a decision is empowered to "**state** … a method or formula" for one of the purposes specified in s 148F(2)(a), namely –

(a) for **deciding** the market value of the petroleum;

(b) for **working out** particular tolls or tariffs paid or payable by the petroleum producer;

(c) for **adjusting** the market value of the petroleum or the tolls or tariffs in particular circumstances; or

(d) to be **used in working out** any other component of the wellhead value of the petroleum (i.e. any other of the expenses or charges referred to in s 148(2)).

[267] The particular exercise of power in this case was the first one listed, namely the power to state a formula for deciding the market value of petroleum.

[268] The applicants contend that it could not have been contemplated by the Regulation that a formula stated by the Minister for the purpose of deciding the market value could be formulated such that the determination of important variables was left open to "subjective estimates, assessment, discretionary allocation, and matters of judgment".

[269] The text employed by the Regulation is somewhat equivocal on this question. That a formula must be used for the purpose of "deciding the market value" does not, without more, suggest that it cannot permit of any form of evaluative judgment or processes of assessment, estimation or discretionary allocation. The use of the present participle of the verb "decide" suggests that the formula be used for arriving at an opinion or conclusion on the question of market value. As any judicial officer knows, decisions can be arrived at even though they involve estimations, evaluative judgments or discretionary allocations.

[270] However the text is not to be understood without an appreciation of context.

[271] The jurisdiction to make a petroleum royalty decision was evidently created for the purpose of introducing consistency and certainty into the calculation of whichever of the components of the wellhead value of petroleum was the subject of the decision. I observe:

(a) One curiosity of the regulatory framework is that no explicit legal significance is accorded to a petroleum royalty decision or to the methods or formulae stated in it for working out the relevant component of the wellhead value of petroleum. For instance, there is no provision in either the Act or the Regulation which states that, where a petroleum royalty decision has been made and a method or formula stated, the producer is obliged to use the stated method or formula in working out the relevant component of the wellhead value of petroleum for the purpose of lodging royalty returns and discharging its obligation to pay royalty. Nor is there any explicit statement that the Minister is obliged to use the stated method or formula for the purposes of assessment or reassessment of royalty payable.

(b) Instead the legal significance of a petroleum royalty decision and the method or formula stated in it for working out the relevant component of the wellhead value of petroleum is left to be inferred.

(c) It must be taken to be implicit in the regulatory framework that if the petroleum royalty decision mechanism has been implemented and the contemplated outcome obtained, both the petroleum producer and the Minister would in fact use the stated method or formula for the purposes for which it was stated. Before me, the Minister accepted that this must be so.

(d) At the least, proper compliance with a petroleum royalty decision properly made would enable the processes of royalty return lodgement, royalty payment, and assessment of royalty under the Act to be conducted consistently and with certainty, so as to avoid the prospect of reassessment under s 599C and the possible consequential imposition of penalties and payment of default interest.

[272] It is obvious that the way in which the applicants have framed their uncertainty case relies heavily on the analysis of Dixon J in *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 and his Honour's conclusion in relation to the legislative framework

with which he was dealing that it was not enough if the price, or some element entering into its composition, could be obtained only by estimation or by the exercise of judgment or discretion, as, for instance, where apportionment or allocation was required. It will be recalled that it was a combination of the expressions used in the regulations (e.g. "fix and declare the maximum price") and the nature of the duty imposed on the subject (i.e. the extremely heavy punishments imposed on a seller breaching the duty) which influenced the conclusion of Dixon J that the exercise of power to fix prices had the limitations which he identified.

[273] I do not think that this case is as clear a case as that considered by Dixon J. Nevertheless, in my view a purpose can be discerned from the provisions by which the Minister's power to state a method or formula for deciding the market value of petroleum was created, to condition the valid exercise of that power on the achievement of the degree of certainty contended for by the applicants. I agree with the applicants that it would not be enough if the formula stated by the Minister was formulated such that the determination of important variables was left open to "subjective estimates, assessment, discretionary allocation, and matters of judgment", because that course would tend to defeat the whole purpose of the petroleum royalty decision mechanism.

Was the allegedly requisite degree of certainty not achieved?

[274] In order to understand the applicants' contentions it is necessary to have regard to the terms of the formula as set out in Annexure A to these reasons.

[275] Annexure A at [2] sets out the principal formula:

$$MV = \frac{V_{LNG} \times P_{LNG} - V_{Port} \times Toll_{Loading} - V_{Plant} \times Toll_{Processing} - V_{Pipeline} \times Toll_{Transport}}{V_{Pipeline}}$$

[276] The table beneath the formula in Annexure A at [2] defines the variables used in it.

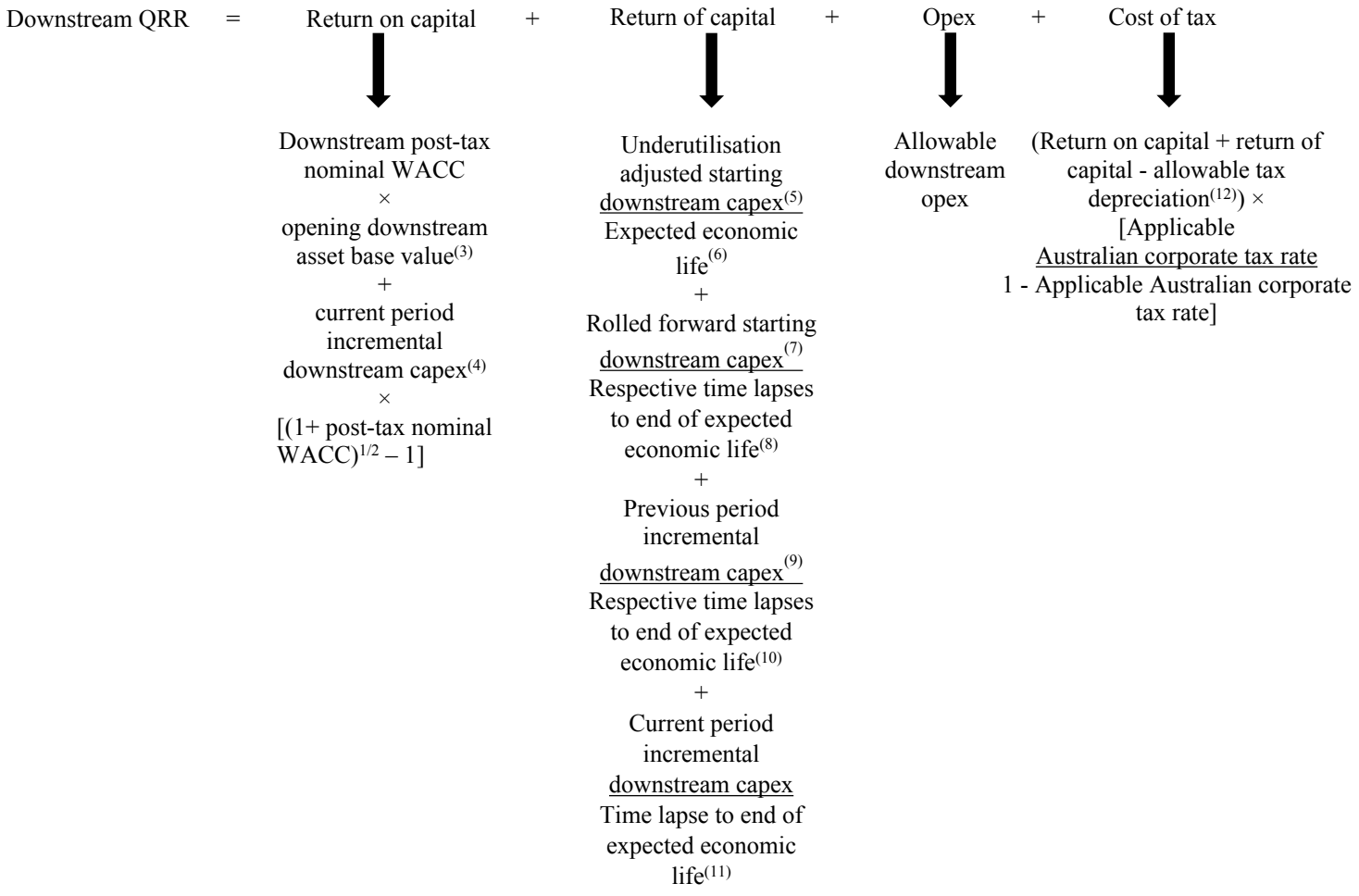
[277] As previously explained, it is a netback formula. Three separate toll variables (namely $Toll_{Transport}$, $Toll_{Processing}$, and $Toll_{Loading}$) are used.

