

**SANRUS PTY LTD & ORS V MONTO COAL 2 PTY LTD & ORS
SUPREME COURT OF QUEENSLAND PROCEEDING NO. 8609/07**

SCHEDULE 1

Schedule expressing the Court’s ruling on the defendants’ objections to reports of Mr Freeman

Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] (2 November Report)

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants’ suggested ruling	(6) Plaintiffs’ suggested ruling	(7) Final ruling
Item 2 from the defendants’ schedule of objections						
1.	[25] First and second sentences (‘I have considered...’)	<p>Mr Freeman provides evidence about the track record of Macarthur Coal and commentary about other mining projects.</p> <p>Not proper matters for expert opinion.</p> <p>Facts underpinning this opinion are not stated or proved by admissible evidence</p>	<p>Macarthur Coal’s “<i>industry achievement</i>” in relation to the prompt development of coal mines is evidenced by reference to the Moorvale development:</p> <ul style="list-style-type: none"> Macarthur Coal had a 77% interest in the Moorvale Project ([MAC.518.002.8283] p. 8287); Moorvale was a greenfield site ([TRA.500.030.0001] T30-69/11); A feasibility study in relation to the Moorvale project was produced on 22 February 2002 [MAC.906.001.0927]; mining lease applications were lodged on 22 February 2002 ([MAC.906.001.0927 at pdf p. .0942]; A mining lease was obtained in December 2002 ([TRA.500.030.0001] T30-69/31); Financing was put in place in late 2002/early 2002 ([TRA.500.030.0001] T30-69/8-9); Moorvale was brought into production around the middle of 2003 and the second half of 2003 ([TRA.500.030.0001] T30-69/13-14) including the construction of a new rail spur ([TRA.500.030.0001] T30-69/16-17). <p>ollows gave evidence that Mr Talbot considered that Moorvale could be developed within a year (T30-74/33-34). In response to a question “<i>that was his reputation at the time</i>” Ms Hollows said “<i>He did it once – doesn’t, yeah ...</i>” (T30-74/33-34). Ms Hollows also agreed that “<i>Moorvale, as I think you have given evidence earlier, progressed quite quickly. It was being pushed hard and it came online really in the middle of 2003</i>” (T32-84/36-37 [TRA.500.032.0001]).</p> <p>More generally, the major shareholder, Managing Director and CEO of Macarthur Coal was Mr Talbot ([MAC.518.002.8283 at pdf p. .8294]). Mr Greenwood gave evidence that:</p> <ul style="list-style-type: none"> “<i>Ken Talbot was very much a 100-mile-an-hour man and wanted things moving very, very quickly all the time. He certainly didn’t like pessimists. I think there was a little balance between what was pessimism and realism on this particular issue, and I did discuss that with him and with Roger Marshall on another occasion, that the programme was very</i> 	<p>(The defendants did not insert a suggested ruling for this item, but I took the defendants’ position as seeking to support the provisional ruling. The material below for this item merely sets out definitions employed in other parts of column 5 of the schedule.)</p> <p>In this schedule, the provisional ruling in item 1(2) of the schedule to <i>Sanrus No. 5</i> – namely, that the evidence is inadmissible because it does not state the facts or assumptions underpinning the opinion – will be referred to as the “assumption identification ruling”.</p> <p>The provisional ruling in item 2(2) of the schedule to <i>Sanrus No. 5</i> – namely, that evidence expressing an opinion on what a third party would do in hypothetical circumstances is inadmissible for the reasons expressed in the judgment – will be referred to as the “hypothetical conduct ruling”.</p> <p>The provisional ruling in item 5(2) of the schedule to <i>Sanrus No. 5</i> – namely, that evidence expressing an opinion as to the state of mind of a third party is inadmissible for the reasons expressed in the judgment – will be referred to as the “state of mind ruling”.</p> <p>The provisional ruling in [62] of the judgment in <i>Sanrus No 5</i> and item 157(1) of the schedule to <i>Sanrus No. 5</i> – namely, that “it is not a proper matter for expert opinion evidence for an expert to review documents including confidential documents obtained on subpoena and to express conclusions on what the expert would infer from those documents” – will be referred to as the “documents review ruling”.</p> <p>The provisional ruling in [52] of the judgment in <i>Sanrus No 5</i> – namely, that “the expert must state, in chief, the reasoning by which the conclusion arrived at flows from the facts proved or assumed by the expert so as to reveal that the opinion is based on the expert’s expertise” – will be referred to as the “statement of reasoning ruling”.</p>	<p>This evidence was given in response to an opinion expressed by Mr Morton that other projects would have been preferred by the GPC over the Monto Project: see [22] of the 2 November 2018 report.</p> <p>This evidence summarises one of Mr Freeman’s reasons for disagreement with Mr Morton and is contained in the Executive Summary of the 2 November 2018 report. The detailed analysis of the relevance of the reputation of Macarthur Coal is provided in Parts A and B of the 2 November 2018 report in relation to port (commencing at pdf p.68).</p> <p>It is evidence of facts by Mr Freeman who had knowledge of the reputation of Macarthur Coal in the Australian mining industry at the relevant time: see [216] – [217] of the 2 November 2018 report.</p> <p>Both Mr Freeman and Mr Morton consider that the reputation of Macarthur Coal was a relevant consideration for the purposes of the Project Feasibility Assessment: see, for example, EXP.500.026.0001_2 at pdf p.8 at item 9.</p> <p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I agree that the impugned sentences do not address proper matters for expert opinion in the sense I have explained that rule. Whilst I acknowledge that expertise can be gained by experience as well as by training or study, the matters expressed fall into the category impugned by Gleeson CJ in <i>HG v The Queen</i>, quoted <i>Sanrus No. 5</i> at [48].</p> <p>(2) If the subject matter was a proper matter for expert opinion, I agree that the expression of opinion has not complied with the assumption identification rule and the facts underpinning this expression of opinion have not been stated.</p> <p>(3) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> The plaintiffs’ references to Mr Morton’s report do nothing to meet the objections as to admissibility. The assumption identification rule must be met by the expression of expert opinion. Failure so to do cannot be remedied after the fact by way of a lawyer’s submission which attempts to identify the requisite assumptions. The impugned sentences do not themselves express factual evidence of the reputation of Macarthur Coal. That evidence is elsewhere if it is anywhere at all. The impugned sentences cannot be upheld on that basis. I have ruled that the plaintiffs may not advance the unpleaded advice case. <p>(4) Subject to the next paragraph, I uphold the objections.</p> <p>(5) I took the plaintiffs’ submission to include the proposition that the impugned evidence was within the scope of the plaintiffs’ fallback argument. The defendants did not</p>

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			<p><i>challenging, indeed</i>” (T20-55/15-19);</p> <ul style="list-style-type: none"> “<i>Ken was extremely optimistic and didn’t like people with any sort of pessimism regarding the programme. And, in fact, it would not have been worth your while to have said, ‘Look, hold on; this is going to take another year’</i>” (21-46/35-37); and in relation to the development timetable “<i>It would have been very difficult for me to have pushed it out any further. That would not have easily been accepted by Ken Talbot</i>” (T21-47/16-17). <p>Mr Wallin gave the following evidence (in cross examination) (T9-65/35-44):</p> <p><i>“Now, you also knew, I suggest, that Mr Talbot had a track record for completing mine development at record speed and low cost?---Yes.</i></p> <p><i>And, indeed, of making a success of a mine which needed to market its coal as a niche product?---Yes.</i></p> <p><i>And Coppabella had been an example of Mr Talbot doing both?---Yes.</i></p> <p><i>And you’d had some personal involvement in Coppabella which you’ve related in your evidence-in-chief?---Yes.”</i></p> <p>Otherwise, Mr Freeman’s industry experience extends to knowledge gained by involvement in the industry about the track record of significant participants in the industry, such as Macarthur Coal (which would have been notorious in the industry): see <i>Cargill</i> at [50(19)].</p>			<p>contend the contrary. Accordingly, the impugned evidence may be admitted for the limited purpose of supporting the plaintiffs’ fallback argument referred to in the body of my judgment, but subject to the limitations there identified.</p>
2.	[59] Second sentence (‘In any event...’)	<p>Mr Freeman provides evidence about the track record of Macarthur Coal and commentary about other mining projects.</p> <p>Not proper matters for expert opinion.</p> <p>Facts underpinning this opinion are not stated or proved by admissible evidence.</p>	<p>The evidence in support of Macarthur Coal’s track record and the fact that it was a “<i>well-established producer</i>” includes Macarthur Coal’s 4 November 2002 prospectus [MAC.518.002.8283] which, in relation to Macarthur Coal:</p> <ul style="list-style-type: none"> states “<i>Quality management with a proven track record of developing low cost, highly productive coal mines</i>” [at pdf p. 8287]; lists nine individual projects within its “<i>coal portfolio</i>” [at pdf p. 8294]; and refers to the Coppabella Coal Mine “<i>which had been operating successfully since July 1998</i>” [at pdf p. 8294] and in which Macarthur Coal had a 50% interest [at pdf p. 8296]. <p>On 4 November 2002, in relation to the prospectus, the directors of Macarthur Coal resolved to confirm</p>	(I took the defendants’ position as seeking to support the provisional ruling.)	<p>This evidence summarises one of Mr Freeman’s reasons for disagreement with Mr Morton and is contained in the Summary Response to Mr Morton’s Report (in relation to rail). The detailed analysis of the relevance of the reputation of Macarthur Coal to issues relating to port is provided in Parts A and B of the 2 November 2018 report (commencing at pdf p.68).</p> <p>It is evidence of facts by Mr Freeman who had personal knowledge of the reputation of Macarthur Coal in the Australian mining industry at the relevant time: see [216] – [217] of the 2 November 2018 report.</p> <p>Both Mr Freeman and Mr Morton</p>	<p>(1) In column 6, the plaintiffs have clarified that they contended that the first clause of the sentence should be admitted as factual evidence from this witness as to the reputation of Macarthur Coal. I would allow that evidence for that limited purpose.</p> <p>(2) I uphold the objection to the second clause of the sentence (commencing “and would have been able”) because the impugned sentence expresses an implicit view as to Macarthur Coal’s ability to commit to port capacity and its timing, which involves an expression of opinion as to what a third party, namely GPC would have been prepared to do. That expression of opinion is</p>

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			that “ <i>all statements that relate to knowledge, belief, intention or other state of mind of the company are accurate and not misleading</i> ” ([MAC.907.001.0472] at 0487 and [TRA.500.019.0001] at T19-47/19-27). Otherwise, refer to the final paragraph of 1 above.		consider that the reputation of Macarthur Coal was a relevant consideration for the purposes of the Project Feasibility Assessment: see, for example, EXP.500.026.0001_2 at pdf p.8 at item 9. The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs otherwise rely on the submissions dated 6 September 2019.	inadmissible because: <ul style="list-style-type: none">it expresses an opinion on what a third party would do and that is impermissible for reasons expressed in the body of my reasons; andeven if such an opinion was permissible, the facts underpinning it are not stated. (3) As to the further submissions advanced by the plaintiffs in column 6: <ul style="list-style-type: none">The plaintiffs' references to Mr Morton's report do nothing to meet the objections as to admissibility.The assumption identification rule must be met by the expression of expert opinion. Failure so to do cannot be remedied after the fact by way of a lawyer's submission attempting to identify the requisite assumptions.I have ruled that the plaintiffs may not advance the unpleaded advice case. (5) I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants did not contend the contrary. Accordingly, the impugned evidence may be admitted for the limited purpose of supporting the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified.
3.	[67] Third sentence ('Mr Morton's rationale...')	Mr Freeman provides evidence about the track record of Macarthur Coal and commentary about other mining projects. Not proper matters for expert opinion. Facts underpinning this opinion are not stated or proved by admissible evidence	Refer to 1 and 2 above.	(I took the defendants' position as seeking to support the provisional ruling.)	It is evidence of facts by Mr Freeman who had knowledge of the reputation of Macarthur Coal in the Australian mining industry at the relevant time: see [216] – [217] of the 2 November 2018 report. Both Mr Freeman and Mr Morton consider that the reputation of Macarthur Coal was a relevant consideration for the purposes of the Project Feasibility Assessment: see, for example, EXP.500.026.0001_2 at pdf p.8 at item 9. The evidence is therefore something	(1) In column 6, the plaintiffs have clarified that they contended that the first clause of the sentence should be admitted as factual evidence from this witness as to the reputation of Macarthur Coal. I would allow the evidence for that limited purpose. (2) Otherwise I would allow the objections for the reasons identified in item 1(1) and (2). (3) I took the plaintiffs' submission to include the proposition that the

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					<p>which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>impugned sentences were within the scope of the plaintiffs' fallback argument. The defendants did not contend the contrary. Accordingly, the impugned sentences may be admitted for the further limited purpose of supporting the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified.</p>
4.	[214]-[219]	<p>Mr Freeman provides evidence about the track record of Macarthur Coal and commentary about other mining projects.</p> <p>Not proper matters for expert opinion.</p> <p>Facts underpinning this opinion are not stated or proved by admissible evidence</p>	<p>As to paragraph [214], refer to items 1 and 2 above.</p> <p>As to paragraph [215], this is an expression of Mr Freeman's opinion based upon his relevant expertise.</p> <p>As to paragraph [216]:</p> <ul style="list-style-type: none"> As to the first sentence: <ul style="list-style-type: none"> Macarthur Coal was led by Ken Talbot ([MAC.518.002.8283 at pdf p. 8294]); Mr De Lacy, a former director of Macarthur Coal, gave evidence that on entry into the Joint Venture Agreement <i>"Being able to fund these things was not an issue. We – well, we knew that we had the confidence of the market"</i> (T42-24/6-7). Mr De Lacy also gave evidence as follows (T42-43/1-8): <p><i>"Now, you said to me that had you wished to raise the funds, there would've been no difficulty - - -?---Yes. - - - in raising the funds, I think?--- Absolutely.</i></p> <p><i>Is that a fair summary?---Absolutely. If we have a viable project and we wanted to raise the funds, ... That was always my experience with Macarthur Coal. It was – well, it was a well respected company"</i></p> Mr De Lacy also gave evidence that <i>"I'm not aware of any time, when Macarthur Coal needed further capital, that we – that couldn't raise the capital"</i> (T42-45/41-42); As to the second sentence, this is an expression of opinion or inference by Mr Freeman. As to the third sentence, the report referenced [SAN.054.001.0802] in support of this statement [see also at pdf p. 0833]. As to the fourth and fifth sentences, these 	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p>	<p>It is evidence of facts by Mr Freeman who had knowledge of the reputation of Macarthur Coal in the Australian mining industry at the relevant time: see [216] – [217] of the 2 November 2018 report.</p> <p>Both Mr Freeman and Mr Morton consider that the reputation of Macarthur Coal was a relevant consideration for the purposes of the Project Feasibility Assessment: see, for example, EXP.500.026.0001_2 at pdf p.8 at item 9.</p> <p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) As to [214], I uphold the objection for the reasons expressed in relation to item 1.</p> <p>(2) As to [215], I uphold the objection because the paragraph expresses an opinion on what both the Joint Venture and the GPC would do and that is impermissible for reasons expressed in the body of my reasons. Even if such an opinion was admissible, the facts underpinning it are not stated.</p> <p>(3) As to [216], [217], [218], I uphold the objection for the reasons expressed in relation to item 1 at (1).</p> <p>(4) As to [219], I uphold the objection for the reasons expressed in relation to item 1 at (1) and (2).</p> <p>(5) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> The plaintiffs' references to Mr Morton's report do nothing to meet the objections as to admissibility. I have ruled that the plaintiffs may not advance the unpleaded advice case. <p>(6) I took the plaintiffs' submission to include the proposition that the impugned sentences were within the scope of the plaintiffs' fallback argument. The defendants did not contend the contrary. Accordingly, the impugned sentences may be admitted for the limited purpose of supporting the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified.</p>

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			<p>matters are consistent with Mr Wallin's evidence set out in response to the objection to paragraph [25] above. Development of Coppabella within 14 months of discovery is referenced in [MAC.151.028.0007 at pdf p. 0016].</p> <p>As to the first sentence of paragraph [217], Mr Freeman is giving evidence of his own experience relating to his expertise. As to the second sentence, it is cross-referenced to a document which is in evidence [MAC.151.028.0007].</p> <p>As to paragraph [218], it is cross referenced to a document which is in evidence [MAC.151.028.0007].</p> <p>As to paragraph [219]:</p> <ul style="list-style-type: none"> • The first sentence is a summary of the matters referred to above concerning Macarthur Coal's reputation; • The second sentence is based upon Mr Freeman's first-hand experience; • The third sentence is based upon Mr Freeman's first-hand experience and is a logical inference from the matters set out in paragraph [219]. <p>Otherwise, refer to the final paragraph of 1 above.</p>			
5.	[226]	<p>Mr Freeman provides evidence about the track record of Macarthur Coal and commentary about other mining projects.</p> <p>Not proper matters for expert opinion.</p> <p>Facts underpinning this opinion are not stated or proved by admissible evidence</p>	<p>As to paragraph [226(a)], the reference to the "<i>expertise and achievements of Macarthur Coal</i>" is evidenced by the matters set out in response to the other parts of this Item 2.</p> <p>As to paragraph [226(b)], evidence in relation to these dates is provided in [SAN.054.001.0226] which is referred to in footnote 34 and in the report of Euan Morton [EXP.020.167.0001] at [98(a)(iv)] which refers to document [SYN.004.001.0713] (which post-dates mid-2005).</p> <p>Otherwise, refer to the final paragraph of 1 above.</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p> <p><u>Additional submission</u></p> <p>In the defendants' submissions in reply, the defendants argue the evidence does not fall within the scope of the plaintiffs' fallback argument, because it concerns expression of opinion which could not be characterised as an input by way of opinion into a Stage 2 Feasibility Study in May 2005 ([226(b)] only).</p>	<p>It is evidence of facts by Mr Freeman who had knowledge of the reputation of Macarthur Coal in the Australian mining industry at the relevant time: see [216] – [217] of the 2 November 2018 report.</p> <p>Both Mr Freeman and Mr Morton consider that the reputation of Macarthur Coal was a relevant consideration for the purposes of the Project Feasibility Assessment: see, for example, EXP.500.026.0001_2 at pdf p.8 at item 9.</p> <p>Both Mr Freeman and Mr Morton also took into account competing demand as being relevant to a Stage 2 Feasibility Study.</p> <p>The evidence something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I uphold the objection for the reasons expressed in relation to item 1(1) and (2).</p> <p>(2) I also uphold the objection in relation to [226(b)] because it expresses an opinion as to the state of mind of the GPC and that is impermissible for reasons expressed in the body of my reasons. Even if such an opinion was admissible, the facts underpinning it are not stated.</p> <p>(3) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> • The plaintiffs' references to Mr Morton's report do nothing to meet the objections as to admissibility. • The impugned sentences do not themselves express factual evidence of the reputation of Macarthur Coal. That evidence is elsewhere if it is anywhere at all. The impugned sentences and

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						<p>cannot be upheld on that basis.</p> <ul style="list-style-type: none"> The assumption identification rule must be met by the expression of expert opinion. Failure so to do cannot be remedied after the fact by way of a lawyer's submission attempting to identify the requisite assumptions. I have ruled that the plaintiffs may not advance the unpleaded advice case. <p>(4) I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants did not contend the contrary in relation to [226(a)]. Accordingly, the impugned subparagraph may be admitted for the limited purpose of supporting the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified. The defendants advanced the objection recorded in column 5 in relation to [226(b)]. I agree that the impugned subparagraph cannot be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, I uphold the objection in relation to [226(b)]</p>
6.	[273]	<p>Mr Freeman provides evidence about the track record of Macarthur Coal and commentary about other mining projects.</p> <p>Not proper matters for expert opinion.</p> <p>Facts underpinning this opinion are not stated or proved by admissible evidence</p>	<p>The reference to the "<i>industry achievements of Macarthur Coal</i>" is evidenced by the matters set out in response to the other parts of this Item 2. Otherwise, refer to the final paragraph of 1 above.</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p>	<p>This evidence summarises one of Mr Freeman's reasons for disagreement with Mr Morton and is contained in Part C of the 2 November 2018 report relating to port, which contains a summary comparison of opinions. The detailed analysis of the relevance of the reputation of Macarthur Coal is provided in Parts A and B of the 2 November 2018 report in relation to port (commencing at pdf p.71).</p> <p>It is evidence of facts by Mr Freeman who had knowledge of the reputation of Macarthur Coal in the Australian mining industry at the relevant time: see [216] – [217] of the 2 November 2018 report.</p> <p>Both Mr Freeman and Mr Morton consider that the reputation of Macarthur Coal was a relevant consideration for the purposes of the Project Feasibility Assessment: see, for</p>	<p>(1) I rule in the same way as I have in relation to item 1.</p>