[278] Each of the toll variables is calculated in the way set out in the simple formula set out in Annexure A at [3]:

$$\text{Notional toll} = \frac{\text{Downstream QRR}}{\text{Quarterly volume}}$$

[279] As appears from that formula, one of the variables used in calculating each toll is the identification of a downstream Quarterly Required Revenue (**QRR**). QRR is calculated in respect of each relevant aspect of the downstream operations for which a toll variable is developed (i.e. the aspects of **transporting** feedstock gas through the relevant pipeline, **processing** the feedstock gas in the liquefaction plant, and **loading** the LNG by using the storage and port loading facilities).

[280] In each case, the downstream QRR variable is calculated by reference to the formula and subsidiary formulae which appear beneath Annexure A at [3]:



[281] As appears, QRR is the sum of four variables (namely "return **on** capital"; "return **of** capital", "Opex", and "cost of tax"), each of which is itself calculated by the subsidiary formulae identified by arrows. The superscript references within the subsidiary formulae are references to the notes to Annexure A at [3]. Relevant variables are also explained in Annexure A at [4] and [5].

[282] Three particular variables used in the subsidiary formulae were impugned by the applicants, namely –

(a) "expected economic life", which is a variable used in the subsidiary formula for the calculation of "return of capital";

(b) "allowable downstream opex" (i.e. operating expenditure) and "downstream capex" (i.e. capital expenditure), which are subsidiary variables relevant to each of the variables of which downstream QRR is comprised; and

(c) "post-tax nominal WACC" (i.e. weighted average cost of capital) which is a variable used in the subsidiary formula by which "return on capital" is calculated.

[283] As to the "expected economic life" variable:

(a) The capital cost of the downstream infrastructure for the APLNG project was approximately $14 billion.

(b) But the formula provided no guidance for determining what was the expected economic life of the infrastructure save the somewhat Delphic proposition in footnote 6 that "Expected economic life of the relevant downstream infrastructure asset is not necessarily the same as its allowable tax depreciation life".

(c) The evidence revealed that after the decision was made there has been an on-going debate between the OSR and APLNG as to whether the "expected economic life" should be 20 years (APLNG's position) or 30 years (OSR's position).

(d) The phrase "expected economic life" is a reference to a theoretical construct capable of being approached in a number of different ways depending on the context: cf *Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346 per Edelman J at [72] *et seq*.

(e) The effect of the Minister's argument before me was to contend that the phrase was merely ambiguous and capable of having meaning given to it, even if only by exercise by a Court of its jurisdiction to resolve disputes as to meaning by granting declaratory relief.

(f) I do not find that response to be persuasive. The purpose of the Minister's exercise of power is to promote consistency and certainty, not to reduce it by the use of terms of indeterminate meaning which might require a trial before a Supreme Court judge to determine. I accept that a meaning might be capable of being given to the phrase "expected economic life" in such circumstances, but in my view that does not necessarily mean that the exercise of power in this case using that phrase was a valid exercise of power.

(g) Given the difficulties involved in attributing a particular meaning to the phrase, I agree with the applicants' contention that this important variable is sufficiently uncertain to give rise to invalidation of the exercise of power.

[284] As to allowable and non-allowable opex and capex:

(a) Annexure A at [5] sets out how those variables are to be calculated.

> *Allowable/Non-allowable expenditure*
>
> 5. Following are the principles to be applied in classifying allowable and non-allowable capital expenditure (capex) and operating expenditure (opex) under the Formula:
>
> […]
>
> c. Only capex or opex to the extent that it relates to export of LNG is allowed, e.g. any opex or capex to the extent it is related to domestic gas sales is not permitted.
>
> […]
>
> g. Where costs are incurred in relation to both upstream and downstream they are to be allocated between upstream and downstream on a reasonable and equitable basis.
>
> […]
>
> k. Capex and opex to the extent they are shared with another entity are to be apportioned on a reasonable basis.
>
> l. Only capex and opex to the extent that they are related to the downstream (i.e. post-First Points of Disposal) transportation, processing of coal seam gas (CSG) to LNG in LNG Trains 1 and 2, and storage and loading of LNG are allowed e.g. capex and opex relating to produced water/associated water treatment is not allowed.
>
> […]
>
> n. Overheads are to be apportioned on a reasonable basis.

[…]

(b) It is well to recall that the exercise of the jurisdiction to state the formula was intended to permit a decision to be made as to market value in circumstances in which, because upstream and downstream producers were not at arms-length, the allocation of costs and profits between them for the purpose of determining market value was debatable. The statement of the formula was intended to resolve that debate. However, it does not.

(c) Subparagraphs (c) and (l) each use the language of relationship, but without articulating any standard by which relationship is to be assessed. So far as subparagraph (c) was concerned, the evidence demonstrated that capital expenditures were capable of being regarded as relating both to export and domestic sales. No basis is stated by which any apportionment could occur. Similarly in relation to subparagraph (l).

(d) Subparagraphs (g), (k), and (n) respectively require certain cost allocations or apportionments. Subparagraph (g) requires cost allocation between the upstream and downstream operators "on a reasonable and equitable basis". Subparagraphs (k) and (n) require apportionment of shared expenditure and overheads on a "reasonable basis". But again, there is no objectively ascertainable standard for determining what is reasonable, or reasonable and equitable.

(e) The evidence revealed that after the decision was made there was communication between OSR and APLNG on how to resolve these questions, without any clarity being given. An illustration of the problem can be seen in OSR's letter dated 30 June 2016, which provided on this topic:

> The PRD provides clear principles to be followed by APLNG to determine allowable and non-allowable expenditure […]
>
> APLNG must determine how these principles relate to its expenditure when it applies the PRD. It would not be […] appropriate for OSR to consider items or categories of expenditure as being allowable or non-allowable, without understanding all of the relevant circumstances related to that expenditure. If after considering the principles to be applied in classifying allowable and non-allowable expenditure as set out in the PRD, APLNG has a query about specific expenditure, it may provide details of such to OSR in writing. OSR could then fully consider the query and circumstances and provide APLNG with any necessary information or guidance consistent with the principles in the PRD.
>
> APLNG must be able to substantiate the basis on which it has included capex and opex for the PRD and, for compliance purposes, must keep records of all expenditure and calculations relevant to the PRD.

(f) Given the absence of any objectively identifiable standards by which the matters I have identified might be determined, I agree with the applicants' contention that these important variables are uncertain.

[285] As to post-tax nominal WACC:

(a) Annexure A at [4] provides:

> The following pre-production and post-production post tax nominal WACC rates are to be used as return on capital inputs for the notional transport toll, notional processing toll and notional loading toll in the Formula.

Pre-production post tax nominal WACC % per annum	Post-production post tax nominal WACC % per annum	Post-production post tax nominal WACC % per quarter[53]

[53] Post tax nominal quarterly WACC = (1+ post tax nominal annual WACC)$^{1/4}$-1.

Downstream infrastructure assets:				
-	Pipelines	9.9	6.94	1.69
-	Liquefaction plant	6.86	8.223	1.99
-	Port loading facility	6.86	6.94	1.69

(b) It is obvious from the table that different WACC rates are specified depending on where the subject expenditure fits within the timeline division posited by the first row in the table and the infrastructure categories specified in the first column.

(c) But the line between pre- and post- production is not specified. Nor is the division between the three categories of downstream infrastructure assets.

(d) The problem is that there are categories of infrastructure assets and of expenditure over time which do not clearly fall within the categories made relevant by the table. The wording used in the formula creates too rough a measure of allocation to give rise to a certain outcome. It leaves the person charged with implementing the formula to reach some form of subjective judgment as to categorisation.

(e) Whatever judgment is reached then feeds into the formula itself where it (or any of the inputs to it) refers to WACC.

(f) I agree with the applicants' submission that it could hardly be supposed that the regulation intended to authorise the expression of a formula with this degree of uncertainty.

[286] For the reasons I have identified I do not think that the requisite degree of certainty was achieved by the formula stated by the Minister. The result was that the exercise of power is vitiated by failure of the condition that the requisite degree of certainty be achieved.

Was the exercise of power improper under ss 20(2)(e) and 23(h) of the Judicial Review Act

[287] The applicants contended that the purported exercise of the power was uncertain such that the making of the decision was an improper exercise of the power pursuant to ss 20(2)(e) and 23(h) of the *Judicial Review Act*, because it was an exercise of power in such a way that the result of the exercise of the power is uncertain.

[288] It seems to me that the use of "result" is intended to be a reference to uncertainty as to what the result is. If such certainty exists, then I do not think that the section contemplates a qualitative assessment of the result to see if it meets the descriptor "uncertain".

[289] In considering these matters, an important distinction must be drawn between the decision which was authorised to be made and the reasons for the decision: cf *Colonial Range Pty Ltd v CES-Queen (Vic) Pty Ltd* [2015] VSCA 356 at [18] and [22].

[290] The Regulation itself draws that distinction. Under s 148F(1) and (2), the petroleum royalty decision may state: (1) the method or formula concerned, (2) the period for which the decision applies, and (3) when the decision is to be reviewed. Under s 148F(3) the Minister must give the producer notice of the decision and reasons for it. Reasons were intended to be separate from the decision and the method or formula stated by it.

[291] The notice of the decision made by the Minister maintained that distinction. The reasons for the decision were separately set out in schedule 4 to the notice. As appears from the

analysis at [91] to [93] above, the decision was explicitly stated consistently with s 148F(1) and (2), namely –

(a) the market value of the petroleum was to be worked out in accordance with the formula set out in schedule 2 to the notice of decision;

(b) the decision applied for the period commencing on 1 October 2015 and ending on 31 December 2020; and

(c) reviews could occur to determine whether there was a basis for amendment of the decision and that the Minister considered certain listed circumstances to be fundamental to the decision.

[292] There is no uncertainty as to the result of the exercise of power to make a petroleum royalty decision: see [93](f), [93](g) and [93](h) above. This aspect of the applicants' uncertainty argument fails.

Conclusion as to ground 6

[293] The applicants have established this ground of review.

Ground 7: Procedural fairness

[294] The applicants claim that the Minister breached the rules of natural justice in making the decision by failing to provide them with an opportunity to be heard in relation to –

(a) the second and third Lonergan reports;

(b) the final form of the formula as proposed to be stated;

(c) the material considered by the OSR with respect to the estimated royalty estimates;

(d) the Tri-Star material; and

(e) the QTC Report.

Relevant legal principles

[295] In *Pollentine v Parole Board of Queensland* [2018] QSC 243, I considered a complaint by an applicant for parole that there had been a failure to accord procedural fairness by not according an oral hearing. I essayed a summary of relevant general principles, the first part of which is presently relevant:

> [12] In *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, the High Court identified a number of principles of present relevance. Although the Court referred to "procedural fairness", rather than the term "natural justice" which is used in the Judicial Review Act, the terms may presently be regarded as interchangeable.
>
> [13] **First**, where an exercise of statutory power by an administrative decision-maker is conditioned on affording procedural fairness, to satisfy the condition of procedural fairness the administrative decision-maker is obliged to adopt a procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances.[54]
>
> [14] **Second**, the concern of procedural fairness, which operates as a condition of the exercise of a statutory power, is with procedures rather than with outcomes. It follows that a failure on the part of a repository of the power to give the opportunity to be heard which a reasonable repository of power ought fairly to give in the totality of the circumstances constitutes, without more, a denial of procedural fairness in breach of the implied condition which governs the exercise of the power.[55]

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[54] *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 per Gageler and Gordon JJ at [53], citing *Kioa v West* (1985) 159 CLR 550 per Brennan J at 627.

[55] *Minister for Immigration and Border Protection v WZARH* per Gageler and Gordon JJ at [55]. For consistency of language with the first principle, I have substituted reference to "repository of power" for the particular decision makers which were identified in the passage in their Honours' reasoning.

[296] It was, appropriately, common ground that it was a condition of the power of the Minister to make the decision that he afford procedural fairness to the applicants. Accordingly, the Minister was obliged to adopt a procedure which conformed to the procedure which a reasonable and fair repository of the power would adopt in the circumstances.

[297] I accept the Minister's submission that these matters are not covered by immutable rules. Natural justice is a flexible concept. The procedure which a reasonable and fair repository of power will adopt in any particular case will vary depending on the circumstances, including the nature of the inquiry, the subject matter, and the rules (if any) under which the decision-maker is acting.[56] In particular circumstances it might be appropriate to conclude that adequate opportunity to be heard had been afforded, even though not every piece of adverse material which a repository of power had and which might influence its exercise of power had been disclosed.[57]

Discussion

The second and third Lonergan reports

[298] To my mind, the Minister's position in relation to the procedure adopted in relation to the second and third Lonergan reports was indefensible.

[299] The Minister adopted a procedure which involved –

(a) the reception of submissions and one expert opinion from APLNG (namely the first Ernst & Young report, as to which see [42] to [45] above);

(b) giving the applicants an opportunity to be heard about preliminary views which the OSR had formed and the expert opinion which OSR had obtained (namely the first Lonergan report, as to which see [50] to [57] above);

(c) the reception of submissions and further expert opinion evidence from APLNG (namely the 6 reports provided with the APLNG submission of 30 January 2015, as to which see [58] to [61] above);

(d) the reception of further expert opinion evidence in response to the applicants' new evidence (namely the second and third Lonergan reports, as to which see [65] to [70] above); and

(e) finally, his acting on and adopting that further expert opinion evidence without the applicants ever being told that further expert opinion had been obtained and without them being given an opportunity to make submissions on it.

[300] It could not seriously be said that the new and unseen evidence from Lonergan was not adverse information which was credible, relevant and significant (to adopt the language of Brennan J in *Kioa v West*[58]). Nor could it be said merely to be a restatement of that to which the applicants had already had an opportunity to respond. That much is clear from my own summary of the material at [65] to [70] above. To my mind, the failure to give the applicants an opportunity to be heard on the new unseen evidence represented a startling departure from the procedure which a reasonable and fair repository of the power would adopt in the circumstances. Whilst such a person would have recognised that there must be an end to the cycle of reception of expert evidence, they would have realised that APLNG needed at least to be given an opportunity to make submissions about the new evidence which had been obtained by OSR.

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[56] cf per Mason J in *Kioa v West* (1985) 159 CLR 550 at 584 – 5.

[57] cf *Greyhound Racing NSW v Cessnock & District Agricultural Association* [2006] NSWCA 333 at per Basten JA [88] and *R v Monopolies and Mergers Commission; Ex Parte Matthew Brown Plc* [1987] 1 All ER 463 per Macpherson J at 469.

[58] (1985) 159 CLR 550 at 628 – 9.

[301] I pause to observe that my conclusion as to the significance of the material on which the applicants were denied an opportunity to be heard was also supported by the expert opinion evidence of the economist, Professor Gray, who was able to explain the significance of the new material from an economic modelling standpoint. As I have said in Annexure B, I think his evidence is admissible on this question. His views were –

(a) at p 69:

> The Lonergan report of 2014 is based upon a hypothetical transaction in which the upstream gas producer has the characteristics of a small Australian gas exploration and extraction company. By contrast, the Lonergan reports of 2015 are based upon a hypothetical transaction in which the upstream gas producer has the characteristics of a very large multinational oil and gas firm. Thus, the nature of the hypothetical bargain changed very materially between the 2014 and 2015 versions of the Lonergan reports – from gas being sold by a small Australian gas exploration and extraction company to gas being sold by a very large multinational oil and gas firm.