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					<p>example, EXP.500.026.0001_2 at pdf p.8 at item 9.</p> <p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	
Item 3 from the defendants' schedule of objections						
7.	[66] Second sentence ('The Joint Venture...')	<p>Mr Freeman gives an opinion about what the Joint Venture (and others) would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"The Joint Venture was well progressed with discussions with QR in late 2002 and if it had committed to further studies and a viable solution in late 2002, or early 2003, it would have been able to commit to conditional rail capacity and conditional port capacity from late 2003/early 2004."</i></p> <p>This is not what the Joint Venture would have done. Rather, it assumes a hypothetical and then states what would flow in respect of matters observable by Mr Freeman within his expertise.</p> <p>The factual basis is also given, in addition to the documents referenced in footnote [10], A meeting of the <i>"Stage 2 Transport Infrastructure Partnership Group"</i> was held on 6 June 2002 [MON.002.001.0005]. The minutes identify three phases of Queensland Rail's work (p. 0005-0006). Phase A was <i>"a high level investigation of the rail infrastructure options. Estimated cost is \$70,000"</i> (p. 0005). Phase B was <i>"an investigation into the preferred corridor options determined in Stage A. Estimated cost is \$580,000"</i> (p. 0005) and Phase C was <i>"preliminary designs for civil, track, signalling and telecommunications to deliver a cost estimate of +/- 20% accuracy. The estimated cost is \$145,000"</i> (p. 0006). At the meeting, Queensland Rail were instructed to proceed with Phase A (p. 0006). Mr Greenwood gave evidence that Queensland Rail went ahead with Phase A, did not complete Phase B and did not commence Phase C ([TRA.500.021.0001] at T21-43/43-46 and T21-44/1-2).</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p> <p><u>Additional submission</u></p> <p>In the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p>	<p>The evidence something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>It is evidence of what the Joint Venture could have done during the period in which the Stage 2 Feasibility Study was being undertaken, rather than an opinion as to what the Joint Venture would have done.</p> <p>This evidence summarises one of Mr Freeman's reasons for disagreement with Mr Morton and is contained in the Summary Response to Mr Morton's Report (in relation to rail).</p> <p>The facts on which Mr Freeman relies to say that the Joint Venture was well progressed with discussions with QR in late 2002 are identified in footnote 10 on pdf p.27 of the 2 November 2018 report.</p> <p>The second part of the sentence contains an assumption, namely "if" the Joint Venture had done something, then, based on that assumption, Mr Freeman expresses an opinion as to what he considers could then have occurred.</p> <p>As to the facts on which Mr Freeman's opinion is based to opine that the Joint Venture could have committed to conditional rail capacity, see [196] (first sentence) of the 2 November 2018 report. As to the date on which the contract could have been entered, this turns on the facts relating to the discussions being well progressed and the timing of those discussions (which facts are identified in the footnote identified above).</p>	<p>(1) I uphold the objection because the impugned sentence expresses an implicit view as to what QR and GPC would have been prepared to do if the Joint Venture had sought to have them do it. That expression of opinion is inadmissible because:</p> <ul style="list-style-type: none"> it expresses an opinion on what a third party would do and that is impermissible for reasons expressed in the body of my reasons; and even if such an opinion was permissible (and in relation to QR I am not presently prepared to rule on the question whether Mr Freeman might be able to give admissible factual evidence on that question), the facts underpinning it are not stated. <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> The plaintiffs' references to Mr Morton's report do nothing to meet the objections as to admissibility. I adhere to my views about the inadequacy of the statement of the factual underpinning. I took into account the footnote. Insofar as the submissions identify facts or analysis not identified by Mr Freeman, the assumption identification rule must be met by the expression of expert opinion. Failure so to do cannot be remedied after the fact by way of a lawyer's submission attempting

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					<p>As to the facts on which Mr Freeman's opinion is based to opine that the Joint Venture could have committed to conditional port capacity, this is referred to at [265] of the 2 November 2018 report as being a process by which risk would be managed. As to the date on which the contract could have been entered, this turns on the facts relating to the discussions being well progressed and the timing of those discussions (which facts are identified in the footnote identified above).</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>to identify the requisite assumptions.</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. <p>(3) I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. I agree that the impugned sentences cannot be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, I uphold the objection and reject the submission that the impugned sentence may be admitted for the purpose of the plaintiffs' fallback argument.</p>
8.	[162]	<p>Mr Freeman gives an opinion about what the Joint Venture (and others) would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"If QR decided not to fund an infrastructure upgrade to the Monto Branch Line, the Joint Venture could have gone to the State and attempted to convince them of the mine's requirements and the need for assistance by QR. I am aware, from my own experience, that the State has been known to advise QR to take a certain course of action on several occasions. Alternatively, the mine could fund the infrastructure upgrades itself if this was the Joint Venture's preference."</i></p> <p>This is evidence of what the Joint Venture <u>could</u> have done and not what it would have done in hypothetical circumstances. It is based on statements of fact observable from Mr Freeman's experience.</p>	(I took the defendants' position as seeking to support the provisional ruling.)	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. In particular, it would be expected that an expert engaged in the hypothetical Stage 2 Feasibility Study would have reached conclusions about different funding options which the Joint Venture could consider.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I agree that the first and third sentences posit hypothetical courses of action which might have been open to the joint venture.</p> <p>(2) The second sentence would be capable of being regarded as a statement of fact about a past historical event, if it had any meaningful content. But it does not.</p> <p>(3) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I take the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants did not contend the contrary. Accordingly, the first and third sentences may be admitted for the limited purpose of supporting the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified. <p>(4) For the foregoing reasons, subject only to the exception stated in the</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
						previous paragraph, I uphold the objection.
9.	[191] Second and third sentences ('In my experience...')	<p>Mr Freeman gives an opinion about what the Joint Venture (and others) would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p> <p>As to [191] and [196], the objection is also on the grounds of relevance: the question of what a prudent producer would have done is not an issue in dispute in the case.</p>	<p>The evidence (in its context) is:</p> <p><i>"It is common practice in the Queensland coal industry to seek both below rail and port capacity at the same time even though under UTI QR did not require proof of port capacity at the time it entered discussions with a producer. In my experience, a producer would be able to receive an allocation of port capacity and continue to negotiate this concurrently with the below rail provider if both rail and port providers were satisfied that the negotiations were progressing at the same pace. In my opinion, a prudent mine producer could have procured both below rail and port capacity subject to certain conditions precedent, by early 2004."</i></p> <p>When seen in its full context it is evidence about general industry practice but what would have been done in a particular hypothetical circumstance.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p> <p>As to relevance, the statement goes to the infrastructure solutions for the mine, and not what a prudent producer would have done in the circumstances. The evidence concerns options available to a producer in the circumstances.</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. In particular, it would be expected that an expert engaged in the hypothetical Stage 2 Feasibility Study would have identified what the Joint Venture would be able to do, namely seek both rail and port capacity at the same time, and then, if it obtained an allocation of port capacity, continue to negotiate in relation to rail. The final sentence identifies what could have been done, that is identifying that an opportunity was available should the Joint Venture wish to take up that opportunity.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I reject the plaintiffs' characterisation of the evidence. Whilst the author might have been able to give admissible factual evidence as to relevant practices of QR and GPC, that is not what he has sought to express. He has expressed a conditional statement of opinion, without identifying a particular practice. The only statement of practice is in the preceding sentence, and no objection is taken to it.</p> <p>(2) I uphold the objection to the impugned sentences because they express opinions as to what GPC would have been prepared to do if the Joint Venture had sought to have them do it. Such expressions of opinion are inadmissible because:</p> <ul style="list-style-type: none"> they express opinions on what a third party would do and that is impermissible for reasons expressed in the body of my reasons; even if such opinions were permissible, the facts underpinning them are not stated. <p>(3) Insofar as the impugned sentences express opinions as to what QR would have been prepared to do if the Joint Venture had sought to have them do it, I rule in the same way as expressed in relation to item 7(1).</p> <p>(4) As to the relevance objection, I reject the plaintiffs' characterisation of the evidence. It is expressed as a proposition as to the way in which a "prudent producer" would behave. It is expressed as a proposition as to what the "prudent producer" could achieve. I note that the plaintiffs have not sought to support the relevance of such a proposition and I would uphold the objection on relevance grounds too.</p> <p>(5) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case.

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
						<ul style="list-style-type: none"> I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. I agree that the impugned evidence cannot be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, I uphold the objection and reject the submission that the impugned sentence may be admitted for the purpose of the plaintiffs' fallback argument. <p>(4) For the foregoing reasons, I uphold the objection.</p>
10.	[193] Third sentence ('In my opinion...')	<p>Mr Freeman gives an opinion about what the Joint Venture (and others) would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"In my opinion this is considered a low risk to the Joint Venture as QR would seek to mitigate loss should Stage 2 not proceed, and this procurement could form standard inventory for use across the coal network."</i></p> <p>The evidence is about what QR would do in general circumstances about which Mr Freeman has direct experience.</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The expert conducting the feasibility assessment would be expected to consider ways in which timing and cost considerations could be improved, as well as risk of loss minimised for the Joint Venture.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I uphold the objection for the reasons expressed in relation to item 9 at (2) to (3).</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. I think it is arguable that the impugned evidence could be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, the evidence may be admitted for the limited purpose of supporting the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified. <p>(4) For the foregoing reasons, subject only to the exception stated in the previous paragraph, I uphold the objection.</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
11.	[196] Final sentence ('A prudent producer...')	<p>Mr Freeman gives an opinion about what the Joint Venture (and others) would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p> <p>As to [191] and [196], the objection is also on the grounds of relevance: the question of what a prudent producer would have done is not an issue in dispute in the case.</p>	<p>The evidence is:</p> <p><i>"A prudent producer would be in ongoing discussions with the rail providers to negotiate amendments to the dates for satisfaction of conditions precedent if project timelines were not likely to be met."</i></p> <p>This is a statement about general industry practice and/or observable facts in Mr Freeman's experience.</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>It is evidence of what the Joint Venture could have done during the period in which the Stage 2 Feasibility Study was being undertaken, rather than an opinion as to what the Joint Venture would have done.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I reject the plaintiffs' characterisation of the impugned sentence. It is not expressed as a statement about general industry practice. It is expressed as a proposition as to the way in which a "prudent producer" would behave. I note that the plaintiffs have not sought to support the relevance of such a proposition and I would uphold the objection on relevance grounds.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. However, I think it is arguable that the impugned evidence could be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, the evidence may be admitted for the limited purpose of supporting the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified. <p>(3) For the foregoing reasons, subject only to the exception stated in the previous paragraph, I uphold the objection.</p>
12.	[231] Second and third sentences ('In my opinion...')	<p>Mr Freeman gives an opinion about what the Joint Venture (and others) would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p>"In my opinion the Joint Venture, understanding this critical resource/path, would have made a calculated investment decision on the timing of a commitment to the Port Agreement to manage this risk."</p> <p>This is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I reject the plaintiffs' characterisation of the impugned sentences. They are not expressed as statements about general industry practice. The first sentence is expressed as a proposition as to the way in which the joint venture would behave. The second sentence is expressed as a proposition as to the way in which the GPC would behave if the joint venture had taken a certain course. I uphold the objection to the impugned sentences because they express opinions as to</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
				<p>2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 		<p>what the particular corporations would have done in particular circumstances. Such expressions of opinion are inadmissible because:</p> <ul style="list-style-type: none"> they express opinions on what a third party would do and that is impermissible for reasons expressed in the body of my reasons; even if such opinions were permissible, the facts underpinning them are not stated. <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. I agree that the impugned evidence cannot be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, I uphold the objection and reject the submission that the impugned sentence may be admitted for the purpose of the plaintiffs' fallback argument. <p>(3) For the foregoing reasons, I uphold the objection</p>
13.	[237] Second and third sentences, ('In my opinion...')	<p>Mr Freeman gives an opinion about what the Joint Venture (and others) would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>The evidence is:</p> <p><i>"In my opinion, from the known reputation of the Joint Venture parties, conditional arrangements could have been secured. I am also of the opinion that independent mine can manage projects to quick set up."</i></p> <p>This is a comment about what the Joint Venture <u>could</u> have done in the circumstances and is drawn from his experience.</p> <p>Mr Freeman is qualified to give evidence based on facts observed in his experience. The "known reputation" of the Joint Venture parties is evidenced</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>It is evidence of what the Joint Venture could have done during the period in which the Stage 2 Feasibility Study was being undertaken, rather than an opinion as to what the Joint Venture would have done.</p> <p>The plaintiffs otherwise rely on the</p>	<p>(1) The impugned sentences express opinions as to what QR and GPC would have been prepared to do if the Joint Venture had sought to have them do it. I uphold the objection for the reasons expressed in relation to item 9 at (2) to (3).</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case.

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			by the matters set out in Item 2 above.	<p>on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 	submissions dated 6 September 2019.	<ul style="list-style-type: none"> The distinction between "could" and "would" is irrelevant because implicit in both is a statement about the willingness of the other party. I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. I agree that the impugned evidence cannot be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, I uphold the objection and reject the submission that the impugned sentence may be admitted for the purpose of the plaintiffs' fallback argument. <p>(3) For the foregoing reasons, I uphold the objection</p>
14.	[263]	<p>Mr Freeman gives an opinion about what the Joint Venture (and others) would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>The evidence is:</p> <p><i>"In my opinion, Stage 2 tonnage would be discussed and secured at the same time as Stage 1 tonnage, potentially with an option provision which would enable the Joint Venture to ramp up to Stage 2 tonnage from a nominated date. Being an existing GPA customer from this time would have allowed the project to be well informed of GPA's plans regarding capacity expansion and competing demand."</i></p> <p>This is evidence of facts observable by Mr Freeman in his experience. The opinion is based on the stated assumption that the Joint Venture would have been an existing customer of GPC as a result of Stage 1.</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>It is evidence of what the Joint Venture could have done during the period in which the Stage 2 Feasibility Study was being undertaken, rather than an opinion as to what the Joint Venture would have done.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I uphold the objection for the reasons expressed in relation to item 13.</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
				<p>within the scope of the plaintiffs' fallback argument because:</p> <ul style="list-style-type: none"> ○ insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; ○ insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 		
15.	[345] Third sentence ('In practice...')	<p>Mr Freeman gives an opinion about what the Joint Venture (and others) would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"In practice, the land acquisition consultation/negotiation process would be done at the time of the Stage 2 Feasibility Study."</i></p> <p>This is a statement of fact observable in Mr Freeman's experience about a matter of general industry practice.</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I reject the plaintiffs' characterisation of the evidence. Whilst the author might have been able to give admissible evidence as to his experience about the relationship between the timing of the processes to which he refers and the conduct of feasibility studies, that is not how he has expressed himself. Accordingly, I uphold the objection for the reasons expressed in relation to item 13.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I would rule as per item 13(2).</p>
16.	[389(b)] Final sentence ('In my opinion it is likely that the Joint Venture...')	<p>Mr Freeman gives an opinion about what the Joint Venture (and others) would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"In my opinion it is likely that the Joint Venture would have selected option (ii) given the time constraints were manageable, the capital cost would be amortised over the life of the asset rather than being funded upfront, and in my experience, it was an easier and faster process to acquire an easement when undertaken by a statutory Government Owned Corporation."</i></p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Mr Freeman is qualified to give evidence based on facts observed in his experience.</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p>	<p>The evidence forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>In particular, it would be expected that an expert engaged in the hypothetical Stage 2 Feasibility Study would have identified the preferred option which the Joint Venture could consider.</p> <p>It is evidence of what could have done during the period in which the Stage 2 Feasibility Study was being undertaken, rather than an opinion as to what the Joint Venture and others would have done.</p> <p>No objection is taken to the evidence on the basis that the facts or assumptions underpinning the statements have not been</p>	<p>(1) I reject the plaintiffs' characterisation of the first clause of the impugned sentence (down to "funded upfront"). The author expressed a view as to what the joint venture would have done and I would uphold objection to that opinion for the reasons already expressed.</p> <p>(2) As to the remainder of the sentence, whilst the author might have been able to give admissible evidence as to his experience which informed the conclusion expressed, he does not do so but expresses a conclusion without the identification of the facts or assumptions which underpin the statement of comparison.</p> <p>(3) As to the further submissions</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
					<p>stated.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I take the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants did not contend the contrary. Accordingly, the evidence may be admitted for the limited purpose of supporting the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified. <p>(4) For the foregoing reasons, subject only to the exception stated in the previous paragraph, I uphold the objection.</p>
Item 4 from defendants' schedule of objections						
17.	Not pressed					
18.	<p>[18]–[24]</p> <p><u>[19]–[20]</u></p>	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p> <p>Paragraphs [18]–[20], [44], [52] and [205] are also objected to on the basis that they rely on Mr Freeman's 'Technical Assessment' (see Item 1 above)</p>	<p>Refer to report.</p> <p>This section summarises Mr Freeman's opinion which is set out more fully in sections 4.3 and 4.8 [EXP.010.005.0001] at pdf pp 0020-0025 and 0035-0052].</p> <p>At to [18] the first sentence and points (a)-(f) are observable facts or matters within his experience. The second sentence is evidence as to what QR would have done in the circumstances, which Mr Freeman is qualified to give evidence on.</p> <p>Otherwise to the extent that [18] depends upon factual matters as opposed to matters of opinion, see QR's Project Assessment Report [MON.004.005.1529] at pdf p. 1548].</p> <p>As to [19] this is not as to what the Joint Venture or any third party would have done, it is a statement of observable fact as to availability of port/rail in the relevant period.</p> <p>As to [20] this is a statement of whether rail capacity "could have been secured" and does not go to what the Joint Venture or a third party would have done.</p> <p>As to [21] this summarises his opinion.</p> <p>AS to [22] this notes that "capacity was available at the time of the Stage 2 Feasibility Study" which is a</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>[19] refers to an opportunity for the Joint Venture to do something during the feasibility period of 2002-2005, being something which the expert would have identified.</p> <p>[20] contains an opinion that above rail capacity access "could have been secured" which, again, is something which the expert doing the feasibility study would have identified.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) Many of the statements in the response are superseded by the narrowing of the objection.</p> <p>(2) I uphold the objections to paragraphs [19] and [20] on the basis that they express opinions as to what QR and GPC would have been prepared to do if the Joint Venture had sought to have them do it. I uphold the objection for the reasons expressed in relation to item 9 at (2) to (3).</p> <p>(3) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. I agree that the impugned evidence cannot be characterised as