(b) at pp 71-72:

> […] the fundamental nature of the hypothetical transaction, and the nature of the parties involved in it, has changed materially between the 2014 and 2015 versions of the Lonergan reports.

[302] My conclusion was also supported in attachments B and C to the applicants' written submissions, which extracted in detail the new arguments articulated in the second and third Lonergan reports. Given the views I have already expressed, it is unnecessary to record that detail here. Not every aspect of detail which changed or new argument which was presented would, by itself, have justified the applicants' complaint. The point here is that it was obvious that a plethora of new matters of substance was in fact dealt with in the two new Lonergan reports. The requisite procedural solution was obvious: the applicants should have been given an opportunity to make submissions in relation to the new evidence.

[303] The procedure adopted in relation to the second and third Lonergan reports was not consistent with the procedure which a reasonable and fair repository of the power would adopt in the circumstances. For this reason, this ground of review is made out and justifies setting aside the Minister's decision.

[304] I make one supplementary observation. The applicants' evidence before me was that if they had been given an opportunity to be heard on the second and third Lonergan reports they would have "sought independent expert advice in relation to the material and would have made written submissions to the OSR and the respondent in relation to the additional material." What I have written makes it clear that I think APLNG should have been given the opportunity to make further submissions. Different considerations would affect the question whether the right to be heard should have extended to allowing APLNG the opportunity to adduce another round of further expert opinion evidence. It is unnecessary to express a view on this point, but there would have been much to be said for the argument that that course would not have been necessary. There must be an end to the process of giving APLNG the opportunity to be heard. The critical consideration was that the end would only have been reached if APLNG had been given an opportunity to make submissions on the second and third Lonergan reports.

The final form of the formula as proposed to be stated

[305] The draft OSR report which was given to the applicants to comment on 8 October 2014 reproduced the formula which it was then proposed would form the subject of the Minister's decision in appendices E, F and G to the draft OSR report. The appendices do not seem to have been reproduced in the material before me.

[306] The final OSR report, which was attached to the second briefing paper of 27 November 2015 (and which was not provided to the applicants) had contained a number of appendices. Amongst other appendices:

(a) Appendix P had set out a Netback formula, which was an earlier version of the Netback formula which was ultimately expressed in schedule 2 to the Minister's decision and to which I have referred at [275] and [276] above.

(b) Appendix Q had set out a Toll Formula which was an earlier version of the Notional Toll formula and QRR formula which were ultimately expressed in schedule 2 to the Minister's decision and to which I have referred at [280] above.

(c) Appendix R was an earlier version of the post-tax nominal WACC table which was also ultimately expressed in schedule 2 to the Minister's decision and to which I have referred at [285] above.

[307] The final versions of those aspects of what became the formula stated in the Minister's decision were in fact provided to the Minister when he was given the draft "Notice of Petroleum Royalty Decision and Reasons" with the third briefing note on 14 December 2015. The final versions contained a number of changes:

(a) There were differences in the wording of the table beneath the Netback formula.

(b) The WACC figures were different, consequent upon the third Lonergan report.

(c) There were also material changes to the formula at appendix Q to the final OSR Report. For example, the term "PRR" had been changed to "QRR", the formulae for return on capital and opex were different, the formula for "Notional toll" had changed, and the notes to the formula were materially different in a range of respects, including numerically (14 notes in appendix Q to the final OSR report reduced to 12 notes to the formula in the decision).

[308] The result was that the applicants were not given an opportunity to be heard in relation to the final form of the formula which the Minister proposed to make. They were given an opportunity to be heard in relation to the formula as it stood on 8 October 2014, but changes were made thereafter, as is demonstrated at the least by the changes to which I have adverted above. Such changes included introduction for the first time of the matters to which I have referred in the previous paragraph.

[309] I am not persuaded that, taken by itself, this aspect of the adopted procedure fell outside the bounds of what a reasonable and fair repository of the power would do. The real vice was the antecedent failure to expose to the applicants for submission the expert opinion evidence on which the final formulation of the decision turned. If the applicants had been given the opportunity to be heard in relation to the second and third Lonergan reports, the fact that they had not seen the final formulation of the decision would not matter. That does not mean that the matters I have identified issue should be regarded as adding weight to the vice of the failure to given an opportunity to be heard in relation to the second and third Lonergan reports.

[310] The complaint advanced in the written submissions seemed to focus on the aspects of the final OSR report to which I have referenced. If, which I did not understand to be the gravamen of this point, the complaint was directed to the more general proposition of the failure to provide the final OSR report for submissions, in the same way as the draft OSR report had been earlier provided, I would have rejected that submission. In the particular circumstances of this case, if the second and third Lonergan reports had been provided to APLNG in sufficient time for a submission to be made about them, I think a reasonable and fair repository of power would not have thought it necessary to provide the final OSR

report (which on that hypothesis would have been a report prepared subsequent to receipt of further APLNG submissions on the second and third Lonergan reports) for yet another round of submission.

Other material said to have been considered

[311] There are three categories of other material in respect of which the applicants complain that they were denied an opportunity to be heard, namely –

(a) the material with respect to the estimated royalty revenue discussed under ground 4 above;

(b) the Tri-Star material discussed under ground 4 above; and

(c) a miscellany of material which was listed in Attachment D to the applicants' written submissions.

[312] As to the material concerning royalty revenue:

(a) In my reasons in respect of ground 4 I concluded that the proper construction of the Regulation was that this was an irrelevant consideration.

(b) If the Minister was bound not to consider it, then a reasonable and fair repository of the power would not have found it necessary to give the applicants an opportunity to be heard about it.

(c) The procedural fairness argument in respect of this material must fail.

[313] As to the Tri-Star material:

(a) In my reasons in respect of ground 4 I concluded that it should not be regarded as having been material to the decision.

(b) That conclusion carries with it the implication that a reasonable and fair repository of the power would not have found it necessary to give the applicants an opportunity to be heard about it.

(c) The procedural fairness argument in respect of this material must fail.

[314] As to the material listed in Attachment D:

(a) The applicants did not seek to persuade me to conclude that the material listed could be regarded as adverse material which was credible, relevant and significant. In fact they conceded that if they did not win on one of the earlier points they could not succeed on this point.

(b) In my view the procedural fairness argument in respect of this material must fail.

Conclusion as to ground 7

[315] The applicants have established this ground of review.

Conclusion

[316] The applicants have made out ground 4 (taking into account an irrelevant consideration); ground 6 (uncertainty) and ground 7 (procedural fairness) to my satisfaction.

[317] Accordingly I conclude that the Minister's petroleum royalty decision dated 16 December 2015 was not a decision authorised by the Regulation. I declare that it was invalid and of no effect.

[318] I do not make the second of the declarations sought by the applicants.

[319] I make an order setting aside the Minister's petroleum royalty decision dated 16 December 2015 with effect from the date it was made.

[320] I make an order referring the matter to which the respondent's petroleum royalty decision dated 16 December 2015 relates back to the Minister for further consideration and determination according to law.

[321] I will hear the parties on the question of costs.

Annexure A: The formula stated by the Minister[i]

SCHEDULE 2: FORMULA

1. For each Relevant Period[ii] the Market Value of the Petroleum is to be worked out in accordance with the following Formula.
2. When accounting for disposals of Petroleum during a particular Relevant Period in an annual royalty return,[1] the Market Value of that Petroleum must be recalculated in accordance with the Formula, after making any necessary adjustments (for example, to reflect information which was not available when the Market Value was originally calculated and/or where estimates were necessarily used in the original Market Value calculation for the Relevant Period).