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			<p>statement of fact which leads to him positing an opinion not on what a third party would have done but that capacity “<i>would have been allocated to the Joint Venture <u>upon</u> execution of a port agreement</i>” which is also a statement of fact within his expertise having observed that capacity is allocated upon execution of such an agreement.</p> <p>As to [23] this is also not a statement about what the Joint Venture or a third party would have done, rather it is about what the Joint Venture could have done to be ahead of competing demand.</p> <p>As to [24] this is also not a statement about what GPC would have done, it is about what, hypothetically, GPC <u>could</u> have done based on his observable experience.</p>			<p>expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, I uphold the objection and reject the submission that the impugned evidence may be admitted for the purpose of the plaintiffs’ fallback argument.</p> <p>(4) For the foregoing reasons, I uphold the objection.</p>
19.	<p>[27] <u>the words 'would be preferred by the Joint Venture and SunWater as it' and the final sentence ('Further, I disagree...')</u></p> <p>Third sentence, from 'however I consider an alternative pipeline route' through to the end of the paragraph</p>	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>“I agree that the source of water would be Paradise Dam, however I consider an alternative pipeline route would be preferred by the Joint Venture and SunWater as it has a lower infrastructure CAPEX. Further, I disagree with Mr Harradine that the CAPEX is payable upfront, rather it is amortised, applied as a monthly charge and payable under a longer-term Water Transport Agreement.”</i></p> <p>The first sentence in the quote is a matter of opinion about the CAPEX of Mr Freeman’s preferred route which is a matter of opinion. The second sentence is a matter of observable fact about general industry practice as to typical terms in an agreement.</p> <p>As to the facts underpinning the opinion, these are set out in Mr Freeman’s Technical Assessment in sections 6.2 and 6.5 [EXP.010.005.0001 at pdf pp .0094-0095 and 0101-0103].</p>	(I took the defendants’ position as seeking to support the provisional ruling.)	<p>An expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of water supply, which includes the route of the pipeline, which is relevant to issues relating to both cost and timing. An expert would also provide opinions as to the likely contractual terms on which the infrastructure provider would likely agree to provide the water.</p> <p>The evidence as to what SunWater would have preferred, and the commercial terms, are things which form part of, or are relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I uphold the objections to the words in the first sentence on the basis that the words expressed opinion as to the state of mind of the Joint Venture and of SunWater. Such an expression of opinion is inadmissible for reasons expressed in the body of my reasons.</p> <p>(2) I uphold the objection to the final sentence for similar reasons. It expresses a statement as to what SunWater would have done and does not seek to justify it by first identifying proper evidence of a particular practice in the industry. The latter might have been admissible, but that is not the form of the statement.</p> <p>(3) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I take the plaintiffs’ submission to include the proposition that the impugned evidence was within the scope of the plaintiffs’ fallback argument. The defendants did not contend the contrary. Accordingly, the evidence may be admitted for the limited purpose of supporting the plaintiffs’ fallback argument referred to in the body of my judgment, but subject to the limitations there identified.. <p>(4) For the foregoing reasons, subject only to the exception stated in the</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
						previous paragraph, I uphold the objection.
20.	[29] First sentence ('SunWater would have...')	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"SunWater would have been prepared to construct, own and operate the pipeline connecting into the Paradise Dam, and it would have been likely that the Joint Venture would have accepted this proposal."</i></p> <p>This is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.</p> <p>As to the facts underpinning the opinion, these are set out in Mr Freeman's Technical Assessment in sections 6.2 and 6.5 [EXP.010.005.0001 at pdf pp .0094-0095 and 0101-0103].</p>	(I took the defendants' position as seeking to support the provisional ruling.)	<p>An expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of water supply, which includes construction, ownership and operation of the pipeline, which is relevant to issues relating to both cost and timing.</p> <p>The evidence as to what SunWater would have been prepared to do is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I uphold the objection to the impugned sentences because they express opinions as to what and the Joint Venture would have done. Such expressions of opinion are inadmissible because:</p> <ul style="list-style-type: none"> they express opinions on what a third party would do and that is impermissible for reasons expressed in the body of my reasons; even if such opinions were permissible, the facts underpinning them are not stated. <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I take the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants did not contend the contrary. Accordingly, the evidence may be admitted for the limited purpose of supporting the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified. <p>(3) For the foregoing reasons, subject only to the exception stated in the previous paragraph, I uphold the objection.</p>
21.	[31] Third sentence ('Further, I also disagree...')	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"Further, I also disagree that the CAPEX is payable upfront, rather it is amortised, applied as a monthly charge and payable under a Connection Agreement."</i></p> <p>This is a fact which Mr Freeman is qualified to give based on his experience. As to the facts underpinning the opinion, these are set out in Mr Freeman's Technical Assessment in section 7.5 [EXP.010.005.0001 at pdf pp 0116-0122].</p>	<p><u>Suggested ruling</u></p> <p>The sentence expresses an opinion as to what the Joint Venture and a third party would have done. The objection should be upheld on the basis of the hypothetical conduct ruling.</p>	<p>An expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of water supply, which includes the likely contractual terms on which the infrastructure provider would likely agree to provide the water.</p> <p>The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 20(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
					Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs otherwise rely on the submissions dated 6 September 2019.	
22.	Not pressed					
23.	Not pressed					
24.	[56]	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>“The total number of lots to be acquired for this alignment is impractical, likely to be expensive and highly probable not to have been the option favoured by QR after detailed assessment. If QR was to pursue this Hybrid Route Alignment, QR would first have to attempt to acquire these lots itself and DTMR would only resume as a last resort. In addition, land in State Forests or Reserves is not resumed, rather its designation as State Forest must be revoked. Moreover, DTMR could only be convinced to compulsorily acquire if it was for a public purpose and necessary to retain the integrity of the railway. Refer to Section 4.9 of this Response Report for further details.”</i></p> <p>Mr Freeman is qualified to give evidence as to what QR would have done in the circumstances as well as facts observed by him in his experience.</p> <p>As to the facts underpinning the opinion, refer also to section 4.9 of the 2 November Report [EXP.010.005.0001 at pdf pp 0053-0063].</p>	<p><u>Suggested ruling</u></p> <p>The objections to the third sentence are not pressed.</p> <p>The other sentences express an opinion as to what third parties would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p>Reserve whether Mr Freeman can give admissible factual evidence about what QR would have done in a hypothetical set of circumstances.</p>	<p>The plaintiffs rely on the matters stated in the Response to Objection and the submissions dated 6 September 2019.</p> <p>An expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of potential rail solutions, which includes the merits of one particular solution over another, and why one solution is likely to be adopted or preferred by an infrastructure provider such as QR. The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 20(2) and (3).</p>
25.	[60]	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>“Mr Morton’s conclusion is a BFS required executable above rail, below rail and port agreements to be in place. I am aware that both above and below rail agreements could be entered into on any number of conditions precedent and, with respect to port, GPA was prepared to allocate capacity and negotiate with a producer in order to assist the producer to commit to mine development. Therefore, this does not pose a delay to the Stage 2 Feasibility Study.”</i></p> <p>This is not evidence about what GPC would have done in the circumstances, rather it is evidence given as observable facts derived from Mr Freeman’s experience and a conclusion drawn therefrom.</p> <p>As to the facts underpinning the opinion, these are set out in Mr Freeman’s Technical Assessment in sections 4.3, 4.8, 5.2 and 5.5 [EXP.010.005.0001 at pdf pp 0020-0025, 0035-0052, 0074-0075 and 0082-0087].</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs’ characterisation of the evidence should be rejected. Evidence as to what GPC was prepared to do is either evidence of GPC’s state of mind or evidence of what GPC would have done in hypothetical circumstances. The objection should be upheld on the basis of the state of mind ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants’ submissions in reply, the defendants argue the evidence does not fall within the plaintiffs’ fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants’ submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on ‘Port’ of Jamie Freeman and Euan Morton</p>	<p>The plaintiffs rely on the matters stated in the Response to Objection and the submissions dated 6 September 2019.</p> <p>Mr Freeman is giving evidence of what he has observed from his own experience, including in working for QR, namely that both above and below rail agreements could be entered into with conditions precedent and that GPC/GPA acted in a particular way from his own observations.</p> <p>An expert preparing a feasibility study who had this type of experience and personal knowledge would be expected to draw upon that experience and knowledge when undertaking a feasibility study including considering whether it was necessary (as Mr Morton opines) for executable contracts to be in place for above rail, below rail and port, or whether there was a prospect that something else (such as a conditional rail agreement) could be entered into and if so,</p>	<p>(1) Save that in the first clause of the second sentence refers to conduct by QR, and I would reserve whether Mr Freeman can give admissible factual evidence about what QR would have done in a hypothetical set of circumstances, I adopt the defendants suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. The distinction between “could” and “would” is irrelevant because implicit in both is a statement about the willingness of the other party. I took the plaintiffs’ submission to include the proposition that the

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
				<p>–</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 	<p>whether that would be sufficient for a bankable feasibility study.</p> <p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>It is evidence of what could have done during the period in which the Stage 2 Feasibility Study was being undertaken, rather than an opinion as to what the Joint Venture and others would have done.</p>	<p>impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. I agree that the impugned evidence cannot be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, I uphold the objection and reject the submission that the impugned evidence may be admitted for the purpose of the plaintiffs' fallback argument.</p> <p>(3) For the foregoing reasons, subject to the exception at (1), I uphold the objection.</p>
26.	Not pressed					
27.	Not pressed					
28.	Not pressed					
29.	Not pressed					
30.	Not pressed					
31.	Not pressed					
32.	Not pressed					
33.	Not pressed					
34.	<p>{198} {200}</p> <p><u>[199]</u></p>	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions</p>	<p>This evidence is:</p> <p><i>"In my opinion, based on an evaluation of capacity, technical elements, financial benefits and commercial considerations, a rebuild of the existing Monto Branch Line as outlined in this Part B would probably have been QR's preferred solution. 199. The issue of whether QR would fund the upgrade to the Monto Branch Line would have to have been</i></p>	<p><u>Suggested ruling</u></p> <p>The evidence expresses an opinion as to what the Joint Venture and third parties would have done. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p>Reserve whether Mr Freeman can give admissible factual evidence about what QR would have done in a hypothetical set of</p>	<p>The plaintiffs rely on the matters stated in the Response to Objection and the submissions dated 6 September 2019.</p> <p>An expert preparing a feasibility study would identify an issue and potential solutions for that issue, which is what Mr Freeman is doing by this evidence.</p> <p>The evidence is therefore something which</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 20(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		underpinning the opinion not proved by admissible evidence.	<p><i>resolved. It is likely that QR would have paid for the upgrade as the Monto Branch Line was part of the rail corridor and on the basis that the extra volume on the line would require corresponding upgrades to the mainline, for example, at Callemondah Yard, earlier than QR had planned thereby benefiting the whole Moura System. If not, the mine could have entered into infrastructure funding arrangements either with QR or with another debt provider as QR had indicated that it was actively pursuing a "Major Venture" financing package specifically for the Monto Coal Project 26 . Many different funding arrangements were in use by QR at the time including upfront contributions and AFDs. 200. The infrastructure upgrades and rollingstock configurations identified in Section 4.6of this Response Report would have been the solution QR would probably have adopted as they were the most operationally efficient, would not have involved a lengthy and costly land acquisition process and could have been achieved within the required timeframe at the lowest capital cost."</i></p> <p>These paragraphs are statements of what would have been QR's preferred solution, based on facts observable by Mr Freeman in particular as to the content of common agreements. That is a matter within Mr Freeman's expertise.</p> <p>The basis for the opinions is identified in the foregoing parts of Section 4.9 [EXP.010.005.0001 at pdf pp 0053-0063].</p>	circumstances.	<p>forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>It is evidence of what could have done during the period in which the Stage 2 Feasibility Study was being undertaken, rather than an opinion as to what the Joint Venture and others would have done.</p>	
35.	Not pressed					
36.	Not pressed					
37.	<p>[227] Third and fourth sentences (Both Rolleston and...) ('I do not consider...')</p>	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"Both Rolleston and Gindie Minerva were greenfield developments requiring innovative track and/or rollingstock solutions. I do not consider that these projects would have been considered less challenging than the Monto development."</i></p> <p>As to the greenfield nature of the Gindie Minerva and Rolleston projects, see documents at footnotes 58 and 60 of Mr Morton's report ([EXP.020.022.0001_0001 at pdf p. 0042]).</p> <p>As to the innovative nature of the Gindie Minerva track and/or rollingstock solutions, see [5.3.2(b)] of Mr Hunter's report dated 27 April 2018 ([EXP.020.018.0001_0001 at pdf p. 0043]).</p> <p>As to the innovative nature of Rolleston track and/or rollingstock solutions:</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. Evidence as to GPC would have "considered" the Monto development is either evidence of how GPC would have acted in hypothetical circumstances or evidence of GPC's state of mind. The objection should be upheld on the basis of the state of mind ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the</p>	<p>The plaintiffs rely on the matters stated in the Response to Objection and on the submissions dated 6 September 2019.</p> <p>An expert preparing a feasibility study would identify what he considers are relevant considerations from the perspective of the infrastructure provider (which was GPA in this instance), which is what Mr Freeman is doing by this evidence.</p> <p>The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>Further, [227] forms part of the section of Mr Freeman's 2 November 2018 report relating to port so he is not giving evidence</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. I agree that the impugned evidence cannot be characterised as expressing support for an input by

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			<ul style="list-style-type: none"> Rolleston's railway was still under construction at the relevant time ([EXP.500.026.0001 at 5.28(c) pdf p. 0024]; Development of Rolleston involved "construction of line from Rolleston to Kinrola by Queensland Rail" ([EXP.500.026.0001 footnote 13, pdf p. 0042]. <p>These facts are otherwise observable by Mr Freeman in his experience. The final sentence is a statement of opinion as to the nature of the Monto development as compared to those observed by Mr Freeman.</p> <p>Mr Hunter's report refers to significant delays concerning the Bauhinia Line (which is related to the Rolleston project) ([EXP.020.165.0001_0001 at pdf p. 0030].</p>	<p>defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 	<p>about how QR, Powerlink and SunWater would behave.</p>	<p>way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, I uphold the objection and reject the submission that the impugned evidence may be admitted for the purpose of the plaintiffs' fallback argument.</p> <p>(3) For the foregoing reasons, I uphold the objection.</p>
38.	[229]	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"Whilst the Joint Venture may have had to compete for the capacity allocation over 2003/2004, it would have been at least an equal contender for the available capacity from a reputation perspective, even if industry reputation was a criterion for the allocation process, (which it was not)."</i></p> <p>This is not a statement of what the Joint Venture or a third party would have done, it is a statement about the reputation of the Joint Venture and industry practice, which are matters observable by Mr Freeman in his experience.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It is not evidence of industry practice, but of what the Joint Venture would have been able to do – that is, evidence of what third parties dealing with the Joint Venture would have done or evidence of their states of mind. The objection should be upheld on the basis of the state of mind ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port</p>	<p>The plaintiffs rely on the matters stated in the Response to Objection and in the submissions dated 6 September 2019.</p> <p>An expert preparing a feasibility study would identify what he considers are relevant considerations from the perspective of the infrastructure provider (which was GPA in this instance), and how he considers that the Joint Venture would have been regarded by the GPA, which is what Mr Freeman is doing by this evidence.</p> <p>The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>Further, [229] forms part of the section of Mr Freeman's 2 November 2018 report relating to port so he is not giving evidence</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
				<p>section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 	about how QR, Powerlink and SunWater would behave.	
39.	[245]	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>“Both announced expansions were to deliver additional capacity at or prior to the 1 July 2007 railings commencement. This is supported by the 2004/5 CQPA Annual Report (ALL.001.001.0259) which states that the sharp increase in demand for coal resulted in the State Government’s approval to expand RGTCT to 65mtpa and BPCT to 7mtpa, with this increase from 45mtpa occurring by 2007. Given the Monto Stage 1 tonnage would already be handled by GPA, the Joint Venture had an established relationship with GPA, and the Stage 2 contract would have been under discussion during the feasibility period, it would have been probable that the Joint Venture <u>could</u> commit to the port capacity prior to competing demand.”</i></p> <p>This is not a statement about what the Joint Venture would have done, it is a statement, based on a hypothetical assumption about what the Joint Venture could have done in the circumstances which is a matter within Mr Freeman’s expertise.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs’ characterisation of the evidence should be rejected. It is evidence of what the Joint Venture and GPC would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants’ submissions in reply, the defendants argue the evidence does not fall within the plaintiffs’ fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants’ submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on ‘Port’ of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose 	<p>The plaintiffs rely on the matters stated in the Response to Objection and in the submissions dated 6 September 2019.</p> <p>The first and second sentences of this paragraph relates to public announcements about expansions of the port as well as reference to an Annual Report which is also a public document. Announcements about and the fact of available capacity is something which both experts consider to be relevant to a feasibility assessment: see [244] of the 2 November 2018 report.</p> <p>An expert preparing a feasibility study would identify what he considers are relevant considerations to port, which includes the capacity of the port, which is what Mr Freeman is doing by this evidence. The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the</p>	<p>(1) I adopt the defendants’ suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. The distinction between “could” and “would” and the reference to “opportunity” is irrelevant because implicit in all such language is a statement about the willingness of the other party. I took the plaintiffs’ submission to include the proposition that the impugned evidence was within the scope of the plaintiffs’ fallback argument. The defendants advanced the objection recorded in column 5. I

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			<p>As to the basis of the pre-existing use of the port, this is addressed in paragraph [215] of the November Report [EXP.010.005.0001 at pdf p. 0069].</p>	<p>of supporting the unpleaded advice case;</p> <ul style="list-style-type: none"> even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; <p>insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.</p>	<p>Mine 1 Stage Development.</p> <p>Further, [245] forms part of the section of Mr Freeman's 2 November 2018 report relating to port so he is not giving evidence about how QR, Powerlink and SunWater would behave.</p> <p>As to the third sentence of the paragraph, the evidence that the Joint Venture could have committed to the port capacity prior to competing demand is identification by Mr Freeman of an opportunity for something to occur, being a conclusion which it would be expected that an expert would reach during a feasibility study.</p> <p>It is based on Mr Freeman's opinion as to the events which he either assumes would have occurred (that is, Stage 1 tonnage commenced to be shipped through the port) and his evidence as to what would likely have taken place during the Stage 2 Feasibility Study (being discussions with the port, which discussions are referred to in [254] (first sentence) and [265] (in part) of the 2 November 2018 report and to which no objection is taken).</p> <p>An expert preparing a feasibility study would identify what he considers are relevant considerations to port, which includes the opportunities available to enter into a contract in relation to port and the matters which will bear upon whether that opportunity will be available, which is what Mr Freeman is doing by this evidence. The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p>	<p>agree that the impugned evidence cannot be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, I uphold the objection and reject the submission that the impugned evidence may be admitted for the purpose of the plaintiffs' fallback argument.</p> <p>(3) For the foregoing reasons, I uphold the objection.</p>
40.	[286] Fifth sentence ('In my opinion SunWater...')	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"In my opinion SunWater and the Joint Venture would have considered other routes, the topographically constraints and CAPEX/OPEX outcomes to arrive at an alternative solution."</i></p> <p>This is a statement about what Mr Freeman considers, in his opinion, would have been considered by the parties, not what a third party would have done in making a decision.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. Evidence as to what SunWater and the Joint Venture would have "considered" in hypothetical circumstances is either evidence of how they would have acted in hypothetical circumstances or evidence of their states of mind. The objection should be upheld on the basis of the state of mind ruling and the hypothetical conduct ruling.</p>	<p>An expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of water supply, which includes the route of the pipeline, which is relevant to issues relating to both cost and timing. The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on the matters</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I take the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
					stated in the Response to Objection column and their submissions dated 6 September 2019.	defendants did not contend the contrary. Accordingly, the evidence may be admitted for the limited purpose of supporting the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified. (3) For the foregoing reasons, subject only to the exception stated in the previous paragraph, I uphold the objection.
41.	[288] <u>the words 'however I consider it unlikely that SunWater would have objected to HDPE pie as a suitable product.'</u> (Second sentence: 'I acknowledge that...')	Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation. Not proper matters for expert opinion. Facts or assumptions underpinning the opinion not proved by admissible evidence.	This evidence is: <i>"I acknowledge that SunWater generally chose metallic pipes (MSCL or DICL), however I consider it unlikely that SunWater would have objected to HDPE pipe as a suitable product."</i> This is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. The sentence is evidence of what SunWater would do in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.	An expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of water supply, which includes the type of pipe which would likely be used by SunWater (which would in turn affect cost). The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs otherwise rely on the matters stated in the Response to Objection column and their submissions dated 6 September 2019.	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).
42.	Not pressed					
43.	[295] Second sentence ('In my opinion...')	Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation. Not proper matters for expert opinion. Facts or assumptions underpinning the opinion not proved by admissible evidence.	This evidence is: <i>"In my opinion, with the coverage of a commercial arrangement whereby the project would have been accountable for the costs of any pre-construction activities, SunWater would have commenced preconstruction activities (i.e. design, planning, approvals, etc.) ahead of the Joint Venture's Stage 2 Mining Lease being granted."</i> This is evidence of observable fact within Mr Freemans experience about SunWater.	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. The sentence is evidence of what SunWater would do in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling. <u>Additional submission</u> Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005	An expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of water supply, which includes the type of works which he considers would typically be commenced by SunWater ahead of grant of a Mining Lease (which would in turn affect timing). The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs otherwise rely on the matters stated in the Response to Objection column and their submissions dated 6 September 2019.	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).
44.	[327(c)]	Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical	This evidence is: <i>"Water Transport: The pipeline capital expenditure of \$99.69M82 and annual O&M costs in the order</i>	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. The sentence is	This evidence is admissible as evidence of industry practice regarding calculation of water charges. It is of the same nature as paragraphs 327(a), (b) and (d) of the 2	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p><i>of \$500,000 per annum would be amortised applied in line with the agreed billing provisions (e.g. quarterly) of the Water Transport Agreement. This would likely be under Part A \$10.15M per annum (fixed) and under Part B \$118 per ML (variable)."</i></p> <p>This is a statement of observable fact as to usual provisions to include in an agreement and otherwise matters of opinion within Mr Freeman's expertise.</p> <p>The cost estimate is expanded upon in paragraph [312] and Appendix 8 of the November Report [EXP.010.005.0001 at pdf p. 0103].</p>	<p>evidence of what the Joint Venture and third parties would do in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p>	<p>November 2018 report, to which no objection is made.</p> <p>Further, an expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of water supply, which includes the costs which would likely be charged by the third party infrastructure provider and the terms on which those costs would be charged. The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on the matters stated in the Response to Objection column and their submissions dated 6 September 2019.</p>	<p>advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>
45.	Not pressed					
46.	[335]	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"I do not consider that all capital would require upfront funding, rather the capital costs would be amortised and applied as a monthly or quarterly fixed charge."</i></p> <p>This is a statement of a fact observable by Mr Freeman in his experience.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. The sentence is evidence of what the Joint Venture and third parties would do in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p>	<p>This evidence is admissible as evidence of industry practice regarding calculation of water charges. It is of the same nature as paragraphs 327(a), (b) and (d) of the 2 November 2018 report, to which no objection is made.</p> <p>Further, an expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of water supply, which includes the costs which would likely be charged by the third party infrastructure provider and the terms on which those costs would be charged. The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on the matters stated in the Response to Objection column and their submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>
47.	[336]	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.</p> <p>Not proper matters for expert</p>	<p>This evidence is:</p> <p><i>"I disagree with Mr Harradine that SunWater would not enter into contracts for the supply of water without Monto Coals Stage 2 Mining Lease being granted. In my opinion, with the appropriate commercial arrangements whereby the project would have been accountable for any costs or risks</i></p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. The sentence is evidence of what third parties would do in hypothetical circumstances. The objection should be upheld on the basis of the</p>	<p>Further, an expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of water supply, which includes the costs which would likely be charged by the third party infrastructure provider and the terms on which those costs would be charged. The</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		opinion. Facts or assumptions underpinning the opinion not proved by admissible evidence.	<i>ahead of the grant of the Mining Lease, SunWater would enter into contracts for the supply of water."</i> This is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.	hypothetical conduct ruling. <u>Additional submission</u> Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005	evidence is therefore which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs otherwise rely on the matters stated in the Response to Objection column and their submissions dated 6 September 2019.	
48.	[339] Second sentence ('I do not believe Powerlink...')	Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation. Not proper matters for expert opinion. Facts or assumptions underpinning the opinion not proved by admissible evidence.	This evidence is: <i>"I do not believe Powerlink would approve Mr Harradine's connection to the Calvale-Tarong transmission as it is a critical piece of Powerlink infrastructure and subject to strict minimum standards."</i> This is predominately a statement of fact observable by Mr Freeman in his experience. And otherwise is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. The sentence is evidence of what Powerlink would do in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.	An expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of power supply, which includes the merits of one particular solution over another, and why one solution is likely to be adopted or preferred by an infrastructure provider such as Powerlink. The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs otherwise rely on the matters stated in the Response to Objection column and their submissions dated 6 September 2019.	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).
49.	[342] Third sentence ('In my opinion Powerlink...')	Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation. Not proper matters for expert opinion. Facts or assumptions underpinning the opinion not proved by admissible evidence.	This evidence is: "In my opinion Powerlink would not have approved the proposed alignment and connection, due to the proposed tee connection." This is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. The sentence is evidence of what Powerlink would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.	An expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of power supply, which includes the merits of one particular solution over another, and why one solution is likely to be adopted or preferred by an infrastructure provider such as Powerlink. The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs otherwise rely on their submissions dated 6 September 2019.	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).
50.	Not pressed					
51.	[344]	Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation. Not proper matters for expert	This evidence is: <i>"In paragraph 3.18 [of Mr Harradine's report] the lead times of 24 months commence only post award of the Mining Lease which I consider overly conservative and not what was done during this time. Powerlink would not have required the award</i>	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. The sentence is evidence of what Powerlink and the Joint Venture would have done in hypothetical circumstances. The objection should be	First sentence is admissible as evidence of industry practice. Further, an expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of power supply, which includes the merits of	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		opinion. Facts or assumptions underpinning the opinion not proved by admissible evidence.	<i>of the mining lease and could commit to agreements including early works arrangements with the provision of appropriate commercial provisions whereby the project would have been accountable for any costs or risks ahead of the grant of the Mining Lease. Powerlink would require 16months for construction and would work with the Joint Venture to ensure all planning/approval activities were conducted prior to the final investment decision for the project to enable deliverables by the required dates."</i> Whilst expressed in terms of what Powerlink "would have" done, it is in truth simply a statement of what Mr Freeman has observed in his experience.	upheld on the basis of the hypothetical conduct ruling. <u>Additional submission</u> Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.	one particular solution over another, and why one solution is likely to be adopted or preferred by an infrastructure provider such as Powerlink, and timing and other considerations relevant to possible solutions. The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs otherwise rely on their submissions dated 6 September 2019.	
52.	[348] First sentence ('In my opinion Powerlink...')	Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation. Not proper matters for expert opinion. Facts or assumptions underpinning the opinion not proved by admissible evidence.	This evidence (in context) is: <i>"In my opinion Powerlink would not have approved Mr Harradine's solution (EXP.020.017.0001) as he has proposed. To meet Powerlink's standards a new 275kV substation would be required. Whilst I generally agree that the cost proposed by Mr Harradine (i.e. \$21.2M) reflects his proposed transmission, the cost could increase to approximately \$55M with the inclusion of a new 275kV substation."</i> Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. The basis for the opinion is set out in the remainder of the paragraph.	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. The sentence is evidence of what Powerlink and the Joint Venture would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.	Except for the first sentence, the evidence is admissible as evidence of equipment required to meet Powerlink's standards and the estimated cost of that equipment. An expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of power supply, which includes the merits of one particular solution over another, and why one solution is likely to be adopted or preferred by an infrastructure provider such as Powerlink. The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs otherwise rely on their submissions dated 6 September 2019.	(1) I adopt the defendants' suggested ruling, but would also uphold the objection by reference to the state of mind ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).
53.	Not pressed					
54.	[351] Second sentence ('This is not my understanding...')	Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation. Not proper matters for expert opinion. Facts or assumptions underpinning the opinion not proved by admissible evidence.	This evidence is: <i>"This is not my understanding of Ergon contracts."</i> This is a statement of fact observable by Mr Freeman in his experience.	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. Read in context, the sentence is evidence of what Ergon would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. In this case, Mr Freeman is giving evidence, based on his own experience, of the likely terms of any contract with Ergon, being a matter which would be addressed in a feasibility study. The plaintiffs otherwise rely on their submissions dated 6 September 2019.	(1) I adopt the defendants' suggested ruling, noting that the relevant context is what is said in the first sentence in [351]. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
55.	[353] Second sentence ('In my opinion...')	Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation. Not proper matters for expert opinion. Facts or assumptions underpinning the opinion not proved by admissible evidence.	This evidence is: <i>"In my opinion Powerlink would have entered into such arrangements with appropriate commercial provisions whereby the project would have been accountable for any costs or risks ahead of the grant of the Mining Lease."</i> This is a statement of fact observable by Mr Freeman in his experience as to the content of commercial agreements not about what Powerlink would have done in a particular circumstance.	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. The sentence is evidence of the terms upon which Powerlink and third parties would have entered into hypothetical agreements. That is evidence of what Powerlink and third parties would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling. <u>Additional submission</u> Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. In this case, Mr Freeman is giving evidence, based on his own experience, of the likely terms of any contract with Powerlink, being a matter which would be addressed in a feasibility study. The plaintiffs otherwise rely on their submissions dated 6 September 2019.	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6: <ul style="list-style-type: none">I have ruled that the plaintiffs may not advance the unpleaded advice case.I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. However, I think it is arguable that the impugned evidence could be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, the evidence may be admitted for the limited purpose of supporting the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified. (3) For the foregoing reasons, subject only to the exception stated in the previous paragraph, I uphold the objection.
56.	[378]	Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation. Not proper matters for expert opinion. Facts or assumptions underpinning the opinion not proved by admissible evidence.	This evidence is: <i>"Where Powerlink funds the remaining transmission infrastructure (i.e. \$21.69M), the capital expenditure and operation and maintenance costs would be amortised over the agreed term of the Connection Agreement (most likely a 20-year term) and require payment of a fixed charge per month."</i> This is a statement of fact observable by Mr Freeman in his experience.	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. The sentence is evidence of what Powerlink would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.	An expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of power supply, which includes the costs which would likely be charged by the third party infrastructure provider and the terms on which those costs would be charged. The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs otherwise rely on the submissions dated 6 September 2019.	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).
57.	[390]	Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.	This evidence is: <i>"Powerlink would have required the Joint Venture to enter into a Connection Agreement, the terms and conditions of which would have been based on Powerlink's standard Connection Agreement and</i>	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. The sentence is evidence of what Powerlink would have done in hypothetical circumstances. The objection	An expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of power supply, which includes the costs which would likely be charged by the third	(1) I adopt the defendants' suggested ruling, but would also uphold the objection by reference to the state of mind ruling. (2) As to the further submissions

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p><i>negotiated on a reasonable basis with the Connecting parties prior to execution."</i></p> <p>This is predominately a statement of fact as to what Powerlink's Connection Agreement terms were and when they were negotiated. Otherwise, this is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.</p> <p>Otherwise, Mr Freeman is qualified to give evidence based on facts observed in his experience. Mr Freeman here gives evidence as to typical terms which may be entered into between mine operators and Powerlink, which is a proper matter for expert evidence based upon Mr Freeman's experience.</p>	<p>should be upheld on the basis of the hypothetical conduct ruling.</p>	<p>party infrastructure provider and the terms on which those costs would be charged. The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on the matters stated in the Response to Objection column and their submissions dated 6 September 2019.</p>	<p>advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>
58.	[392] Last sentence ('However, if necessary, Powerlink...')	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"Powerlink's standard practice was to incorporate the early works in the Connection Agreement which would be executed prior to the time of commencing the early works. However, if necessary, Powerlink may have entered into an early works agreement, in order to meet project time requirements."</i></p> <p>This is predominately a statement of fact observable by Mr Freeman in his experience. Otherwise this is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.</p>	<p><u>Suggested ruling</u></p> <p>The impugned sentence is evidence that Powerlink may have entered into an agreement with a third party. That is evidence of what the third party would do in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>An expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of power supply, which includes the costs which would likely be charged by the third party infrastructure provider and the terms on which those costs would be charged.</p> <p>The plaintiffs otherwise rely on the matters stated in the Response to Objection column and their submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants' suggested ruling, but would also uphold the objection by reference to the state of mind ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>
59.	[394] First sentence, the words: 'and would not be approved by Powerlink'	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would have acted in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>This evidence (in context) is:</p> <p><i>"I believe Mr Harradine's solution (EXP.020.017.0001) is technically flawed and would not be approved by Powerlink. In my opinion, having reviewed 10 options, there was a power solution available to the Joint Venture which is technically sound and minimises time and cost blowout risk."</i></p> <p>When seen in context this is not about what Powerlink would have done in particular circumstances, it is evidence of opinion about a preferred solution to include in a feasibility study based on knowledge of practice.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. The words are evidence of what Powerlink would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. An expert preparing a feasibility study would identify what he considers are relevant considerations to the issue of power supply, which includes the merits of one particular solution over another, and why one solution is likely to be adopted or preferred by an infrastructure provider such as Powerlink.</p>	<p>(1) I adopt the defendants' suggested ruling, but would also uphold the objection by reference to the state of mind ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>
60.	[399]	<p>Mr Freeman purports to give evidence about how QR, GPC, Powerlink and SunWater would</p>	<p>This evidence is:</p> <p><i>"I disagree that Powerlink would not enter into arrangements for the supply of the power</i></p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. The sentence is</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been</p>	<p>(1) I adopt the defendants' suggested ruling, but would also uphold the objection by reference to the state of</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>have acted in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p><i>infrastructure without the Stage 2 Mining Lease being granted. In my opinion Powerlink would have entered into such arrangements ahead of the Joint Venture's Stage 2 Mining Lease being granted with the coverage of commercial provisions such that if the project did not achieve financial close the arrangements would be terminated and the project would be liable for any costs incurred by Powerlink up to that point."</i></p> <p>This is an observation about what Powerlink had done in the past and is a statement of fact observable by Mr Freeman in his experience. Otherwise, this is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.</p>	<p>evidence of what Powerlink would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p>	<p>reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>In this case, Mr Freeman is giving evidence, based on his own experience, of the likely terms of any contract with Powerlink, being a matter which would be addressed in a feasibility study.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>mind ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>
Item 5 from the defendants' schedule of objections						
61.	[22] Second sentence ('I disagree with...')	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"I disagree with this opinion as capacity was available at the time of the Stage 2 Feasibility Study (i.e. 2002- 2005) and would have been allocated to the Joint Venture upon execution of a port agreement."</i></p> <p>These are statement of fact observable by Mr Freeman in his experience.</p> <p>As to the basis for this opinion, refer to Section 5 of the 2 November Report [EXP.010.005.0001 at pdf pp 0068-0092].</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility 	<p>This evidence summarises one of Mr Freeman's reasons for disagreement with Mr Morton and is contained in the Executive Summary of the 2 November 2018 report. The detailed analysis of the issues in relation to availability of port capacity (in particular) is provided in Parts A and B of the 2 November 2018 report in relation to port (commencing at pdf p.68).</p> <p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. In this case, Mr Freeman is giving evidence, based on his own experience including dealings with GPC and his review of documents which he considers to be relevant to his feasibility assessment, of the available capacity at the port during the Stage 2 Feasibility Study and whether there was an opportunity to obtain an allocation of capacity during that period, being matters which would be addressed in a feasibility study.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I uphold the objection and agree with the characterisation of this aspect of Mr Freeman's opinions asserted by the defendants. I reject the plaintiffs' characterisation of the impugned sentence as a statement of fact observable by Mr Freeman. In fact it expresses a conclusion as to the outcome of hypothetical conduct by the Joint Venture and by the GPC. Such an expression of opinion is inadmissible for reasons expressed in the body of my reasons. See in particular <i>Sanrus No 5</i> at [58].</p> <p>(2) Further I would uphold the objection on the basis that I agree that the assumptions underpinning the opinion are not identified. I do not think the submission made by the plaintiffs as to the basis of those assumptions is sufficient to rectify the defect as to form.</p> <p>(3) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> The assumption identification rule must be met by the expression of expert opinion. Failure so to do cannot be remedied after the fact by way of a lawyer's submission which attempts to identify the requisite assumptions. I have ruled that the plaintiffs may

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
				<p>Study as at May 2005;</p> <ul style="list-style-type: none"> insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 		<p>not advance the unpleaded advice case.</p> <ul style="list-style-type: none"> I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. I agree that the impugned evidence cannot be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, I uphold the objection and reject the submission that the impugned evidence may be admitted for the purpose of the plaintiffs' fallback argument. <p>(3) For the foregoing reasons, I uphold the objection.</p>
62.	[23] Second sentence ('I disagree with...')	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not</p>	<p>This evidence is:</p> <p><i>"I disagree with this timeframe and consider the Joint Venture had until mid-2006 to execute a contract to be ahead of competing demand."</i></p> <p>This is a statement of fact observable by Mr Freeman in his experience.</p> <p>As to the basis for this opinion, refer to Section 5 of the 2 November Report, in particular paragraphs 242-250 [EXP.010.005.0001 at pdf pp 0073-0081].</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the assumption identification ruling.</p> <p>In any event, the context makes clear that the sentence is expressing an opinion as to the time by which the Joint Venture "would have had to sign a port agreement". It is therefore evidence of what the Joint Venture and GPC would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply category 2, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion that rely on events after May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; 	<p>This evidence summarises one of Mr Freeman's reasons for disagreement with Mr Morton and is contained in the Executive Summary of the 2 November 2018 report. The detailed analysis of the issues in relation to availability of port capacity (in particular) and timing of execution of a contract with the GPC is provided in Parts A and B of the 2 November 2018 report in relation to port (commencing at pdf p.68).</p> <p>The plaintiffs rely on the matters stated in the Response to Objection. They also rely on the submissions dated 6 September 2019.</p> <p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>In this case, Mr Freeman is giving evidence, based on his own experience including dealings with GPC and his review of documents which he considers to be relevant to his feasibility assessment, of the available capacity at the port during the Stage 2 Feasibility Study and the timing by which the Joint Venture would need obtain an allocation of capacity during, being</p>	<p>(1) I adopt the defendants' suggested ruling, but would also uphold the objection by reference to the state of mind ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> The assumption identification rule must be met by the expression of expert opinion. Failure so to do cannot be remedied after the fact by way of a lawyer's submission which attempts to identify the requisite assumptions. I have ruled that the plaintiffs may not advance the unpleaded advice case. I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. I agree that the impugned evidence cannot be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005.

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		set out or proved by admissible evidence.		<ul style="list-style-type: none"> even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 	matters which would be addressed in a feasibility study.	<p>Accordingly, I uphold the objection and reject the submission that the impugned evidence may be admitted for the purpose of the plaintiffs' fallback argument.</p> <p>(3) For the foregoing reasons, I uphold the objection.</p>
63.	[24]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p>	<p>This evidence is:</p> <p><i>"Although I consider port capacity was available for the Joint Venture to secure, I am also of the opinion the port had the ability to expand further to meet growing industry demand. The expansion options available to GPA could have enabled the port to expand to capacity of 100mtpa."</i></p> <p>This is evidence of fact observable by Mr Freeman in his experience and his opinion about GPC's capacity, not what GPC would do in a hypothetical situation.</p> <p>As to the basis for this opinion, refer to Section 5 of the 2 November Report, in particular paragraphs 242-250 [EXP.010.005.0001 at pdf pp 0073-0081].</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling, the assumption identification ruling, the hypothetical conduct ruling, and the statement of reasoning ruling.</p> <p>The objection should also be upheld on the basis that Mr Freeman does not have the required expertise. The plaintiffs concede that Mr Freeman does not have the expertise necessary to give evidence about the construction or expansion of the terminal: see T63-20/44-46.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply category 2, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion that rely on events after May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p>	<p>The evidence summarises one of Mr Freeman's reasons for disagreement with Mr Morton and is contained in the Executive Summary of the 2 November 2018 report. The detailed analysis of the issues in relation to port is provided in Parts A and B of the 2 November 2018 report in relation to port (commencing at pdf p.68).</p> <p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>In this case, Mr Freeman is giving evidence, based on his own experience including dealings with GPC and his review of documents which he considers to be relevant to his feasibility assessment, and based on his expertise as an infrastructure expert, of the available capacity at the port (which would take into account the prospect of future expansions to port capacity to meet industry demand), being matters which would be addressed in a feasibility study. In terms of an expert being informed of potential port expansions, Mr Freeman identifies in [254] of his 2 November 2018 report that this information would be</p>	<p>(1) I adopt the defendants' suggested ruling, but would also uphold the objection by reference to the state of mind ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> The assumption identification rule must be met by the expression of expert opinion. Failure so to do cannot be remedied after the fact by way of a lawyer's submission which attempts to identify the requisite assumptions. I have ruled that the plaintiffs may not advance the unpleaded advice case. I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. I agree that the impugned evidence cannot be characterised as expressing support for an input by