The Formula is:-

$$MV = \frac{V_{LNG} \times P_{LNG} - V_{PORT} \times Toll_{Loading} - V_{Plant} \times Toll_{Processing} - V_{Pipeline} \times Toll_{Transport}}{V_{Pipeline}}$$

Where:

MV	=	Market Value gigajoule (GJ) of Petroleum disposed of by a Producer for the Relevant Period
V_{LNG}	=	Volume of LNG in GJ exported[2] by APLNG Processing for the Relevant Period
P_{LNG}	=	Volume-weighted average price per GJ calculated based on the total proceeds from the sales of LNG and the total volume of LNG sold during the Relevant Period.[3] The proceeds from the sales of LNG during the Relevant Period include the proceeds from the sales of LNG at FOB, and if not FOB the netted back FOB contract prices,[4] of LNG exported by APLNG Processing for the Relevant Period plus any additional payments made or due to any APLNG project entitles or related parties in relation to the LNG sales under the SPAs [redacted]
V_{Port}	=	The volume of LNG in GJ entering the storage and port loading facilities for the Relevant Period
$Toll_{Loading}$	=	Notional loading toll per GJ of LNG entering the storage and port loading facilities (in A$) for the Relevant Period, calculated in accordance with the following formula and relevant inputs

[1] s 599 Act.
[2] The point of export is to be determined on a reasonable and consistent basis.
[3] The volume weighted average price allows for the fact that (i) there are multiple shipments of LNG during the Relevant Period; (ii) the volume of each LNG shipment may be different; and (c) the effective price per GJ for each shipment or, [redacted], for a part shipment may vary during the Relevant Period.
[4] 'Contract prices' include contract prices determined by formulae set out in LNG long-term sale and purchase agreements with the LNG buyers. When applicable, 'Contract prices' also include prices determined based on pricing mechanisms set out in LNG short-term sale agreements and LNG spot sale agreements. No allowance is to be made for bad or doubtful debts.

V_{Plant}	=	Volume of gas in GJ entering the APLNG liquefaction plant in relation Train 1 or Train 2 for the Relevant Period
$Toll_{Processing}$	=	Notional processing toll per GJ of gas entering the APLNG liquefaction plant (in A$) for the Relevant Period, calculated in accordance with the following formula and relevant inputs
$Toll_{Transport}$	=	Notional transport toll per GJ of gas entering the transmission pipeline (in A$) for the Relevant Period, calculated in accordance with the following formula and relevant inputs
$V_{Pipeline}$	=	Volume of gas in GJ entering the transmission pipeline for the Relevant Period

Inputs to Formula

Notional tolls

3. For each Relevant Period the notional pipeline, processing and loading tolls are to be worked out using the following formula. The inputs to the formula vary, depending on the notional toll being calculated.

$$\textbf{Notional toll} = \frac{\textbf{downstream QRR}^{(1)}}{\textbf{quarterly volume}^{(2)}}$$

Downstream QRR –

Return on capital + Return of capital + Opex + Cost of tax

Downstream post-tax nominal WACC × opening downstream asset base value[3] + current period incremental downstream capex[4] × [(1+ post-tax nominal WACC)$^{1/2}$ – 1]

Underutilisation adjusted starting downstream capex[5] / Expected economic life[6] + Rolled forward starting downstream capex[7] × Respective time lapses to end of expected economic life[8] + Previous period incremental downstream capex[9] × Respective time lapses to end of expected economic life[10] + Current period incremental downstream capex × Time lapse to end of expected economic life[11]

Allowable downstream opex

(Return on capital + return of capital - allowable tax depreciation[12]) × [Applicable Australian corporate tax rate / 1 - Applicable Australian corporate tax rate]

Notes:

1 Quarterly required revenue.

2 Quarterly volume is comprised of equity gas volume plus contracted third party volume that passes through the entry point of the relevant downstream infrastructure asset, not reduced on account of any gas losses through the corresponding downstream part of the APLNG value chain. Depending on the downstream infrastructure asset, the gas losses may include, for example, gas used to generate electricity in transporting, processing, loading or storing the gas/LNG, or gas that is flared.

3 For the first Relevant Period, opening downstream asset base value is equal to the starting downstream asset base value (starting downstream capex) times a utilisation factor for the first Relevant Period. The starting downstream asset base value is the actual pre-production capex (including capitalised opex) incurred in relation to LNG Trains 1 and 2, converted, where applicable, into Australian dollars at exchange rates that reasonably reflect the relevant exchange rates prevailing at the time they were incurred and rolled forward to the date of production commencement at the relevant pre-production post-tax nominal weighted average cost of capital (**WACC**).

A utilisation factor for a Relevant Period is calculated as the lower of the ratio of the actual volume of gas that passes through the entry point of the relevant downstream infrastructure asset during that Relevant Period (expressed as a percentage) to the steady state volume of gas in relation to LNG trains 1 and 2 through the same entry point, and 100 percent. The steady state volume in relation to LNG Trains 1 and 2 for a Relevant Period is calculated as a quarter of the sum of what would be the annual take or pay contract volumes (before downward quantity tolerances) when such annual take or pay contract volumes under the respective SPAs have become constant. The portion of the starting downstream capex, which is equal to the starting downstream capex times (1 – utilisation factor for the first Relevant Period), is rolled forward at the relevant post-production post-tax nomination WACC and progressively incorporated into the opening downstream asset base value when the actual volume of gas progressively reached the steady state volume of gas over time. Subsequent to the first Relevant Period and prior to the steady state volume being achieved, the share of the rolled forward portion of the staring downstream capex which is incorporated into the opening downstream asset base value for a particular Relevant Period is calculated based on the incremental increase in the utilisation factor for that period (i.e. the difference between the utilisation factor for that period and the utilisation factor for the immediately preceding Relevant Period). For that period, the opening downstream asset base value is equal to the closing asset base value for the immediately preceding Relevant Period plus, the share of the rolled forward starting downstream capex which is incorporated into the downstream asset base value. The closing asset base value for the immediately preceding Relevant Period is equal to the opening downstream asset base of that period plus, where applicable, the incremental downstream apex incurred less the return of capital during that period.

When the steady state volume of gas has not been achieved for the immediately preceding Relevant Period, the incremental downstream capex incurred during that period is not incorporated into the closing downstream asset base value, but rolled forward at the relevant post-production post-tax nominal WACC and incorporated into the opening asset base value of the Relevant Period in which the steady state volume of gas has been achieved.

4 Current period incremental downstream capex is assumed to be incurred in the middle of the Relevant Period. A return on capital is calculated in respect of current period incremental downstream capex for the Relevant Period if the actual volume of gas has reached or exceeded the steady state volume of gas. If not, current period incremental downstream capex is rolled forward at the relevant post-production post-tax nominal WACC and incorporated into the opening downstream asset base value of the Relevant Period in which the steady state volume of gas has been achieved.

5 Underutilisation adjusted starting capex is equal to the starting capex in relation to LNG Trains 1 and 2 times the utilisation factor for the first Relevant Period.

6 Expected economic life of the relevant downstream infrastructure asset is not necessarily the same as its allowable tax depreciation life.

7 For a Relevant Period, rolled forward starting downstream capex is comprised of a portion or portions of the starting downstream capex which have been rolled forward at the relevant post-production post-tax nominal WACC and incorporated into the opening asset base value for the Relevant Period, in respect of which a return of capital is calculated.

8 Being the time lapse from the period in which the relevant portion of the rolled forward starting capex is incorporated into the opening asset base value to the end of the expected economic life of the relevant downstream infrastructure asset. For a given Relevant Period, the opening asset base value can include different portions of the rolled forward starting capex with different time lapses to the end of the expected economic life of the relevant downstream infrastructure asset.

9 Being, were applicable, incremental downstream capex incurred in one or more Relevant Periods prior to the Relevant Period in question. When the actual volume of gas for the preceding Relevant Period has not achieved the steady state volume of gas, the incremental downstream capex incurred during each of those periods is not incorporated into the closing asset base value n respect of which return of capital is calculated, but rolled forward at the relevant post-production post-tax nominal WACC and incorporated into the opening asset base value of the Relevant Period in which the steady state volume of gas is achieved.

10 Being, where applicable, the time lapse from when each corresponding previous period incremental downstream capex is incurred to the end of the expected economic life of the relevant downstream infrastructure asset.

11 A return of capital is calculated in respect of current period incremental downstream capex for the Relevant Period if the steady state volume of gas has been achieved. In such cases, the time lapse to end of expected economic life is the time lapse from when the current Relevant Period capex is incurred to the end of the expected economic life of the relevant downstream infrastructure asset. If the steady state volume of gas

has not been achieved for the Relevant Period, current period incremental downstream capex is rolled forward and incorporated into the opening downstream asset base value of the Relevant Period in which the steady state volume of gas has been achieved.