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p> <p>The statements concerning taking a calculated risk in the secondary market (see [255]), accelerating expansions and undertaking further expansions ([24], [254] and [259]) are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>		<ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 	<p>obtained from GPC during discussions.</p> <p>The plaintiffs rely on the matters stated in the Response to Objection. They also rely on the submissions dated 6 September 2019.</p>	<p>way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, I uphold the objection and reject the submission that the impugned evidence may be admitted for the purpose of the plaintiffs' fallback argument.</p> <p>(3) For the foregoing reasons, I uphold the objection.</p>
64.	[25] Third sentence ('I am also of the opinion...')	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. 	<p>This evidence is:</p> <p><i>"I am also of the opinion that given the Stage 1 tonnage would have been already contracted with the port during the Stage 2 Feasibility Study period, Stage 2 would not be considered a "greenfield" mine but rather a mine expansion."</i></p> <p>This is a statement of fact observable by Mr Freeman in his experience on a specified assumption and not what GPC would do in a hypothetical situation.</p> <p>As to the basis for this opinion, refer to Section 5 of the 2 November Report, in particular paragraph [215] [EXP.010.005.0001 at pdf p. 0069].</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the hypothetical conduct ruling and the state of mind ruling.</p>	<p>The evidence summarises one of Mr Freeman's reasons for disagreement with Mr Morton and is contained in the Executive Summary of the 2 November 2018 report. The detailed analysis of the issues in relation to port is provided in Parts A and B of the 2 November 2018 report in relation to port (commencing at pdf p.68).</p> <p>The plaintiffs rely on the matters stated in the Response to Objection. They also rely on the submissions dated 6 September 2019 in relation to matters addressed in summary sections of the 2 November 2018 report (which is admissible if the facts underpinning the opinion are stated elsewhere, as it is in this case) and Mr Freeman's reliance on documents for the purposes of expressing his opinion.</p> <p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>In this case, Mr Freeman is giving evidence, based on his own experience including</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p>			<p>dealings with GPC and his review of documents which he considers to be relevant to his feasibility assessment, of the manner in which the Monto Mine would have been regarded (that is, as an expansion rather than a new mine) during the Stage 2 Feasibility Study period, being a matter which would be addressed in a feasibility study.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	
65.	[58] Second sentence, the words: 'In my opinion RGTCT had enough capacity at the time.'	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"In my opinion RGTCT had enough capacity at the time and QR itself stated in October 2002 (SAN.001.021.0030) that, while RGTCT had a capacity of 45mtpa, QR was railing 36mtpa, which was well below its contracted rail capacity of 42mtpa at that time."</i></p> <p>This is a statement of fact observable by Mr Freeman in his experience (and drawn from underlying evidence).</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p>	<p>The evidence summarises one of Mr Freeman's reasons for disagreement with Mr Morton and is contained in Section 4.4: Summary Response to Mr Morton's Report in the 2 November 2018 report (in relation to rail). The detailed analysis of the issues in relation to rail is provided in Part B of the 2 November 2018 report in relation to rail (commencing at pdf p.32).</p> <p>The plaintiffs rely on the matters stated in the Response to Objection. They also rely on the submissions dated 6 September 2019 in relation to matters addressed in summary sections of the 2 November 2018 report (which is admissible if the facts underpinning the opinion are stated elsewhere, as it is in this case) and Mr Freeman's reliance on documents for the purposes of expressing his opinion, including the document which he identifies expressly in the impugned paragraph.</p> <p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>In this case, Mr Freeman is giving evidence, based on his own experience including dealings with GPC and working for QR and his review of documents which he considers to be relevant to his feasibility assessment, of the availability of port and rail capacity, being matters which would be addressed in a feasibility study.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>
66.	[59] Third sentence ('In addition, the Stage 1	Not proper matters for expert	<p>This evidence is:</p> <p><i>"In addition, the Stage 1 tonnage would have been</i></p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis</p>	<p>The evidence summarises one of Mr Freeman's reasons for disagreement with Mr Morton and is contained in Section 4.4:</p>	<p>(1) I adopt the defendants' suggested ruling.</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
	tonnage...')	<p>opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p>	<p><i>under agreement with the port, further establishing the producer/supplier relationship."</i></p> <p>This is an observation about the consequences of a particular assumption and not about what GPC would have done in a particular circumstance.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Otherwise, Mr Freeman is qualified to give evidence based on facts observed in his experience.</p> <p>As to the basis for this opinion, refer to Section 5 of the 2 November Report, in particular paragraph [215] [EXP.010.005.0001 at pdf p. 0069].</p>	of the hypothetical conduct ruling and the assumption identification ruling.	<p>Summary Response to Mr Morton's Report in the 2 November 2018 report (in relation to rail). The detailed analysis of the issues in relation to rail is provided in Part B of the 2 November 2018 report in relation to rail (commencing at pdf p.32).</p> <p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>In this case, Mr Freeman is giving evidence, based on his own experience including dealings with GPC and his review of documents which he considers to be relevant to his feasibility assessment, about whether the Joint Venture would be able to get port capacity.</p> <p>The plaintiffs otherwise rely on the matters stated in the Response to Objection and the submissions dated 6 September 2019.</p>	(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).
67.	[62] Second sentence ('GPA would negotiate...')	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of 	<p>This evidence is:</p> <p><i>"GPA would negotiate for significantly long periods of time to provide certainty for producers so that producers could commit to mine development."</i></p> <p>This is a statement of fact observable by Mr Freeman in his experience. Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p> <p>As to the basis for this opinion, refer to Section 5 of the 2 November Report [EXP.010.005.0001 at pdf pp 0068-0091].</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling, the hypothetical conduct ruling, and the assumption identification ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>In this case, Mr Freeman is giving evidence, based on his own experience and observations including dealings with GPC and his review of documents which he considers to be relevant to his feasibility assessment, about whether the Joint Venture would be able to get port capacity for Stage 2 and if so, during what time frame including by reference to the likely duration of negotiations (being something which Mr Morton also addresses as can be seen from the first part of [62]) and so is relevant to a feasibility assessment.</p> <p>The plaintiffs otherwise rely on the matters stated in the Response to Objection and the submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p>				
68.	[64] Third sentence ('In my view...')	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"In my view, the conclusion that Mr Morton's holds is not correct as in my opinion rail capacity could have been available from mid-2007 based on my technical assessment in section 4.8."</i></p> <p>This is not a statement about what any party would have done in a hypothetical circumstance it is about a matter of observable fact and within Mr Freeman's expertise, namely the availability of rail capacity.</p> <p>The basis for this opinion, refer to Section 4.8 of the 2 November Report [EXP.010.005.0001 at pdf pp 0035-0052].</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>In this case, Mr Freeman is giving evidence, based on his technical assessment in section 4.8 of the 2 November 2018 report, about whether rail capacity could have been made available from mid-2007, being topics which would be addressed in a feasibility assessment. By this evidence, he is not saying that either QR or the Joint Venture would have done something; rather, he is identifying that rail capacity for Stage 2 could have been available from a particular date assuming the willingness of those parties to enter into a contract.</p> <p>Further, and self-evidently, the evidence does not express an opinion based on the things identified by the defendants such as Mr Freeman's interpretation of documents prepared by GPC.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants' suggested ruling so far as it refers to the hypothetical conduct ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3). I would add that I reject the characterisation of the witness' evidence that he is "assuming the willingness". His evidence is expressed as a statement of what QR would have been willing to do.</p>
69.	[69] Third sentence ('In my experience, GPA was willing...')	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the 	<p>This evidence is:</p> <p><i>"In my experience, GPA was willing to enter into contracts subject to conditions precedent (including the issue of the Mining Lease)."</i></p> <p>This is a statement of fact observable by Mr Freeman in his experience.</p> <p>As to the basis for this opinion, refer to Section 5 of the 2 November Report [EXP.010.005.0001 at pdf pp 0068-0091].</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the state of mind ruling, the hypothetical conduct ruling, and the assumption identification ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>In this case, Mr Freeman is giving evidence, which is based on his own experience and observations, to the effect that GPA/GPC was prepared to enter into conditional contracts, being a topic which would be</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>application of specialised knowledge;</p> <ul style="list-style-type: none"> Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p>			<p>considered in a feasibility assessment. By this evidence, he is not saying that either GPA or the Joint Venture would have done something as a matter of fact; rather, he is identifying that he has observed that GPA was willing to enter into contracts subject to conditions precedent, being something which, as an expert undertaking a feasibility assessment, would be a matter relevant to that process.</p> <p>The plaintiffs otherwise rely on the matters stated in the Response to Objection and the submissions dated 6 September 2019.</p>	
70.	[89]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"I also consider it probable that, regardless of the timing of the rail works in the Callemondah-RGTCT area, the Joint Venture could have secured port capacity for some of Stage 2 volumes at BPCT. In doing this the Callemondah-RGTCT area could have been avoided for some of the Stage 2 volume."</i></p> <p>This is not a statement about what the Joint Venture would have done in a hypothetical circumstance, it is rather a statement of observable fact about the availability of port capacity which the Joint Venture could have obtained.</p> <p>Mr Freeman is qualified to give evidence based on facts observed in his experience. Otherwise evidence concerning the increase in the capacity of BPCT is addressed in paragraph [245] of the 2 November Report [EXP.010.005.0001 at pdf p. 0078].</p> <p>This increase is also addressed in Mr Morton's report at [80(a)] ([EXP.020.022.0001_0001 at pdf p. _0037].</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling, the hypothetical conduct ruling, and the assumption identification ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>In giving this evidence, Mr Freeman is identifying an alternative port option for the Monto Mine (being Barney Point Coal Terminal) in the event that issues arose with railings to the RG Tanna Coal Terminal.</p> <p>The plaintiffs otherwise rely on the matters stated in the Response to Objection and the submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
71.	[197]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"If the project did not proceed after commitment to rail and port agreements, or the tonnage railed was not 10mtpa, there would have been enough demand for capacity such that unutilised tonnage could be traded on the secondary market."</i></p> <p>This is not evidence about what a third party would have done in a particular circumstance, it is a matter of observable fact, namely about the tradability of capacity on the secondary market, which is within Mr Freeman's experience.</p> <p>As to the basis for the opinion, Mr Freeman explains the secondary market in paragraphs [174(b)] (rail) and [299(b)] (port) and agrees with Mr Morton's summary of it in paragraphs [208] and [241] of the 2 November Report [EXP.010.005.0001 at pdf pp 0056, 0098, 0068 and 0077].</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling, the hypothetical conduct ruling, and the assumption identification ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>It is something which would be relevant to the risk assessment which would be undertaken by an expert undertaking the Stage 2 Feasibility Assessment, being the identification of a means of minimising exposure under rail and port agreements if the Stage 2 tonnage was not, in fact, achieved (being that it could have been traded on the secondary market).</p> <p>The plaintiffs otherwise rely on the matters stated in the Response to Objection and the submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>
72.	Not pressed					
73.	Not pressed					
74.	[230]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted 	<p>This evidence is:</p> <p><i>"In my opinion the key criteria for port allocation are notification of project requirements as soon as practicable (to register an interest in the capacity), ongoing discussions, negotiation of contract and commitment to a port agreement. These criteria were on schedule to be met given the project capacity requirements were tabled and documented in 2001. In addition, the relationship would have been established for the Stage 1 capacity, and negotiations could have been held over 2003."</i></p> <p>These are statements of fact observable by Mr Freeman in his experience and otherwise is about facts and assumptions underpinning his opinion.</p> <p>The basis for the opinion regarding the availability of capacity up until 2006 is addressed in paragraphs</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the hypothetical conduct ruling, and the assumption identification ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>In this case, Mr Freeman is giving evidence, based on his own experience and observations including dealings with GPC and his review of documents which he considers to be relevant to his feasibility assessment, about whether the Joint Venture would be able to get port capacity for Stage 2 and if so, by reference to criteria which he considers to be relevant and whether that criteria would be met.</p>	<p>(1) I adopt the defendants' suggested ruling, but would also uphold the objection on the basis of the documents review ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>in a hypothetical factual situation, which is a question of fact;</p> <ul style="list-style-type: none"> Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p>	<p>[248] and [249] of the 2 November Report [EXP.010.005.0001 at pdf pp 0080-0081].</p>	<p>–</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 	<p>The statement in the final sentence that a relationship would have been established by reason of Stage 1 capacity is a conclusion which is based on the initial correspondence with the GPC which is addressed in [251] and [252] of the 2 November 2018 report.</p> <p>The statement that negotiations could have been held over 2003 is an opinion as to what could have occurred as part of the Stage 2 Feasibility Study and is referred to in more detail in other paragraphs of the 2 November 2018 report, such as [244], [245] (final sentence), [261], [264] and [265].</p> <p>The plaintiffs otherwise rely on the matters stated in the Response to Objection and the submissions dated 6 September 2019.</p>	
75.	[232]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. 	<p>This evidence is:</p> <p><i>"In paragraph 98 Mr Morton states "I consider that the Monto Coal Project would need to have been allocated capacity no later than mid 2004". In my opinion this is not a reasonable statement given the environment of competing demand. It was not until late-2006 that additional capacity was contracted by other producers that would have prevented the Monto Coal Project from securing it's full 10mtpa."</i></p> <p>This is a statement of fact observable by Mr Freeman in his experience and an opinion which flows from it.</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling, the hypothetical conduct ruling, and the assumption identification ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply category 2, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion that rely on events after May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton</p> <p>–</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>In this case, Mr Freeman is giving evidence, based on his own experience and observations including dealings with GPC and his review of documents which he considers to be relevant to his feasibility assessment, about whether the Joint Venture would be able to get port capacity for Stage 2 and if so, during what time frame including by reference to the likely duration of negotiations (being something which Mr Morton also addresses as can be seen from the impugned paragraph) and so is relevant to a feasibility assessment.</p> <p>The plaintiffs otherwise rely on the matters stated in the Response to Objection and the submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants' suggested ruling, but would also uphold the objection on the basis of the documents review ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3). Although the stated proposition "it was not until late 2006 [...]", was capable of being characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005, I agree that that expression of opinion would be inadmissible because of the assumption identification and statement of reasoning rules.</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		Otherwise, basis of opinions not set out. Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.		assumption identification and statement of reasoning rules; <ul style="list-style-type: none"> they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 		
76.	Not pressed					
77.	[242]	Not proper matters for expert opinion. Rather, Mr Freeman's opinions are based on: <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. Otherwise, basis of opinions not set out.	This evidence is: <i>"In my opinion capacity was available at the Port of Gladstone and the Joint Venture had the opportunity to negotiate the appropriate agreements within the Stage 2 Feasibility Study period (2002-2005)."</i> This is a statement of fact observable by Mr Freeman in his experience.	(I took the defendants' position as seeking to support the provisional ruling.) <u>Additional submission</u> Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005. In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton – <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on 	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. In this case, Mr Freeman is giving evidence, based on his own experience and observations including dealings with GPC and his review of documents which he considers to be relevant to his feasibility assessment, about whether the Joint Venture would be able to get port capacity for Stage 2 and if so, during what time frame including by reference to the likely duration of negotiations (being something which Mr Morton also addresses as can be seen from the impugned paragraph) and so is relevant to a feasibility assessment. The plaintiffs otherwise rely on their submissions dated 6 September 2019.	(1) I uphold the objection and agree with the characterisation of this aspect of Mr Freeman's opinions asserted by the defendants. I reject the plaintiffs' characterisation of the impugned sentence as a statement of fact observable by Mr Freeman. In fact it expresses a conclusion as to hypothetical conduct by the GPC and as to its preparedness to take a particular approach to the Joint Venture. Such an expression of opinion is inadmissible for reasons expressed in the body of my reasons. See in particular the body of <i>Sanrus No. 5</i> at [58]. (2) Further I would uphold the objection on the basis that I agree that the assumptions underpinning the opinion are not identified. (3) As to the further submissions advanced by the plaintiffs in column 6: <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I took the plaintiffs' submission to include the proposition that the impugned evidence was within

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.		<p>subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005;</p> <p>insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.</p>		<p>the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. I agree that the impugned evidence cannot be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, I uphold the objection and reject the submission that the impugned evidence may be admitted for the purpose of the plaintiffs' fallback argument.</p> <p>(4) For the foregoing reasons, I uphold the objection.</p>
78.	[244]-[253]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p> <p>The statements concerning taking a calculated risk in the secondary market (see [255]), accelerating expansions and</p>	<p>Refer to these paragraphs in the report.</p> <p>These paragraphs are largely statements of fact observable by Mr Freeman in his experience and otherwise are summaries of and the drawing of inferences from documents based on Mr Freeman's experience which is a matter on which he is capable of giving evidence.</p> <p>Paragraph [245] is a statement of Mr Freeman's opinion drawn from the assumptions made.</p> <p>Paragraph [246] is a statement drawn from Mr Freeman's direct experience.</p> <p>Paragraph [249] does not say what the Joint Venture would have done but rather what it could have done which is a matter within Mr Freeman's expertise (i.e. to comment on the content of a feasibility study).</p> <p>Paragraph [253] is a statement of fact observable by Mr Freeman in his experience.</p> <p>The bases for the opinions are given by reason of the material referred to in the paragraphs.</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005 ([244] only). They also argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion that rely on events after May 2005 ([246] – [249] only).</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>In this case, Mr Freeman is giving evidence, based on his own experience and observations including dealings with GPC and his review of documents which he considers to be relevant to his feasibility assessment, about whether the Joint Venture would be able to get port capacity for Stage 2 which includes a consideration of the availability of the port capacity, when the Joint Venture would have had to commit to an agreement and other considerations which the expert undertaking the Stage 2 Feasibility Study would have incorporated in the risk profiling of the port capacity strategy: see [243] of the 2 November 2018 report.</p> <p>As to the objection concerning relevance, the provisional ruling states that those arguments can be addressed in final submissions. However, the plaintiffs understand that the Court now wishes to hear submissions about this topic. The plaintiffs rely on their submissions dated 6 September 2019 in this regard and generally.</p>	<p>(1) I uphold the objection to the impugned paragraphs and, as a general proposition, I agree with the characterisation of these paragraphs which is asserted by the defendants. These opinions as to what the GPC and the Joint Venture would do are inadmissible for reasons expressed in the body of my reasons. See in particular the body of my reasons in <i>Sanrus No. 5</i> at [58].</p> <p>(2) As to [244], [245], [247], [248] [249], [251], [252] and [253], I would not uphold objection on the basis of the assumption identification rule. I think the basis for the opinion stated is sufficiently clear. Reference to those paragraphs does, however, provide support for the conclusion I have expressed in the previous paragraph.</p> <p>(3) As to [246], I would uphold the objection on the basis of the assumption identification rule. Although Mr Freeman references his experience, he does not say what the experience in fact was in any meaningful way. I would uphold the assumption identification rule objection in relation to [253], as the bases are not stated.</p> <p>(4) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I am otherwise not persuaded by the defendants'

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants’ suggested ruling	(6) Plaintiffs’ suggested ruling	(7) Final ruling
		undertaking further expansions ([24], [254] and [259]) are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.		informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.		arguments as to irrelevance, sufficient to rule the impugned evidence out on that basis. <ul style="list-style-type: none">I took the plaintiffs’ submission to include the proposition that the impugned evidence was within the scope of the plaintiffs’ fallback argument. The defendants advanced the objection recorded in column 5.I agree that some parts of the impugned evidence could not be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Thus [246] falls into that category. So too, [247] and [248], because they are based on documents which would not be available to the expert in May 2005. And as to [253], the defendants have elsewhere pointed out that the plaintiffs concede that Mr Freeman does not have the expertise necessary to give evidence about the reconstruction or expansion of the terminal: see T63-20 lines 44 – 46. Accordingly, I uphold the objection and reject the submission that the impugned evidence may be admitted for the purpose of the plaintiffs’ fallback argument.However I think it is arguable that the remaining parts of the impugned evidence could be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, the evidence may be admitted for the limited purpose of supporting the plaintiffs’ fallback argument referred to in the body of my judgment, but subject to the limitations there identified. <p>(5) For the foregoing reasons, subject only to the exception stated in the previous paragraph, I uphold the objection.</p>
79.	[254] Second sentence	Not proper matters for expert	This evidence is:	<u>Suggested ruling</u>	The evidence is something which forms	(1) I adopt the defendants’ suggested

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
	(‘In my opinion...’)	<p>opinion.</p> <p>Rather, Mr Freeman’s opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman’s interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman’s observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p> <p>The statements concerning taking a calculated risk in the secondary market (see [255]), accelerating expansions and undertaking further expansions ([24], [254] and [259]) are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p><i>“In my opinion the export capacity of the RGTCT could have been increased, or further expanded by GPA to accommodate additional export volumes.”</i></p> <p>This is opinion evidence about what the GPC could have done which would be relevant to the preparation of a feasibility study.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Otherwise, Mr Freeman is qualified to give evidence based on facts observed in his experience.</p>	<p>The objection should be upheld on the basis of the documents review ruling, the hypothetical conduct ruling, the assumption identification ruling, and the statement of reasoning ruling.</p> <p>The objection should also be upheld on the basis that Mr Freeman does not have the required expertise. The plaintiffs concede that Mr Freeman does not have the expertise necessary to give evidence about the reconstruction or expansion of the terminal: see T63-20/44-46.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants’ submissions in reply category 2, the defendants argue the evidence does not fall within the plaintiffs’ fallback argument, and it concerns expression of opinion that rely on events after May 2005.</p> <p>In the defendants’ submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on ‘Port’ of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs’ fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; <p>insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.</p>	<p>part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>While it is correct that Mr Freeman does not have expertise in planning or constructing port expansions, he is an infrastructure expert who would be expected to take into account of potential capacity increases at the port (based on information obtained by him or provided to him by the GPC) when conducting the Stage 2 Feasibility Study. Both Mr Freeman and Mr Morton regard the topic of “Opportunities for further port expansions in 2005” to be a topic relevant to a project feasibility assessment: see [EXP.500.026.0001_2] at pdf p.6, item 4.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019.</p>	<p>ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>
80.	[255] <u>Second sentence</u> (‘Despite the above	Not proper matters for expert	<p>Refer to these paragraphs in the report.</p> <p>These paragraphs are largely statements of fact</p>	<p><u>Suggested ruling</u></p> <p>As to the second sentence of [255], the</p>	Other than [259], [260] and [262], the evidence is something which forms part of,	(1) I adopt the defendants’ suggested rulings.

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
	evidence...'), [256]-[262]	<p>opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p> <p>The statements concerning taking a calculated risk in the secondary market (see [255]), accelerating expansions and undertaking further expansions ([24], [254] and [259]) are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p>observable by Mr Freeman in his experience and otherwise are summaries of and the drawing of inferences from documents based on Mr Freeman's experience which is a matter on which he is capable of giving evidence.</p> <p>Paragraph [261] is a statement about what a person negotiating supply agreements would do, which is a matter about which Mr Freeman has direct experience.</p>	<p>objection is upheld on the basis of the assumption identification ruling and the statement of reasoning ruling.</p> <p>At to [256] – [260], the objection is upheld on the basis of the documents review ruling and the hypothetical conduct ruling. The objection should also be upheld on the basis that Mr Freeman does not have the required expertise. The plaintiffs concede that Mr Freeman does not have the expertise necessary to give evidence about the construction or expansion of the terminal: see T63-20/44-46.</p> <p>As to [261], the objection is upheld on the basis of the hypothetical conduct ruling.</p> <p>As to [262], the objection is upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; <p>insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.</p>	<p>or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>[255] second sentence is directed to identification by an expert performing the feasibility assessment of a calculated risk to be considered by the expert taking into account the fact which is stated in the first sentence of [255]. Notably, the third sentence and following (including reference to publicly available documents) is not the subject of objection.</p> <p>[256] (first sentence) is a statement of fact based on Mr Freeman's own experience and observations. [256] (second sentence) is a summary statement of opinion as to the measures which can be taken to increase throughput capacity at ports. Mr Freeman is an infrastructure expert with relevant qualifications (including as an engineer). He is able to express this opinion, which would also be a relevant matter to be considered by an expert undertaking the Stage 2 Feasibility Study.</p> <p>[257] and [258] contain an explanation of the measures by which port capacity can be increased, and identifies, by reference to publicly available documents, how RG Tanna Coal Terminal and Barney Point Coal Terminal have increased capacity over time. This is a relevant consideration for an expert undertaking a feasibility assessment because it necessarily affects whether port capacity could become available at a future date, remembering that Mr Freeman identifies that this is what an expert obtains information about from the infrastructure provider: see [254].</p> <p>[261] relates to negotiations which Mr Freeman considers would have been undertaken by the expert, and the terms which may have been available to be agreed by the parties, but Mr Freeman can do no more than assume that a concluded agreement would have been reached.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019.</p>	<p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I am otherwise not persuaded by the defendants' arguments as to irrelevance, sufficient to rule the impugned evidence out on that basis. I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. I agree that some parts of the impugned evidence could not be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Falling into that category are the first clause of the second sentence of [255]; those parts of [257] and [258] as are based on documents which would not have been in existence at the time; [259]; [260] reference to "until present day"; the first sentence of [261]; and [262]. Accordingly, I uphold the objection to that evidence and reject the submission that the impugned evidence may be admitted for the purpose of the plaintiffs' fallback argument. However I think it is arguable that other parts of the impugned evidence could be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Falling into this category are the second clause of the second sentence of [255]; [256]; those parts of [257] and [258] as are based on documents which would have been in existence at the time; [260] except the reference to "until present day"; the second sentence of [261]. Accordingly, that evidence may be admitted for the limited purpose of supporting

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
						<p>the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified.</p> <p>(3) For the foregoing reasons, subject only to the exception stated in the previous paragraph, I uphold the objection.</p>
81.	[266]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p>	<p>This evidence is:</p> <p><i>"Committing to a port contract and then not proceeding with the project poses a manageable risk in an environment of high demand. It is probable that any relinquished tonnage could be reallocated at no extra cost up to a certain point in time given the volume of expansion tonnage (e.g. 6months post 2005). Aside from these known Blackwater and Moura expansion plans, the DBCT corridor users were also keen to commence increased railings south to counteract congestion and bottlenecks at the port."</i></p> <p>This is a statement of observable fact and also a matter within Mr Freeman's experience, regarding reallocation of tonnage and is a matter as to the content of a feasibility study.</p> <p>As to the potential for coal typically exported using the DBCT to be exported further south at Gladstone, this is addressed in the 2006 Coal Rail Infrastructure Master Plan [AUR.002.001.0085 at pdf p. 0115] (section 5.4).</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the hypothetical conduct ruling and the assumption identification ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>It is something which would be relevant to the risk assessment which would be undertaken by an expert undertaking the Stage 2 Feasibility Assessment, being the identification of a means of minimising exposure under a port contract if the decision was taken not to proceed with Stage 2.</p> <p>The plaintiffs rely on the matters stated in the Response to Objection.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>
82.	[274]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the 	<p>This evidence is:</p> <p><i>"In my opinion, there was available port capacity for commitment during the Stage 2 Feasibility Study period on the primary market at RGTCT/BPCT coal terminals for the long term mine production. Had the Joint Venture committed to a Port Agreement by mid-2006, it would have secured the port capacity allocation in a market of competing demand."</i></p> <p>This is not a statement of what the Joint Venture would have done, it is a conclusion based on a matter of fact within Mr Freeman's experience, namely that</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling, the hypothetical conduct ruling, and the assumption identification ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply category 2, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression</p>	<p>This paragraph is contained in Part C; Comparison of Opinions and so is a summary section of the more detailed section contained in Part B.</p> <p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>It is something which would be relevant to</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3) in relation to the first sentence. Although the second sentence was capable of being characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005, I agree that that expression of opinion would be</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>application of specialised knowledge;</p> <ul style="list-style-type: none"> Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p>	<p>there was available port capacity.</p> <p>Mr Freeman is qualified to give evidence based on facts observed in his experience. The basis for Mr Freeman's opinion as to the availability of port capacity is set out in paragraphs [244]-[249] of the November Report [EXP.010.005.0001 at pdf pp 0077-0081].</p>	<p>of opinion that rely on events after May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; <p>insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.</p>	<p>the risk assessment which would be undertaken by an expert undertaking the Stage 2 Feasibility Assessment, being the identification of whether there was available port capacity and the time within which an agreement in relation to port would need to be reached with GPC.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>inadmissible because of the assumption identification and statement of reasoning rules.</p>
83.	[275]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <ul style="list-style-type: none"> Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not required the application of specialised knowledge; Speculation as to how Gladstone Port Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; 	<p>This evidence is:</p> <p><i>"GPA does not follow a regulated process for capacity allocation, rather it notes the date a request is lodged, liaises with the parties and then negotiates terms and conditions. GPA did not allocate port capacity based on its belief in a project, instead the capacity was allocated once a contract was committed."</i></p> <p>This is a statement of fact observable by Mr Freeman in his experience.</p> <p>Mr Freeman is qualified to give evidence based on facts observed in his experience. The basis for Mr Freeman's opinion as to the availability of port capacity is set out in paragraphs [244]-[249] of the November Report [EXP.010.005.0001 at pdf pp 0077-0081].</p> <p>Mr Morton also gives evidence that GPA operates on an un-regulated basis ([EXP.020.022.0001_0001</p>	<p><u>Suggested ruling</u></p> <p>This objection is not pressed as to the first sentence.</p> <p>The objection should be upheld as to the second sentence on the basis of the documents review ruling and the statement of reasoning ruling.</p> <p><u>Additional submission</u></p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>In this case, Mr Freeman is giving evidence, based on his own experience and observations including dealings with GPC and his review of documents which he considers to be relevant to his feasibility assessment, about whether the Joint Venture would be able to get port capacity for Stage 2 which includes identifying the relevant considerations which the GPC would take into account and then having regard to those considerations when assessing feasibility.</p> <p>This paragraph is contained in Part C; Comparison of Opinions and so is a</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. However I think it is arguable that the impugned evidence could be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants’ suggested ruling	(6) Plaintiffs’ suggested ruling	(7) Final ruling
		<ul style="list-style-type: none">Mr Freeman’s observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p>	at [117] pdf p. 0049].	<p>assumption identification and statement of reasoning rules;</p> <ul style="list-style-type: none">they could not be regarded as falling within the scope of the plaintiffs’ fallback argument because:<ul style="list-style-type: none">insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; <p>insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.</p>	<p>summary section of the more detailed section contained in Part B.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants’ suggested ruling.</p>	<p>Study in May 2005. Accordingly, that evidence may be admitted for the limited purpose of supporting the plaintiffs’ fallback argument referred to in the body of my judgment, but subject to the limitations there identified.</p> <p>(3) For the foregoing reasons, subject only to the exception stated in the previous paragraph, I uphold the objection.</p>
Item 6 from the defendants’ schedule of objections						
84.	Not pressed					
85.	Not pressed					
86.	Not pressed					
87.	Not pressed					
88.	Not pressed					
89.	Not pressed					
90.	Not pressed					
Item 7 from the defendants’ schedule of objections						
91.	[301] First sentence (‘I have been advised...’)	Hearsay. Limited to statement of assumption.	Agree that this should be limited to statement of assumption.	(I took the defendants’ position as seeking to support the provisional ruling.)	(I took the plaintiffs’ position as seeking to support the provisional ruling.)	(1) The sentence can be admitted on the basis that it is so regarded.

Response Report (Actual Costs) of Jamie Freeman dated 22 November 2018 [EXP.010.007.0001] (Costs Report)

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
Item 8 from the defendants' schedule of objections						
92.	[17(b)]	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>"In my opinion, it is likely that the Joint Venture would have been able to procure both rail infrastructure and port capacity through the Moura System to RGCT/BPCT via the primary market from QR and GPA respectively during the feasibility period of 2002- 2005, to support Stage 2 tonnages of 10mtpa (paragraph 191 of my Response Report)."</i></p> <p>This is not a statement of what the Joint Venture would have done in a hypothetical situation, it is a statement of his opinion about the availability of capacity, a matter within his expertise and how that might factor into a feasibility study.</p> <p>This summarises the 2 November Report. The basis for Mr Freeman's opinion as to the availability of port capacity is set out in paragraphs [244]-[249] of the 2 November Report [EXP.010.005.0001 at pdf pp 0077-0081].</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what the Joint Venture would have been able to do. That is evidence of what third parties would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>They argue further that the evidence in the Response Report (Actual Costs) of Jamie Freeman dated 22 November 2019 does not fall within the plaintiffs' fallback argument.</p>	<p>The plaintiffs rely on the matters stated in the Response to Objection.</p> <p>By this evidence, Mr Freeman is referring back to [191] of the 2 November 2018 report. This evidence is admissible on the same basis as that paragraph of his 2 November 2018 report.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>
93.	Not pressed					
94.	[38(a)]	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>"In my opinion, there was available port capacity for commitment during the feasibility period on the primary market at RGTCT/BPCT coal terminals for the long term mine production (Section 5.4 of my Response Report). Had the Joint Venture committed to a Port Agreement by mid-2006, it would have secured the port capacity allocation in a market of competing demand."</i></p> <p>This is a statement of observable fact from Mr Freeman's experience and a conclusion drawn from those facts about what the Joint Venture would have been able to secure had it committed to a Port Agreement. It is not about what the Joint Venture would have done.</p> <p>Mr Freeman is giving evidence of observable facts obtained in the course of his experience preparing and advising on feasibility studies.</p> <p>The basis for Mr Freeman's opinion as to the availability of port capacity is set out in</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to how GPC and the Joint Venture would have acted in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply category 2, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion that rely on events after May 2005.</p> <p>Further they argue the evidence in the Response Report (Actual Costs) of Jamie Freeman dated 22 November 2019 does not fall within the plaintiffs' fallback argument. [note: this appears to be a double up from the Annexure]</p> <p>They also contended the evidence in the</p>	<p>The plaintiffs rely on the matters stated in the Response to Objection.</p> <p>By this evidence, Mr Freeman is referring back to Section 5.4 of the 2 November 2018 report. This evidence is admissible on the same basis as section 5.4 of his 2 November 2018 report.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			<p>paragraphs [244]-[249] of the 2 November Report [EXP.010.005.0001 at pdf pp 0077-0081].</p>	<p>port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; <p>insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.</p>		
95.	[38(b)] Second sentence ('I disagree that...')	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>"I disagree with this opinion as capacity was available during the feasibility period and would have been allocated to the Joint Venture upon execution of a port agreement."</i></p> <p>This is a statement of fact observable by Mr Freeman in his experience.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Otherwise, Mr Freeman is qualified to give evidence based on facts observed in his experience.</p> <p>The basis for Mr Freeman's opinion as to the availability of port capacity is set out in paragraphs [244]-[249] of the 2 November Report [EXP.010.005.0001 at pdf pp 0077-0081].</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what the Joint Venture and GPC would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p>	<p>This evidence should be treated as being evidence as to Mr Freeman's opinion as to what the actual terms of the port contract would have been on the assumption that a port agreement was executed as he had opined would have occurred as part of the Stage 2 Feasibility Study.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I rule in the same way as item 37(2) and (3). Further, the proposition makes no sense. If an agreement had been executed, the terms would be known, an opinion would not be necessary. The "opinion" would only be adding a gloss to the assumption.

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
				<ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; <p>insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.</p>		
96.	[39]-[40]	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>"I consider that the Joint Venture could have negotiated a port agreement in 2003-2004, with the costs of the port services stated in the contract in line with that recorded by GPC for 2003. In my experience these would have escalated at CPI throughout the negotiation period until contract execution.</i></p> <p><i>In my opinion a likely term for a port agreement would be 10 years commencing 1 July 2007 with a renewable option for a further 10 years. In my experience port agreements had options to renew at 5-year or 10-year intervals."</i></p> <p>These are statements of facts including as to the content of common agreements observable by Mr Freeman in his experience and not about what third parties would have done in particular circumstances.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what the Joint Venture and GPC would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>Pursuant to the defendants' submissions in reply category 3, the evidence in the Response Report (Actual Costs) of Jamie Freeman dated 22 November 2019 does not fall within the plaintiffs' fallback argument. [note: this appears to be a double up from the Annexure]</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman</p>	<p>This evidence should be treated as being evidence as to Mr Freeman's opinion as to what the actual terms of the port contract would have been on the assumption that a port agreement was negotiated in 2003-2004 as he had opined would have occurred as part of the Stage 2 Feasibility Study.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I rule in the same way as item 37(2) and (3). Further, the proposition makes no sense. If an agreement had been negotiated, the terms would be known, an opinion would not be necessary. The "opinion" would only be adding a gloss to the assumption.

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
				<p>dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; <p>insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.</p>		
97.	[51]	<p>Not proper matters for expert opinion.</p> <p>Basis of opinions not set out.</p>	<p>This evidence is:</p> <p><i>“In general, SunWater would seek to recover actual outturn costs under the Water Transport Agreement (i.e. amortised capital charge). I consider it is likely the outturn cost would have been in the order of my estimate \$101.9M (\$2005). I do not consider capital would be funded upfront, instead the capital costs would be amortised and applied as a quarterly charge.”</i></p> <p>These are statements of fact observable by Mr Freeman in his experience and not statements about what a third party would have done in hypothetical circumstances.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p> <p>The basis for the calculation of this amount is set out in the 2 November Report [EXP.010.005.0001 at pdf p. 0161].</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what SunWater would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply category 3, the evidence in the Response Report (Actual Costs) of Jamie Freeman dated 22 November 2019 does not fall within the plaintiffs' fallback argument. [note: this appears to be a double up from the Annexure]</p>	<p>This evidence should be treated as being evidence as to Mr Freeman's opinion as to what the actual terms of the contract would have been on the assumption that an agreement was reached with SunWater on the terms identified by Mr Freeman as part of his feasibility assessment.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I rule in the same way as item 37(2) and (3). Further, the proposition makes no sense. If an agreement had been reached, the terms would be known, an opinion would not be necessary. The “opinion” would only be adding a gloss to the assumption.

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants’ suggested ruling	(6) Plaintiffs’ suggested ruling	(7) Final ruling
98.	[59] First sentence (‘As set out in...’)	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>“As set out in paragraph 378 of my Response Report (EXP.010.005.0001), the Connection Agreement covering the infrastructure works and amortised capital charge would be for a term of 20 years.”</i></p> <p>This is a statement of fact observable by Mr Freeman as to the content of agreements in his experience and not a statement about what a third party would have done in a hypothetical situation.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p> <p>It is based on paragraph [378] of the 2 November Report [EXP.010.005.0001 at pdf p. 0123].</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs’ characterisation of the evidence should be rejected. It expresses an opinion as to what a third party would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants’ submissions in reply category 3, the evidence in the Response Report (Actual Costs) of Jamie Freeman dated 22 November 2019 does not fall within the plaintiffs’ fallback argument. [note: this appears to be a double up from the Annexure]</p>	<p>This evidence should be treated as being evidence as to Mr Freeman’s opinion as to what the actual terms of the contract would have been on the assumption that an agreement was reached with Powerlink on the terms identified by Mr Freeman as part of his feasibility assessment including, in particular, [378] of the 2 November 2018 report.</p>	<p>(1) I adopt the defendants’ suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none">• I rule in the same way as item 37(2) and (3).• Further, the proposition makes no sense. If an agreement had been reached, the terms would be known, an opinion would not be necessary. The “opinion” would only be adding a gloss to the assumption.