12 Allowable tax depreciation is one quarter of the amount calculated in accordance with relevant Australian tax laws. If the allowable tax depreciation is not known, a reasonable estimate may be used to calculate the toll for the quarterly return period and the actual allowable tax depreciation for that period (when the amount is subsequently known) is to be taken into account in the next annual royalty return.

Post tax nominal WACC

4. The following pre-production and post-production post tax nominal WACC rates are to be used as return on capital inputs for the notional transport toll, notional processing toll and notional loading toll in the Formula.

	Pre-production post tax nominal WACC % per annum	Post-production post tax nominal WACC % per annum	Post-production post tax nominal WACC % per quarter[5]
Downstream infrastructure assets:			
- Pipelines	9.9	6.94	1.69
- Liquefaction plant	6.86	8.223	1.99
- Port loading facility	6.86	6.94	1.69

Allowable/Non-allowable expenditure

5. Following are the principles to be applied in classifying allowable and non-allowable capital expenditure (**capex**) and operating expenditure (**opex**) under the Formula.

   a. No capex or opex to the extent that it is associated with, or is designed to facilitate the optimising of, operating capacity beyond LNG Train 1 and LNG Train 2, is allowed.

   b. If any incremental capex is incurred that relates to further LNG Trains or increasing capacity, only that expenditure to the extent that it relates to LNG Trains 1 and 2 is allowed (i.e. not costs associated with scalability for further LNG Trains).

   c. Only capex or opex to the extent that it relates to export of LNG is allowed e.g. any opex or capex to the extent it is related to domestic gas sales is not permitted.

   d. Capex is not to include profit margin elements or capitalised interest (which are already reflected in the rate of return component that has bene used in rolling forward the relevant costs).

   e. Any non-arm's length opex is to be at cost, excluding profit.

   f. Only opex and capex to the extent that it is relates to the downstream post-First Points of Disposal is allowed.

   g. Where costs are incurred in relation to both upstream and downstream, they are to be allocated between upstream and downstream on a reasonable and equitable basis.

   h. No provisions for end-of-life, environmental and site rehabilitation expenses or costs or similar are allowed.

   i. Pre-paid expenses are to be apportioned consistently and in accordance with normal accounting requirements.

   j. The starting base capex comprises actual capex and capitalised opex rolled forward at the stated pre-production rate of return (not on an alternative basis for valuing the assets). For the avoidance of doubt, only actual capex and capitalised opex to the extent that such expenses were incurred in constructing,

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5 Post tax nominal quarterly WACC = $(1+ \text{post tax nominal annual WACC})^{1/4}-1$

operating and maintaining infrastructure related to LNG Train 1 and LNG Train 2 are allowable e.g. only the actual costs or expenses of contingent events that have crystallised at the start of production are allowed.

k. Capex and opex to the extent they are shared with another entity are to be apportioned on a reasonable basis.

l. Only capex and opex to the extent that they are related to the downstream (i.e. post-First Points of Disposal) transportation, processing of coal seam gas (**CSG**) to LNG Trains 1 and 2, and storage and loading of LNG are allowed e.g. capex and opex relating to produced water/associated water treatment is not allowed.

m. Where capex or opex was or is incurred in a currency other than A$, such expenditure is to be converted to A$ on a consistent basis that reasonably reflects exchange rates prevailing at the relevant time.

n. Overheads are to be apportioned on a reasonable basis.

End notes to Annexure A

i The footnotes (but not the endnotes) in this annexure reproduce the footnotes which were contained in the footnotes in the text of schedule 2 to the Minister's decision. Text which has been redacted in the body of the annexure and in the footnotes was not redacted in schedule 2 to the Minister's decision but was redacted consequent upon Court order to maintain commercial confidentiality.

ii "Relevant Period" was defined in the Minister's decision as each quarterly royalty return period as defined in the Regulation.

Annexure B: Objections to material not before the Minister

[1] As I mentioned in the body of my reasons, the expert reports and other material which were before the Minister were also in evidence before me. The applicants sought to rely on some new evidence, which had not been placed before the Minister.

[2] Objection was initially taken by the Minister to the following evidence upon which the applicants sought to rely:

(a) the entirety of the report of Will Pulsford dated 22 June 2018;

(b) the entirety of the report of Professor Stephen Gray dated 16 July 2018 other than paragraphs 194 to196;

(c) paragraphs 38, 39 and 45 to 48 inclusive of the affidavit of Daniel Clancy dated 16 July 2018; and

(d) paragraphs 20 to 24 inclusive of the affidavit of Mark McCabe dated 16 July 2018.

[3] Ultimately the only objections which were pressed were those which addressed the manner by which the applicants sought to rely on a further expert report by Professor Gray, in support of grounds 1, 3, 6 and 7.

[4] For reasons which follow, I have concluded that the expert report of Professor Gray should be admitted for limited purposes.

[5] It was not disputed that insofar as the report contained material elucidating the technical concepts of economic theory and modelling and valuation that were in fact dealt with in the material before the Minister, the report was admissible.[1] I think that concession was appropriate. Accordingly I rule that the report may generally be relied on for the purpose of elucidating the technical concepts of economic theory and modelling and valuation that were in fact dealt with in the material before the Minister.

[6] As to the way in which the applicants placed reliance on the report in support of ground 6:

(a) Objection was taken to [200(b)] and [200(d)] of the report, which were relied on in the applicants' written submissions at [240] and [243].

(b) In principle, especially in a case like the present, expert opinion may be admissible to demonstrate by explanation of technical matters the significance of which might otherwise not be capable of being understood by a judge: why a certainty problem in an exercise of administrative power might be thought to exist.

(c) However, in my view the paragraphs to which objection was taken were merely argumentative assertions on matters for which no expert explanation was necessary.

(d) I uphold the objections.

[7] As to the way in which the applicants placed reliance on the report in support of ground 7:

(a) Objection was taken to [202] to [220] of the report, which were relied on in the applicants' written submissions at [274], [277] to [280] and [282] and in the applicants written submissions in reply at [137].

(b) I have identified in the body of my reasons that the Minister obtained the second and third Lonergan reports but denied APLNG an opportunity to advance submissions in relation to the second and third Lonergan reports, even though the Minister relied on them in making his decision.

(c) The impugned paragraphs of Professor Gray's report are paragraphs which explain the significance of the material in the second and third Lonergan reports, including

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[1] cf *Visa International Service Association v Reserve Bank of Australia* [2003] FCA 977 per Tamberlin J at [661].

by identifying changes made in those reports to the thinking revealed by the Lonergan report which was provided to APLNG.

(d) In my view an appreciation of the significance of the economic theory and modelling and valuation concepts dealt with in the second and third Lonergan reports was a subject on which expert opinion was required.

(e) I dismiss the objections.

[8] The applicants also sought to rely on Professor Gray's report in support of grounds 1 and 3. It follows from what I have written at [5] of Annexure B above, that the report could be relied on in relation to grounds 1 and 3 for the limited purpose there identified. However the Minister submitted (and the applicants disputed) that subject to that exception, material which was not before the administrative decision-maker was not relevant or admissible on those grounds.

[9] I should say that although no objection was pressed in relation to the report of Mr Pulsford, what I have to say below applies equally to that report. Although it was admitted without objection, if I formed the view that it was inadmissible for the purposes upon which it was relied, I would not use it for those purposes.

[10] It is appropriate first to identify relevant legal principles.

[11] **First**, ordinarily, material not before the decision-maker at the time of the making of the decision will not be admissible in proceedings for judicial review: *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 per Weinberg J at [454].