Joint Expert Report on Offsite Water Supply of Jamie Freeman and Gary Harradine (D) dated 15 July 2019 [EXP.500.004.0001_2] (Joint Report (Water))

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
Item 9 from the defendants' schedule of objections						
99.	[4.1]	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>“Mr Freeman considered the pipeline CAPEX would be amortised over a 20 year term and applied on a monthly basis with payments escalating at CPI.”</i></p> <p>This is not a statement about what a third party would do in a hypothetical situation it is what the terms of an agreement are likely to be based on observable fact.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what a third party would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling and the statement of reasoning ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The basis for his opinion is contained in his 2 November 2018 report. It is not necessary for Mr Freeman to repeat the basis for his opinion in this joint expert report when it has been exposed elsewhere.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>
100.	[4.5] <u>the words 'and would have been for 20 years'</u>	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>“Mr Freeman does not agree to the term proposed by Mr Harradine as in his experience the term was nominated and negotiated between the parties and would have been for 20 years. Mr Freeman has applied a lower rate of return (7%) based on his experience with Sunwater contracts at that time where, under a contract for 20 years, the principal would be repaid close to 2 times.”</i></p> <p>This is not a matter of what a third party would do in a hypothetical situation it is rather evidence of facts observable by Mr Freeman in his experience.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what SunWater would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling and the statement of reasoning ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The basis for his opinion is identified in the impugned paragraph.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(1) I rule on items 100 and 101 together.</p> <p>(2) I adopt the defendants' suggested ruling.</p> <p>(3) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>
101.	[4.6]	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>“Mr Freeman arrived at his commercial parameters for Monto with respect to managing and varying the water solution for Isaac Plains, which in part was assigned from Carborough Downs. Further Mr Freeman has been involved in several feasibility studies and due diligence processes for various coal projects throughout Queensland (refer Attachment 2).”</i></p> <p>This simply describes Mr Freeman's experience.</p>	<p><u>Suggested ruling</u></p> <p>Mr Freeman does not explain how his previous experience provides the basis for the views he expresses in paragraph [4.5]. The objection should be upheld on the basis of the statement of reasoning objection.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The basis for his opinion is identified in the impugned paragraph.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	(1) See previous item.
102.	[5.3] Third sentence ('Mr Freeman considers...')	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>“Mr Freeman considers the Sunwater Water Transport and Supply Agreements would be</i></p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			<p><i>executed in July 2005 with Sunwater having managed the environmental approvals and land requirements prior to this date under the Early Works Deed."</i></p> <p>This is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.</p>	<p>opinion as to what the Joint Venture and SunWater would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling and the statement of reasoning ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p>	<p>undertaken during the Mine 1 Stage Development.</p> <p>Insofar as it refers to the fact that a contract would have been entered, this should be interpreted as being would have been able to be entered.</p> <p>The plaintiffs rely on the submissions made in the Response to Objection column.</p> <p>The basis for the opinion is contained in the 2 November 2018. It is not necessary for Mr Freeman to repeat the basis for his opinion in this joint expert report when it has been exposed elsewhere.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>
103.	[5.5] the words '(pre financial close i.e. indicatively mid 2004)' and '(post financial close i.e. mid 2005)	<p>Not proper matters for expert opinion.</p> <p>Basis of opinions not set out.</p>	<p>This evidence is:</p> <p><i>"Mr Freeman has been instructed to respond only to Mr Harradine's expert report of 2018 (not Mr Smith's expert report), and in doing so has outlined how water infrastructure would be acquired based on his experience in dealing with the infrastructure provider. This includes but is not limited to, interactions with Sunwater through the feasibility period to determine timeframes, critical risks, infrastructure and OPEX spend and commercial terms. In Mr Freeman's experience the work would be split into Early Works (pre financial close i.e. indicatively mid 2004) and Construction (post financial close i.e. mid 2005). The environmental and approvals process would be identified during the initial interactions with Sunwater and managed during the Early Works stage."</i></p> <p>This is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what the Joint Venture and a third party would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs rely on the submissions made in the Response to Objection column.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>
104.	[5.10] The words 'prior to mid-2005' First sentence ('Mr Freeman considers...')	<p>Not proper matters for expert opinion.</p> <p>Basis of opinions not set out.</p>	<p>This evidence is:</p> <p><i>"Mr Freeman considers environmental processes, other approvals as they may apply, and land access agreements would have been managed and finalised by Sunwater, not the Project, prior to mid-2005 under an Early Works Deed."</i></p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what the Joint Venture and third party would have done in hypothetical circumstances. The objection should be upheld on the basis of the</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs rely on the submissions</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			This is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.	hypothetical conduct ruling. <u>Additional submission</u> Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.	made in the Response to Objection column. The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.	
105.	Not pressed					
106.	[5.17] <u>First sentence</u>	Not proper matters for expert opinion. Basis of opinions not set out.	This evidence is: <i>"In Mr Freeman's experience the environmental investigations would be managed by Sunwater, Environmental impacts at that time until present were minimized by Sunwater through the design optimisation process whereby local alignment adjustments would be made to the alignment to reduce the extent and impact upon matters which would trigger an EIS. Whilst the time allowed in the indicative project schedule for environmental investigations would need to be extended if a full EIS were required in 2004, this need would have been identified early by Sunwater and the project schedule would be adapted accordingly."</i> This is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.	<u>NB: The first column contains a typographical error. It should refer to "final sentence": see Item 9 of ALL.502.001.0055.</u> <u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what third parties would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling. <u>Additional submission</u> Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs rely on the submissions made in the Response to Objection column. The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).
107.	[5.20] <u>the words 'over 2003'</u>	Not proper matters for expert opinion. Basis of opinions not set out.	This evidence is: <i>"Mr Freeman considers Sunwater would determine if an EPBC Act (1999) referral was required during its discussions with the customer over 2003. If so Sunwater would likely have prepared the Referral suitable for submission to the Department of Environment (DoE) with time requirements outlined to the JV. Sunwater would complete a site reconnaissance to assess the required technical studies methodologies and potential study constraints, meet with various department representatives (DoE and DEWR), Whilst Sunwater would try to reroute to minimise these impacts, in need this is a process that could be undertaken in the early works agreement, with time frames identified in early discussions."</i> This is opinion evidence about general	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what SunWater would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling. <u>Additional submission</u> Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs rely on the submissions made in the Response to Objection column. The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.			
108.	[5.27] the words '(pre financial close i.e. indicatively mid 2004)' and '(post financial close i.e. mid 2005)'	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>“Mr Freeman was instructed to respond only to Mr Harradine’s expert report of 2018 (not Mr Cavanagh’s expert report), and in doing so has outlined how water infrastructure would be acquired based on his experience in dealing with the infrastructure provider. This includes but is not limited to, interactions with Sunwater through the feasibility period to determine timeframes, critical risks, infrastructure and opex spend and commercial terms. In Mr Freeman’s experience the work would be split into Early Works (pre financial close i.e. indicatively mid 2004) and Construction (post financial close i.e. mid 2005). The land acquisition process would be identified during the initial interactions with Sunwater and managed during the Early Works stage.”</i></p> <p>This simply describes Mr Freeman’s experience.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs’ characterisation of the evidence should be rejected. It expresses an opinion as to what the Joint Venture and a third party would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants’ submissions in reply, the defendants argue the evidence does not fall within the plaintiffs’ fallback argument, and it concerns expression of opinion on events before May 2005.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>This is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants’ suggested ruling.</p>	<p>(1) I adopt the defendants’ suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>
109.	[5.32]	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>“Based on Mr Freeman’s experience with Sunwater (as the infrastructure provider), as set out in Attachment 2, Mr Freeman is of the opinion that Sunwater would have undertaken a detailed assessment and design of the alignment and would have adjusted that alignment to avoid such costs as derived by Mr Cavanagh.”</i></p> <p>This is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs’ characterisation of the evidence should be rejected. It expresses an opinion as to what SunWater would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs rely on the submissions made in the Response to Objection column.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants’ suggested ruling.</p>	<p>(1) I adopt the defendants’ suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>
110.	Not pressed					
111.	Not pressed					
112.	[5.44]	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>“Mr Freeman has determined the likely approval and land compensation durations for the water supply pipeline, and thereafter</i></p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs’ characterisation of the evidence should be rejected. It expresses an opinion as to what the Joint Venture and a</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage</p>	<p>(1) I adopt the defendants’ suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			<i>advised of the likely construction capital spend over financial years 2006 and 2007."</i> This simply explains the process Mr Freeman has undertaken.	third party would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.	Development. The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.	same way as item 40(2) and (3).
113.	[6.7]	Not proper matters for expert opinion. Basis of opinions not set out.	This evidence is: <i>"Based on Mr Freeman's experience with Sunwater (as the infrastructure provider), as set out in Attachment 2, the parties would enter into an Early Works Reimbursement Deed to cover survey, environmental investigations, detailed design, planning i.e. in the order of \$8m."</i> This statement is observable fact based on Mr Freeman's experience and otherwise this is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what SunWater and the Joint Venture would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling. <u>Additional submission</u> Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs rely on the submissions made in the Response to Objection column. The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).
114.	[6.13] First sentence	Not proper matters for expert opinion. Basis of opinions not set out.	This evidence is: <i>"Mr Freeman is of the opinion that infrastructure providers would seek to minimise disruption to land holders by considering the opportunity to co-locate with other infrastructure providers (road, rail, power, gas water) in existing or proposed infrastructure corridors (refer Attachment 5, page 4 - "The Study Corridor")."</i> This is evidence of a general nature as to the practices of infrastructure providers in the industry.	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what third parties would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. This is evidence of a general nature as to the practices of infrastructure providers in the industry. The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3), noting that the document referred to is a newsletter produced in 2012.
115.	Attachment 1 Mr Freeman's 'easement' and 'early works' references	Not proper matters for expert opinion. Basis of opinions not set out.	This summarises evidence previously given by Mr Freeman. Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Otherwise, Mr Freeman is qualified to give evidence based on facts observed in his experience. As to the basis for the opinion, it is contained in the 2 November Report at paragraphs [293] and [312] (re 'easement') and paragraphs [291], [295], [316], [328], [329] and [334] (re 'early works') [EXP.010.005.0001 at pdf pp 0095-0097, 0103, 0104, 0106-0108 and 0110].	<u>Suggested ruling</u> The evidence expresses an opinion as to what the Joint Venture and third parties would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling. <u>Additional submission</u> Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005 ('early works' references only).	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs rely on the submissions made in the Response to Objection column. The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants’ suggested ruling	(6) Plaintiffs’ suggested ruling	(7) Final ruling
Item 10 from the defendants’ schedule of objections						
116.	Not pressed					
Item 11 from the defendants’ schedule of objections						
117.	[7.11] <u>the words 'as it clearly evidences the intention of infrastructure providers to co-locate their infrastructure corridor with others, i.e. power and water'</u>	Irrelevant.	This evidence is responsive to Mr Harradine and is relevant.	<u>Suggested ruling</u> Mr Freeman’s view as to what intention a document evidences is irrelevant. The objection should be upheld on the basis of irrelevance. <u>Additional submission</u> Pursuant to the defendants’ submissions in reply category 2, the defendants argue the evidence does not fall within the plaintiffs’ fallback argument, and it concerns expression of opinion that rely on events after May 2005.	The evidence is something which forms part of, and is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs rely on the submissions made in the Response to Objection column.	(1) I adopt the defendants’ suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).
118.	[7.12] <u>the words 'however it accords with what Mr Freeman believes, and understands, would have been the case during the period when the Project would have been in discussions with, and negotiating arrangements with Powerlink.'</u>	Irrelevant.	Mr Freeman is qualified to provide background information drawn from documents to support his reasoning and to draw inferences from those documents based on his expertise.	<u>Suggested ruling</u> Mr Freeman’s view as to whether a document accords with his beliefs and understanding is irrelevant. The objection should be upheld on the basis of irrelevance. <u>Additional submission</u> Pursuant to the defendants’ submissions in reply category 2, the defendants argue the evidence does not fall within the plaintiffs’ fallback argument, and it concerns expression of opinion that rely on events after May 2005.	The evidence is something which forms part of, and is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. Mr Freeman states that the document accords with what he believes and understands would have been the case during the period when the Monto Mine was in discussions and negotiations with Powerlink. It is therefore relevant.	(1) I adopt the defendants’ suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).

Joint Expert Report on Offsite Power Supply of Jamie Freeman and Gary Harradine (D) dated 15 July 2019 [EXP.500.011.0001_2] (Joint Report (Power))

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
Item 12 from the defendants' schedule of objections						
119.	[4.1]	Not proper matters for expert opinion. Basis of opinions not set out.	This evidence is: <i>"Mr Freeman considered the power CAPEX would be amortised by Powerlink over a 20 year term and applied on a monthly basis with payments escalating at CPI."</i> This is not a matter of what a third party would do in a hypothetical situation it is rather evidence of facts observable by Mr Freeman in	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what the Joint Venture and Powerlink would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling and the statement of	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The basis for his opinion is contained in his 2 November 2018 report. It is not necessary for Mr Freeman to repeat the basis for his	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			his experience. Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.	reasoning ruling.	opinion in this joint expert report when it has been exposed elsewhere. In particular, it is based on [378] of the 2 November report [EXP.010.005.0001 at pdf p. 0123]. The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.	
120.	[4.5] <u>the words from 'and in the case of this Project' through to the end of the paragraph</u>	Not proper matters for expert opinion. Basis of opinions not set out.	This evidence is: <i>"Mr Freeman does not agree to the term proposed by Mr Harradine as in his experience the term was nominated and negotiated between the parties, and in the case of this Project, Mr Freeman believes it would have been for 20 years. Mr Freeman has applied a higher rate of return (13%) based on his experience with Powerlink where under a contract for 20 years the principal would be repaid close to 3 times."</i> This is not a matter of what a third party would do in a hypothetical situation it is rather evidence of facts observable by Mr Freeman in his experience based on the content of common agreements. Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what the Joint Venture and Powerlink would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.	I rule on items 120 and 121 together, and rule in the same way as items 100 and 101.
121.	[4.6]	Not proper matters for expert opinion. Basis of opinions not set out.	This evidence is: <i>"Mr Freeman arrived at his commercial parameters for Monto power infrastructure from negotiating and managing a power solution for Eagle Downs and negotiating and managing the Ergon arrangements with respect to Isaac Plains. Further, Mr Freeman has been involved in several feasibility studies and due diligence processes for various coal projects throughout Queensland (refer Attachment 2)."</i> This simply a summary of Mr Freeman's experience.	<u>Suggested ruling</u> Mr Freeman does not explain how his previous experience provides the basis for the views he expresses in paragraph [4.5]. The objection should be upheld on the basis of the statement of reasoning ruling.	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The basis for his opinion is identified in the impugned paragraph. The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.	I rule on items 120 and 121 together, and rule in the same way as items 100 and 101.
122.	[5.3] Third and Fourth sentences ('Mr Freeman states...')	Not proper matters for expert opinion. Basis of opinions not set out.	This evidence is: <i>"Mr Freeman states that the JV would enter into a Connection Agreement with Powerlink in mid 2004. This would cover both the early works requirements, provisions such that if the</i>	<u>Suggested ruling</u> The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what the Joint Venture and Powerlink would have done in hypothetical	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			<p><i>project did not achieve financial close the Connection Agreement would be terminated (and the project liable for costs incurred by Powerlink up to that point), and the scope of works and amortised capital values."</i></p> <p>This statement, at least in part, states facts observable by Mr Freeman in his experience, i.e. as to the content of Connection Agreements and what would be considered for a feasibility study.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p>	<p>circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling and the statement of reasoning ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p>	<p>Development.</p> <p>The basis for his opinion is contained in his 2 November 2018 report at [390] – [393]. It is not necessary for Mr Freeman to repeat the basis for his opinion in this joint expert report when it has been exposed elsewhere.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	
123.	[5.6] <u>the words '(pre-financial close i.e. indicatively from mid-2004)' and '(post financial close i.e. mid 2005)'</u>	<p>Not proper matters for expert opinion.</p> <p>Basis of opinions not set out.</p>	<p>This evidence is:</p> <p><i>"Mr Freeman has been instructed to respond only to Mr Harradine's expert report of 2018 (and not Mr Smith's Expert Report), and in doing so has outlined how power infrastructure would be acquired based on his experience in dealing with the infrastructure provider. This includes but is not limited to, interactions with Powerlink through the feasibility period to determine timeframes, critical risks, infrastructure and OPEX spend and commercial terms. In Mr Freeman's experience the work would be split into Early Works (pre-financial close i.e. indicatively from mid-2004) and Construction (post financial close i.e. mid 2005). The environmental and approvals process would be identified during the initial interactions with Powerlink and managed during the Early Works stage."</i></p> <p>This is a statement of Mr Freeman's experience.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what the Joint Venture and Powerlink would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The basis for his opinion is identified in the impugned paragraph.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>
124.	[5.10]	<p>Not proper matters for expert opinion.</p> <p>Basis of opinions not set out.</p>	<p>This evidence is:</p> <p><i>"Mr Freeman considers environmental processes, other approvals as they may apply, and easement resumption would have been managed and finalised by Powerlink from August 2004 to January 2006 under the early works component of the Connection Agreement. This is outlined in the indicative project schedule (Response Report 367). These</i></p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what the Joint Venture and Powerlink would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The basis for his opinion is contained in the impugned paragraph.</p> <p>The plaintiffs otherwise rely on their</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I took the plaintiffs' submission to include the proposition that the

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			<p><i>time frames and stages are indicative and it is noted that early interaction with Powerlink would identify and allow mitigation of timing risks relating to design, planning and approvals (refer Attachment 3, page 4 – “The Study Corridor”). Mr Freeman considers these timeframes reflect how Powerlink would have planned the task which is similar to that planning for Wandoan South to Eurombah Network Project (refer Attachment 3, page 7, where the timetable allows 2yrs from the release of the draft EIS to when the transmission line is commissioned). This project, although at a later date and for higher voltage transmission, is of a similar distance to that proposed for Monto. It demonstrates that Powerlink undertakes an EIS and ministerial designation. The time frame is 2 years in total from release of draft EIS to completion of construction which includes all approvals. This is in line with Mr Freeman’s recollection of the manner in which Powerlink planned and delivered the Eagle Downs power solution from 2008.”</i></p> <p>In part this contains statements of fact observable by Mr Freeman in his experience and otherwise goes to the content of a feasibility study.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Mr Freeman is qualified to give evidence based on facts observed in his experience. Otherwise, Mr Freeman is qualified to provide background information drawn from documents to support his reasoning and to draw inferences from those documents based on his expertise.</p> <p>Further, these opinions are cross referenced to a Powerlink document contained in Attachment 3.</p>	<p><u>Additional submission</u></p> <p>Pursuant to the defendants’ submissions in reply, the defendants argue the evidence does not fall within the plaintiffs’ fallback argument, and it concerns expression of opinion on events before May 2005.</p>	<p>submissions dated 6 September 2019 in relation to the defendants’ suggested ruling.</p>	<p>impugned evidence was within the scope of the plaintiffs’ fallback argument. The defendants advanced the objection recorded in column 5.</p> <ul style="list-style-type: none"> • However I think it is arguable that the impugned evidence concerning indicative scheduling and planning could be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005 because it might be probative of the outstanding tasks which would be identified in such a study if the tasks assumed by the indicative scheduling and planning had not been performed as at the date of the study • Accordingly, that evidence may be admitted for the limited purpose of supporting the plaintiffs’ fallback argument referred to in the body of my judgment, but subject to the limitations there identified. <p>(3) For the foregoing reasons, subject only to the exception stated in the previous paragraph, I uphold the objection.</p>
125.	Not pressed					
126.	[5.18] Final sentence (“The time allowances...”)	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>“The time allowances are reasonable for this work which would be undertaken in 2004.”</i></p> <p>This is a statement of assumption and opinion based on his analysis of work which would be undertaken drawing on his experience, not about what a third party would have done in particular circumstances. It is estimation for the purposes of a feasibility study.</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the statement of reasoning ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants’ submissions in reply, the defendants argue the evidence does not fall within the plaintiffs’ fallback argument, and it concerns expression of opinion on events before May 2005.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The basis for the opinion is explained in the balance of [5.18], [5.19] and [5.20].</p>	<p>(1) I adopt the defendants’ suggested ruling, but also would uphold the objection on the basis of the hypothetical conduct ruling i.e. “which would be undertaken in 2004”.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Otherwise, Mr Freeman is qualified to give evidence based on facts observed in his experience. The basis for the time period is contained in Appendix 12 to the 2 November Report [EXP.010.005.0001 at pdf pp 0165-0168].			
127.	[5.19]	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>“Mr Freeman considers the timeframes in his indicative project schedule reflect how Powerlink would have planned the infrastructure task, which is similar to how Powerlink planned Wandoan South to Eurombah Network Project (refer Attachment 3, page 7, where the timetable allows 2yrs from the release of the draft EIS to when the transmission line is commissioned). This project, although at a later date and for higher voltage transmission, is of a similar distance to that proposed for Monto. Australia Pacific LNG required connection to the transmission network for its future gas processing facilities. This process demonstrates that Powerlink undertakes an EIS and ministerial designation, for an industrial customer. The time frame is 2 years in total from release of draft EIS to completion of construction which includes all approvals, ministerial designation and easement acquisition. This planning structure is in line with Mr Freeman’s experiences in dealing with Powerlink in regard to Powerlink proposals to place an easement for transmission infrastructure across the Eagle Downs tenement.”</i></p> <p>This evidence is largely (with the exception of the first sentence) not about what a third party would do in a hypothetical situation, it is about facts observable in Mr Freeman’s experience and drawn from documents which Mr Freeman summarises.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Mr Freeman is qualified to give evidence based on facts observed in his experience. Otherwise, Mr Freeman is qualified to provide background information drawn from documents to support his reasoning and to draw inferences from those documents based on his expertise.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs’ characterisation of the evidence should be rejected. It expresses an opinion as to what Powerlink would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants’ suggested ruling.</p>	<p>(1) I adopt the defendants’ suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>
128.	Not pressed					