[12] **Second**, but, in principle, the admissibility of evidence not before the decision-maker depends upon the grounds of review on which the applicant relies before the Court: *Attorney-General for the Northern Territory v Minister for Aboriginal Affairs* (1989) 23 FCR 536 per Lockhart J at 539 – 540; *McCormack v Deputy Commissioner of Taxation* (2001) 114 FCR 574 per Sackville J at [38] – [40]; *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 per Weinberg J at [454] – [458]; *Chandra v Webber* (2010) 270 ALR 393 at [40] – [45]; and *Origin Energy Electricity Ltd v Queensland Competition Authority* [2014] 1 Qd R 216 per Jackson J at [6].

[13] **Third**, accordingly, some grounds of review permit evidence not before the decision-maker to be adduced. For example –

(a) proof that an applicant was denied procedural fairness: see *Percerep v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 483, cited with approval in *McCormack*, *Australian Retailers Association* and *Chandra*;

(b) where jurisdiction depended upon the existence of an actual state of facts, proof that the state of facts did not exist: see *Queensland v Wyvill* (1989) 25 FCR per Pincus J at 512 at 519 – 520, cited with approval in *McCormack*, *Australian Retailers Association* and *Chandra*;

(c) where the decision-maker based the finding on a particular fact, proof that the particular fact did not exist: see *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 per Black CJ at 224 cited with approval in *McCormack*, *Australian Retailers Association* and *Chandra*;

(d) proof of bias or fraud: see *R v Northumberland Compensation Tribunal, ex parte Shaw* [1952] 1 KB 338 per Denning LJ at 352, cited with approval in *Chandra*.

[14] **Fourth**, so far as the ground of review which alleges improper exercise of power on the grounds of legal unreasonableness, the position is less clear.

[15] This ground of review would generally lead to the evidence consisting primarily of the material before the decision-maker: *Attorney-General for the Northern Territory v Minister for Aboriginal Affairs* Lockhart J at [11], cited with approval in *Australian Retailers Association*.

[16] The authorities are not entirely clear as to the circumstances in which evidence not before the decision-maker in relation to this ground of review in particular circumstances.

[17] In *Australian Retailers Association v Reserve Bank of Australia* Weinberg J dealt with an application for judicial review of a decision by the Reserve Bank of Australia to "designate" the EFTPOS system, a decision which had the consequence of then empowering the RBA to make standards which must be complied with by participants in the system. His Honour observed at [457] to [460] (emphasis added):

> It should be noted that neither Lockhart J nor Sackville J considered whether it would be open to a party seeking to affirm a decision impugned on the basis of *Wednesbury* unreasonableness to rely upon expert evidence, tendered to show that the decision was in fact entirely reasonable. In principle, albeit with some reluctance (having regard to the additional time and costs taken up with such evidence), I can see no reason why, in an appropriate case, such evidence should not be admitted.
>
> ***Wednesbury* unreasonableness is, in some respects, simply a variant of the ground that a decision-maker lacked jurisdiction to make the decision because jurisdiction was dependent on an actual state of facts that did not exist, or that the decision-maker based the decision on a finding of a particular fact that did not exist. If additional evidence is available, in cases reliant upon such grounds, there is no reason in principle why such evidence should not also be admissible where the ground is couched in terms of unreasonableness**.
>
> That is not to say that the tender of such evidence should be encouraged. Nor is there any basis for a conclusion that it can be admitted as of right. As Sackville J correctly observed, everything depends upon the grounds of review, and the circumstances of the case.
>
> When it is put that a body, such as the RBA, acted irrationally, and not in accordance with sound economic principles, the fact that experts in "payment systems" and regulatory theory say that they would have arrived at the same decision must be probative, at least as regards that issue. What is "sauce for the goose, is sauce for the gander". It follows that evidence by experts that the decision to designate was taken in disregard of fundamental, and quite basic economic principles, must equally be admissible as bearing upon the same issue. I therefore reject the RBA's general objections to the evidence of Mr Gove and Dr Williams.

[18] On the other hand, in *Moolarben Coal Mines Pty Ltd v Director-General of the (former) Department of Industry and Investment NSW (Agriculture Division)* [2011] NSWLEC 191 Moore AJ held:

> [68] The principal plank of Moolarben's attack on the Determination on the grounds of *Wednesbury* unreasonableness was the evidence of three experts referred to earlier in these reasons. Ultimately the plank centrally became the joint opinion of all experts (including Ulan's expert, Mr Lane) advancing the view, with some limited qualifications, that none of the land the subject of the Determination was "agricultural land" for the purposes of Schedule 2 the Act.
>
> [69] However a fundamental question arises as to whether this evidence can be called in aid of this ground. That is, can the question of whether a decision can be impugned on the ground of *Wednesbury* unreasonableness be determined by reference to evidence or material which had not been before the decision-maker. One view, supported by some authority, is that the ground can only considered by reference to the evidence or material before the decision-maker: *McCormack v Commissioner of Taxation* (2001) 114 FCR 574 at [88]. The other view, again supported by some authority, is that recourse can be had to evidence led in the judicial review proceedings in which the challenge is made: *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [457].
>
> [70] A starting point in considering this question is the content of the ground. There is ongoing debate about where *Wednesbury* unreasonableness fits in the panoply of grounds of judicial review (and the content of the ground) probably most recently evidenced by the reasons of the various Justices of the High Court in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16. Fundamentally, however, the ground is concerned with rectifying the abuse of power. A

convenient statement of the ground can be found in the joint judgment of Gleeson CJ and McHugh J in *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] 197 CLR 611 at [39] namely that the decision "was so unreasonable that no reasonable [decision-maker], acting within jurisdiction and according to law, would have come to such a conclusion".

[71] There is an immediate and obvious tension between ascertaining whether the ground is made out, focusing as it does on whether a reasonable decision-maker would have come to the same decision, and having recourse to material that was not before the decision-maker who is said to have made the perverse or manifestly unreasonable decision. The yardstick for testing the reasonableness of the decision could change dimensions, potentially significantly, by the introduction and consideration of fresh material in the judicial review proceedings.

[…]

[76] Ultimately the specific question for determination is whether the evidence of the experts is relevant and therefore admissible to make good the ground of *Wednesbury* unreasonableness. I am not aware of any binding authority requiring me to either admit it or reject it. There is persuasive authority supporting both approaches. I prefer the approach that the evidence is irrelevant. Accordingly I reject the tender of the evidence of the experts in so far as it is relied on to make good the ground of *Wednesbury* unreasonableness.

[19] The most detailed consideration of the question which I have found is that by Biscoe J in *Arnold v Minister Administering the Water Management Act 2000 (No 6)* [2013] NSWLEC 73 at [119] to [139]. In the course of a very long discussion, Biscoe J –

(a) made these very broad observations (at [124], emphasis added):

> Judicial review cannot survive if it tolerates all expert evidence; it does not follow, however, that it will collapse if it tolerates some. **In principle and on the authorities, expert evidence can be tolerated in some circumstances, including at the edge of judicial review, at the high and usually insurmountable barrier of the ground of manifest unreasonableness, if it is relevant to the proposition that, on the material before the decision-maker, the decision was manifestly unreasonable. No violence is done to the general principle that judicial review grounds (other than jurisdictional fact) are determined by reference to the material before the decision-maker if it is acknowledged that expert evidence may be required to show that that material was fallacious and operated to produce an absurd result that no reasonable decision-maker could have reached.** The precise limit of the admissibility of expert evidence for this purpose is not a bright line. But expert evidence is likely to be admissible where, for example, the technical nature of the material before the decision-maker requiring review is such that it may not be fully understood by the court without expert evidence. The admissibility of expert evidence for this purpose is a different question to whether, at the end of the day, the court is satisfied that the hard to prove ground of manifest unreasonableness has been established. It is insufficient to establish mere factual error.

(b) noted some more particular circumstances in which material not before the decision-maker might be admitted (at [128] – [129]):

> Expert evidence not before the decision-maker may be admitted where it is relevant to a ground of denial of procedural fairness, or a ground of absence of jurisdictional fact, or a ground that the decision was based on a finding of a particular fact which did not exist, or where the decision-maker had information that should have caused her to make further inquiries: *McCormack*. Expert opinion evidence may be admitted as to the meaning of technical terms in material before the decision-maker: *Australian Retailers Association v Reserve Bank of Australia* [2005] FCA 1707, (2005) 148 FCR 446 at [467] (Weinberg J).
>
> Expert and other evidence not before the decision-maker may be admitted to show that it is obvious that there was material readily available to the decision-maker which was likely to be of critical importance in relation to a central issue for determination. Such evidence may be regarded as relevant to a ground of manifest unreasonableness: *Prasad v Minister for Immigration and Ethnic Affairs* [1985] FCA 46, (1985) 6 FCR 155 at [33] (Wilcox J); followed in *Luu v Renevier* (1989) 91 ALR 39 at 50 (FCA/FC), *Tickner v Bropho* (1993) 40 FCR 183,199 (Black CJ) and *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20, (1995) 183 CLR 273, 290 (Mason CJ and Deane J). Or it may be regarded as relevant to a ground of jurisdictional error by constructive failure to exercise jurisdiction: *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39, (2009) 259 ALR 429 at [25]; *Minister for Immigration and Citizenship v SZGUR*

> [2011] HCA 1, (2011) 241 CLR 594 at [74] - [78] per Gummow J (Heydon and Crennan JJ agreeing). Or it may be regarded as relevant where it is alleged that there was a breach of a duty to make inquiries: *SZGUR* at [22] per French CJ and Kiefel JJ (Heydon and Crennan JJ agreeing); *King v Great Lakes Shire Council* (1986) 58 LGRA 366, 371, 376, 383 (Cripps CJ); *Caldera Environment Centre Inc v Tweed Shire Council* [1993] NSWLEC 102 (Talbot J). The cases to which I have referred in this paragraph were considered by me in more detail in *Friends of King Edward Park Inc v Newcastle City Council* [2012] NSWLEC 113 at [77] - [83]. See also *Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No 2)* [2013] NSWLEC 38 at [42] - [45] (Pepper J).

(c) (at [134] to [138]) considered and expressed doubt as to the observations as to admissibility made by Moore AJ in *Moolarben*.

[20] In *Changshu Longte Grinding Ball Co., Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science (No 1)* [2017] FCA 1114 Griffiths J followed *Australian Retailers Association* to admit expert opinion on the question whether the decision-maker acted unreasonably or irrationally.

[21] For my part:

(a) I think that Moore AJ was right to suggest that the starting point in any analysis of admissibility must be the juridical basis of the unreasonableness ground.

(b) There is, of course, now no on-going debate about where *Wednesbury* unreasonableness fits in the panoply of grounds of judicial review: see my discussion of *Minister for Immigration and Border Protection v SZVFW* (2018) 357 ALR 408 at [156] – [161] above. That juridical basis is not consistent with the statement made by Weinberg J in *Australian Retailers Association* in the passage quoted above.

(c) As Gageler observed in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [105], cited with approval by Nettle and Gordon JJ in *SZVFW*, "[r]eview by a court of the reasonableness of a decision made by another repository of power "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" but also with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"".

(d) The joint judgment of Hayne, Kiefel and Bell JJ stated in *Minister for Immigration and Citizenship v Li* stated at [66] "[t]he courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power. Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker."

(e) I am unable to accept the breadth of the statement by Biscoe J which I have recorded at [19](a) above. I do not think that as a general proposition it can be correct to advance the apparently absolute statement that expert evidence is admissible on judicial review for legal unreasonableness to demonstrate that material before the decision-maker was fallacious and operated to produce an absurd result that no reasonable decision-maker could have reached.

(f) Taken literally, that statement would permit a party aggrieved of an exercise of power which required the repository of power to make a decision by reference to facts, expert opinion evidence and submissions made in relation thereto (including that by reference to arguments some of the opinion evidence was fallacious), to re-litigate the issues before a judge on a judicial review, under the guise of placing new evidence before the judge in order to demonstrate the truth of the proposition(s) rejected by the repository of power in the first place.

(g) I do not mean to suggest that there are no circumstances in which new evidence might be permitted on an application for judicial review on the grounds of legal unreasonableness. However my view is that wherever the line to which Biscoe J referred is to be drawn, it is not to be drawn in a way which would permit the course to which I have referred in the preceding subparagraph. To proceed in that way would be to permit the aggrieved person to invite the Court to substitute for the view of the decision-maker its own view of the acceptability of the evidence which was before the repository of power, and to do so based on evidence which was not before the repository of power.

[22] In this case, APLNG had developed a detailed argument against the merits of the Lonergan opinion. Amongst the 6 expert reports on which APLNG relied in response to the first Lonergan report was an earlier report by Professor Gray (who had been the author of the SFG report (see [58] and [59] above). Examination of the reports which APLNG in fact placed before the Minister, reveals that they contained similar criticisms to those now sought to be re-canvassed by the reliance on the reports of Professor Gray and Mr Pulsford. For example:

(a) I observe that the applicants rely on both reports to demonstrate that characteristics of real life commercial structures for LNG projects were inconsistent with Lonergan's hypothesis: see applications written submissions at [31], [142] to [148] in support of a submission that there was no relevant industry precedent for Lonergan's hypothesis. They contend at [146]:

> Accordingly, there is not a single precedent in industry practice in the history of LNG projects which replicates the hypothetical commercial structure relied upon by Lonergan (as adopted in full by the Minister), whereby a utility or infrastructure provider accepts a mere toll payment for access and takes ownership of feedstock gas and then takes on the burden, risks and effort associated with all of the downstream activities including sourcing customers and selling the LNG. In circumstances where the hypothetical transaction relied upon by the Minister is inconsistent with real-life industry structures, the appropriate conclusion is that the Decision is so unreasonable that no reasonable person could so exercise the power.

(b) But this very point was made in at least one of the reports which were before the Minister: see Deloitte Tax Services Pty Ltd report dated 30 January 2015 under the headings "Tolling"[2] and "Examples in the industry".[3]

(c) Professor Gray's report which was before the Minister[4] criticised as unrealistic (for reasons which he then develops) the proposition that the downstream operator would require only a tolling-like return. In the new report which the applicants seek to rely upon Professor Gray says that the assumption is "absurd" for reasons which he also develops.[5]

[23] Lonergan had developed a detailed refutation of APLNG's arguments and the criticisms made by the various experts retained by APLNG, including Professor Gray (see [67] above), and the final OSR report had, by Appendix S, summarised the competing views (see [84] above). The Minister's reasons reveal that he considered and rejected the criticisms of the Lonergan opinions (see [95] to [100] above).

[24] To my mind the attempt by the applicants to rely on the reports of Mr Pulsford and Professor Gray is an attempt to have me simply reconsider the merits of some of the very decisions which the Minister made in order to reach the decision which he had been clothed with power to make, namely the decisions to reject the criticism of Lonergan's

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[2] Affidavit of Perrett sworn 29 January 2016, Exhibit RGP-1, at pp 475 – 6.
[3] Affidavit of Perrett sworn 29 January 2016, Exhibit RGP-1, at p 478.
[4] Affidavit of Perrett sworn 29 January 2016, Exhibit RGP-1, at pp 530.
[5] Report of Professor Stephen Gray dated 16 July 2018 at [10].

assumptions and the validity of his hypothesis. I do not think that course is permissible on an application for judicial review. Indeed, it would not even be permissible on an appeal by way of rehearing without an exercise of discretion which considered the distinction between new and fresh evidence.[6]

[25] As to the way in which the applicants placed reliance on those reports in support of grounds 1 and 3:

(a) Objection was taken to [10(a)], [12(a)], [37], [49], [84], [87(a)] – [87(b)], [89] – [140], [148(b)], [149] – [150] and [167] of Professor Gray's report. Those paragraphs were variously relied on in the applicants' written submissions at [71], [78] – [79], [85], [87] – [88], [109] – [113], [115], [118] – [124], [141], [143], [153].

(b) I uphold those objections for the reasons I have articulated.

(c) But quite apart from objections (and as I have said, no objection was pressed in relation to the report of Mr Pulsford) I think it would be erroneous to rely on those reports in support of grounds 1 and 3 for any reason other than as aids in understanding the evidence which was in fact before the Minister.

[6] cf *R v Spina* [2012] QCA 179 at [32] – [34].