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
129.	Not pressed					
130.	[5.28]	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>“Mr Freeman’s indicative schedule for construction from September 2005 is for off-site manufacture of key infrastructure items including transformer, transmission line poles, conductor, earth wire, insulators and hardware and substation plant. Mr Smith has incorrectly interpreted this element of the schedule. Mr Freeman’s project schedule (Response Report paragraph 367-368) allows for key stages of the infrastructure project, along with physical construction on site which commences from February 2006. Mr Freeman considers the timeframes in his indicative project schedule reflect how Powerlink would have planned the infrastructure task, which is similar to how Powerlink planned Wandoan South to Eurombah Network Project for Australia Pacific LNG as outlined in previous sections (refer Attachment 3, page 7, where the timetable allows 2yrs from the release of the draft EIS to when the transmission line is commissioned).”</i></p> <p>With the exception of the phrase <i>“Mr Freeman considers the timeframes in his indicative project schedule reflect how Powerlink would have planned the infrastructure task”</i> the evidence is of opinion about the project schedule and facts observable by Mr Freeman in his experience.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Mr Freeman is qualified to give evidence based on facts observed in his experience. Otherwise, Mr Freeman is qualified to provide background information drawn from documents to support his reasoning and to draw inferences from those documents based on his expertise.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs’ characterisation of the evidence should be rejected. It expresses an opinion as to what Powerlink would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants’ suggested ruling.</p>	<p>(1) I adopt the defendants’ suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>
131.	[5.31]	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>“Mr Freeman was instructed to respond to only Mr Harradine’s expert report of 2018, and in doing so has outlined how power infrastructure would be acquired based on his experience in dealing with the infrastructure provider. This includes but is not limited to, interactions with Powerlink through the feasibility period to determine timeframes, critical risks, infrastructure and OPEX spend and commercial terms. In Mr Freeman’s</i></p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs’ characterisation of the evidence should be rejected. It expresses an opinion as to what the Joint Venture and Powerlink would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling and the statement of reasoning ruling.</p> <p><u>Additional submission</u></p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The basis for the expressed opinion is identified in [5.31] itself.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in</p>	<p>(1) I adopt the defendants’ suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			<p><i>experience, the work would be split into Early Works (pre financial close i.e. indicatively mid 2004) and Construction (post financial close i.e. mid 2005). The land acquisition process would be identified during the initial interactions with Powerlink and managed during the Early Works stage."</i></p> <p>This is a statement of Mr Freeman's experience.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Otherwise, Mr Freeman is qualified to give evidence based on facts observed in his experience.</p>	Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.	relation to the defendants' suggested ruling.	
132.	[5.36]	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>"Based on Mr Freeman's experience with Powerlink (as the infrastructure provider), as set out in Attachment 2, Mr Freeman is of the opinion that Powerlink would have undertaken a detailed assessment and design of the alignment and would have adjusted that alignment to avoid such costs as derived by Mr Cavanagh (refer Attachment 3, page 4 - "The Study Corridor", and page 8 - "How is the final alignment of a transmission line chosen?")."</i></p> <p>This evidence is in part the summary of a document drawing on Mr Freeman's experience. Otherwise, this is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.</p> <p>Mr Freeman is qualified to provide background information drawn from documents to support his reasoning and to draw inferences from those documents based on his expertise.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what Powerlink would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling and the statement of reasoning ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>
133.	[5.41] Sixth, Seventh, Eighth and Ninth sentences ('Mr Freeman considers his indicative estimates...')	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>"Mr Freeman considers his indicative timeframes reflect how Powerlink would have planned the Monto power task which is similar to that planning for Wandoan South to Eurombah Network Project (refer Attachment 3, page 7, where the timetable allows 2yrs from the release of the draft EIS to when the transmission line is commissioned). This project, although at a later date and for higher voltage transmission, is of a similar distance to that proposed for Monto. It demonstrates</i></p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what Powerlink would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>It also contains statements of fact based upon Mr Freeman's own observations.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			<p><i>Powerlink's process. Further, the time frame is 2 years from release of draft EIS to actual completion of construction, and land acquisition is completed within that 2 year time frame, which is in line with Mr Freeman's indicative project schedule."</i></p> <p>This evidence is (with the exception of the 1st phrase, which is of general practice) statements of fact observable by Mr Freeman in his experience.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Otherwise, Mr Freeman is qualified to provide background information drawn from documents to support his reasoning and to draw inferences from those documents based on his expertise.</p>			
134.	[6.11]	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>"Mr Freeman states that the parties could have entered into a Connection Agreement with Powerlink in mid-2004 covering the early works requirements. This agreement would contain provisions such that if the project does not achieve financial close the Connection Agreement would be terminated and the project liable for costs incurred by Powerlink up to that point, as this was the case for Eagle Downs. This would cover works in the order of \$1.5m which enables the planning, design, approvals to be undertaken prior to financial close."</i></p> <p>This evidence is not about what a third party would do in a hypothetical circumstance rather it is a statement of an option available to the Joint Venture based on statements of fact observable by Mr Freeman in his experience as to the content of agreements.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what the Joint Venture and Powerlink would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>
135.	[6.18] First sentence ('Mr Freeman is of the opinion...')	Not proper matters for expert opinion. Basis of opinions not set out.	<p>This evidence is:</p> <p><i>"Mr Freeman is of the opinion that infrastructure providers would seek to minimise disruption to land holders by considering the opportunity to co-locate with other infrastructure providers (road, rail, power, gas water) in existing or proposed infrastructure corridors (refer Attachment 3, page 4 - "The Study Corridor")."</i></p> <p>This is evidence about what infrastructure</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what third parties would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>Mr Freeman has addressed the fact that Attachment 3 post-dated May 2005. His evidence is that while Attachment 3 is dated April 2012, "it accords with what Mr</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 40(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			<p>providers would do as a matter of general practice and is admissible.</p> <p>Mr Freeman is qualified to give evidence based on facts observed in his experience. Otherwise, Mr Freeman is qualified to provide background information drawn from documents to support his reasoning and to draw inferences from those documents based on his expertise.</p>		<p>Freeman believes, and understands, would have been the case during the period when the Project would have been in discussions with, and negotiating arrangements with Powerlink”: at [7.7].</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	
136.	[6.22]	<p>Not proper matters for expert opinion.</p> <p>Basis of opinions not set out.</p>	<p>This evidence is:</p> <p><i>“Mr Freeman has outlined the indicative project schedule in working with an infrastructure provider through a feasibility study and construction phase. The Powerlink Connection Agreement, with early work, scope and amortised capex provisions, would be entered into in mid-2004 with provision to terminate should the Joint Venture not reach financial close.”</i></p> <p>This is an assumption (i.e. entry into the Powerlink Connection Agreement) and a comment about an observable fact in Mr Freeman's experience (i.e. provision to terminate).</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Mr Freeman is qualified to give evidence based on facts observed in his experience. Otherwise, Mr Freeman is qualified to provide background information drawn from documents to support his reasoning and to draw inferences from those documents based on his expertise.</p>	<p><u>Suggested ruling</u></p> <p>The plaintiffs' characterisation of the evidence should be rejected. It expresses an opinion as to what the Joint Venture and Powerlink would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. However I think it is arguable that the impugned evidence concerning indicative scheduling and planning could be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005 because it might be probative of the outstanding tasks which would be identified in such a study if the tasks assumed by the indicative scheduling and planning had not been performed as at the date of the study Accordingly, that evidence may be admitted for the limited purpose of supporting the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified. <p>(3) For the foregoing reasons, subject only to the exception stated in the previous paragraph, I uphold the objection.</p>
137.	Attachment 1 Mr Freeman's 'early works' references	<p>Not proper matters for expert opinion.</p> <p>Basis of opinions not set out.</p>	<p>This summarises evidence previously given by Mr Freeman.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Mr Freeman is qualified to give evidence based on facts</p>	<p><u>Suggested ruling</u></p> <p>The evidence expresses an opinion as to what the Joint Venture and third parties would have done in hypothetical circumstances. The objection should be upheld on the basis of the hypothetical</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p>	<p>I rule in the same way as item 136.</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants’ suggested ruling	(6) Plaintiffs’ suggested ruling	(7) Final ruling
			observed in his experience. The basis for the opinion is given in the 2 November Report at paragraphs [344], [353], [367], [392] and [397] [EXP.010.005.0001 at pdf pp 0112-0113, 0114, 0119-0120, 0128 and 0130].	conduct ruling. <u>Additional submission</u> Pursuant to the defendants’ submissions in reply, the defendants argue the evidence does not fall within the plaintiffs’ fallback argument, and it concerns expression of opinion on events before May 2005.	The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants’ suggested ruling.	
Item 13 from the defendants’ schedule of objections						
138.	Not pressed					
Item 14 from the defendants’ schedule of objections.						
139.	[7.7] the words 'however it accords with what Mr Freeman believes, and understands, would have been the case during the period when the Project would have been in discussions with, and negotiating arrangements with Powerlink.'	Irrelevant	Mr Freeman is qualified to provide background information drawn from documents to support his reasoning and to draw inferences from those documents based on his expertise.	<u>Suggested ruling</u> Mr Freeman’s view as to whether a document accords with his beliefs and understanding is irrelevant. The objection should be upheld on the basis of irrelevance. <u>Additional submission</u> Pursuant to the defendants’ submissions in reply category 2, the defendants argue the evidence does not fall within the plaintiffs’ fallback argument, and it concerns expression of opinion that rely on events after May 2005.	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. Mr Freeman’s evidence is that the document reflects the information that he considers would have been available when undertaking the Feasibility Study and would have informed the content of the study. It is therefore relevant. The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants’ suggested ruling.	I rule in the same way as item 118.

Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton (D) [EXP.500.026.0001] (Joint Report (Port))

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
Item 15 from the defendants' schedule of objections						
140.	[2.1] Mr Freeman's items 3, 4, 5, 6, 7, 8 and 10	Not proper matters for expert opinion. Rather, Mr Freeman's opinions are based on: (a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge; (b) Speculation as to how Gladstone Ports Corporation (and the Joint	Refer to report. With the exception of 7 (second bullet) and 10 (second and third bullets) these are matters of fact observable by Mr Freeman in his experience, including as to how GPC operates and Macarthur Coal's standing in the industry (which would have been notorious: see <i>Cargill</i> at [50(19)]). Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Mr Freeman is qualified to give evidence based on facts observed in his experience. Otherwise, Mr	<u>Suggested ruling</u> The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling. <u>Additional submission</u> In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. [2.1] Items 3, 4, 5, 6, 7, 8 and 10 are all contained in the table under the heading "Project Feasibility Assessment" which commences at pdf p.5 and is contained in section 2 which is entitled "Summary of Key Matters" and is described as a "high level summary".	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6: <ul style="list-style-type: none">I have ruled that the plaintiffs may not advance the unpleaded advice case. I am otherwise not persuaded by the defendants' arguments as to irrelevance, sufficient to rule the impugned evidence out on that basis.I took the plaintiffs' submission to include the proposition that the

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p>Freeman's industry experience extends to knowledge gained by involvement in the industry about the track record of significant participants in the industry, such as Macarthur Coal (which would have been notorious in the industry): see <i>Cargill</i> at [50(19)].</p> <p>As to item 3, the possibility of a secondary market for port capacity was addressed in Mr Stephan's evidence ([TRA.500.029.0001] at T29-56/9-21).</p> <p>As to item 4, see the 2 November Report [EXP.010.005.0001 at [254(a)] and [254(b)] pdf pp 0082-0083].</p> <p>As to item 5, see the response to the objection to paragraph [222] of [EXP.010.005.0001] above.</p> <p>As to item 6, the availability of capacity is addressed in paragraphs [242]-[250] of the 2 November Report [EXP.010.005.0001 at pdf pp 0077-0081].</p> <p>As to item 7, the basis for Mr Freeman's opinion on this issue is addressed in paragraphs [228]-[229] of the 2 November Report [EXP.010.005.0001 at pdf pp 0073-0074].</p> <p>As to item 8, the first bullet point is addressed in paragraph [215] of the 2 November Report [EXP.010.005.0001 at pdf p. 0069].</p> <p>As to item 10, Mr Freeman's reasoning on this issue is set out in paragraph [239] of the 2 November Report [EXP.010.005.0001 at pdf p. 0076]. The experts agree that "there was no formal process, procedure, or policy specifying how GPC allocated capacity" ([EXP.500.026.0001 at pdf p. 0013]).</p>	<ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 	<p>The basis for the opinions contained in this summary are identified elsewhere in either or both the Joint Expert Report (especially section 5 which commences at pdf p.18) and the underlying reports of the experts, which are identified at [1.2] and [1.3] on pdf p.3 and in relation to which particular paragraphs are cross-referenced in the table contained in Appendix 3 which commences at pdf p.31.</p> <p>The statements concerning taking a calculated risk in the secondary market and the prospect of the GPC accelerating expansions of the port and undertaking further expansions of the port are relevant issues which both experts consider to be relevant to the issue of "Project Feasibility Assessment". Mr Morton comments on the same issues and does not say, instead, that such topics are irrelevant to the assessment. It is therefore premature for the Court to decide that such topics are irrelevant to the issues of that which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. I think it is arguable that the impugned evidence could be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005.</p> <ul style="list-style-type: none"> However I in each case, the expression of opinion is inadmissible because of the assumption identification and statement of reasoning rules. These rules must be met by the expression of expert opinion. Failure so to do cannot be remedied after the fact by way of a lawyer's submission attempting to identify the requisite assumptions. Accordingly, that evidence may be not be admitted for the purpose of supporting the plaintiffs' fallback argument. <p>(3) For the foregoing reasons, I uphold the objection.</p>
141.	[3.4]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p>	<p>This evidence is:</p> <p><i>"Mr Freeman, based on his experience (refer Appendix 6- Details of Mr Freeman's Relevant Experience) considers it is the Joint Venture that must satisfy itself that mine production will be able to be exported in such a way so as to attract and secure funding (i.e. by whatever means). For clarity, Mr Freeman does not have a view on how the Joint Venture may have been looking to secure funding for the Project."</i></p> <p>This is not a statement about what the Joint Venture would have done in a hypothetical circumstance, rather it is a statement of fact.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p> <p><u>Additional submission</u></p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>[3.4] appears in section 3 at pdf p.11 under the sub-heading "Project Feasibility Stage" and is responsive to Mr Morton's opinion on the same topics which appears at [3.3]. It is therefore relevant.</p> <p>The evidence in this paragraph is stated to be based on Mr Freeman's own experience which is identified in Appendix 6, and is not based on the</p>	<p>(1) I reject the plaintiffs' characterisation of the impugned paragraph. The paragraph is neither a statement of fact nor an identification of a practice in the industry. The paragraph is not a proper statement of expert opinion about what the Joint Venture must do. I uphold the objection for these reasons.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	done in the circumstances.	<p>statement of reasoning rules;</p> <ul style="list-style-type: none"> they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 	<p>things which are referred to in the Objection column.</p> <p>The evidence does not refer to taking a calculated risk in the secondary market or the prospect of the GPC accelerating expansions of the port and undertaking further expansions of the port.</p>	
142.	[3.7]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning</p>	<p>This evidence is:</p> <p><i>"In addition to capacity in the primary market, the experts agree that: (a) There may be potential to acquire capacity on the secondary market (i.e. via agreement with another miner to purchase its contracted capacity); and (b) There may be potential to use capacity on an uncontracted basis (i.e. on an 'ad hoc' basis)."</i></p> <p>This is evidence as to facts observable by the experts in their experience. It is not a statement of what the Joint Venture or any third party would have done in hypothetical situations.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the statement of reasoning ruling.</p> <p><u>Additional submission</u></p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development, and as being relevant to that issue.</p> <p>[3.7] appears in section 3 which commences at pdf p.11 under the sub-heading "Project Feasibility Stage".</p> <p>[3.7] contains a statement of agreement by the experts about a particular matter. The experts were only instructed to provide reasons for disagreement in the joint expert report. They were not required to, and were not instructed to, provides reasons for agreement, and these instructions were approved by the Court.</p> <p>The defendants agreed to these instructions being provided to the experts and so cannot now object because the basis for a statement of opinion reached by agreement has not been identified in the joint expert report.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. However I think it is arguable that the impugned evidence could be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, that evidence may be admitted for the limited purpose of supporting the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified. <p>(3) For the foregoing reasons, subject only to the exception stated in the previous</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		or constructing port expansions.		<p>hypothetical Stage 2 Feasibility Study as at May 2005;</p> <ul style="list-style-type: none"> o insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 		paragraph, I uphold the objection
143.	[3.9] [3.13] [3.12]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p>This evidence is:</p> <p><i>"The experts agree that there was no formal process, procedure, or policy specifying how GPC allocated capacity. The negotiation process was 'fluid'. 3.1 0. Coal Handling Agreements (CHAs) provided the legally binding allocation of capacity. Prior to that, there was a spectrum of arrangements which provided increasing certainty that GPC would allocate capacity to the mine (e.g. agreed commercial terms, formal exchange of letters, heads of agreement).</i></p> <p><i>GPC would agree commercial terms, and then there would be time allowed to finalise detailed contract negotiations and execute agreements, with some of the other forms of deal sometimes used as intermediate steps to provide increased certainty.</i></p> <p><i>Once the commercial principles had been agreed, if another party was willing to sign a ToP contract for that capacity, there may be a process of GPC requiring 'sign up', or 'let it go'.</i></p> <p><i>GPC appeared to tolerate extended periods to finalise agreements even in the face of known competing demand, provided that it remained confident that the agreement would be signed in accordance with the agreed commercial terms, as evidenced by the protracted negotiations with Anglo for the Dawson project (although the specific circumstances around this negotiation are unknown)."</i></p> <p>This is evidence summarising observable facts about the operations of GPC it is not evidence about what GPC would have done in a particular hypothetical circumstance.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling, the hypothetical conduct ruling and the state of mind ruling.</p> <p><u>Additional submission</u></p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> • they cannot be relied on for the purpose of supporting the unpleaded advice case; • even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; • they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> o insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; o insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development, and as being relevant to that issue.</p> <p>[3.12] appears in section 3 which commences at pdf p.11 under the sub-heading "Project Feasibility Stage".</p> <p>[3.12] contains a statement of agreement by the experts about a particular matter. The experts were only instructed to provide reasons for disagreement in the joint expert report. They were not required to, and were not instructed to, provides reasons for agreement, and these instructions were approved by the Court.</p> <p>The defendants agreed to these instructions being provided to the experts and so cannot now object because the basis for a statement of opinion reached by agreement has not been identified in the joint expert report.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>I dismiss the objection. I agree that the impugned evidence is to be construed as factual evidence summarising observable facts about the operations of GPC and is not evidence about what GPC would have done in a particular hypothetical circumstance.</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
			done in the circumstances. Various coal handling agreements of the kind referred to in these paragraphs are in evidence ([GPC.001.001.1019], [GPC.001.001.1088], [GPC.001.001.1196], [GPC.001.001.1249], [GPC.001.001.1302], [GPC.001.001.1449] and [GPC.001.001.1496]).	of a hypothetical Stage 2 Feasibility Study as at May 2005.		
144.	Not pressed					
145.	[4.4]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p>This evidence is:</p> <p><i>"Mr Freeman considers that the Monto JV could have secured committed capacity by mid-2004. While he considers that the Monto JV would have preferred this to be conditional upon: (1) FID by the Monto JV; and (2) an approved mining lease, he considers that the Monto JV could have been willing to sign an unconditional contract if GPC would not accept these conditions given the market of high demand (Response Report paragraph 266)."</i></p> <p>This is predominately statements of facts observable in Mr Freeman's experience. Otherwise it is about what the Joint Venture <u>could</u> have done, which is a matter relevant to the content of a feasibility study.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. The basis for this opinion is set out in the 2 November Report at paragraph [266] [EXP.010.005.0001 at pdf p. 0088].</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development, and so is relevant evidence.</p> <p>[4.4] appears under the sub-heading "Project Feasibility Stage" in section 4 which commences on pdf p.17.</p> <p>By this evidence, Mr Freeman does no more than identify what the Joint Venture could have done in the event that GPC did not agree to enter a conditional contract of the type which he identifies. This is relevant to showing the conclusions which an expert conducting a feasibility assessment would have reached in the event that the GPC did not agree to entering a conditional port contract.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
				read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.		
146.	[5.5]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p>This evidence is:</p> <p><i>"Mr Freeman contends that the Project may have accepted a calculated risk taken to rely on ad hoc or secondary market capacity should capacity in the primary market fall short of the required 10 mtpa."</i></p> <p>This is about what the Joint Venture could have done, which is relevant to the content of a feasibility study.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development, and so is relevant evidence.</p> <p>[5.5] appears under the sub-heading "Project Feasibility Assessment" in section 5 which commences on pdf p.18.</p> <p>By this evidence, Mr Freeman does no more than identify what the Joint Venture could have done in the event that there was insufficient primary capacity at the port to support the Stage 2 tonnages. This is relevant to showing the conclusions which an expert conducting a feasibility assessment would have reached in the event that there was insufficient primary capacity at the port.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
147.	[5.12] second sentence	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p>This evidence is:</p> <p><i>"Despite this, Mr Freeman considers that had the demand profile required earlier additional capacity, then GPC would have accelerated expansions or initiatives per Appendix 5 paragraphs A5.11 and A5.17."</i></p> <p>This is opinion evidence about general industry practices based on facts observed by Mr Freeman in the course of his experience and what participants in the industry (with whom he has dealt) would be likely to do in particular circumstances.</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p>The objection should also be upheld on the basis that Mr Freeman does not have the required expertise. The plaintiffs concede that Mr Freeman does not have the expertise necessary to give evidence about the construction or expansion of the terminal: see T63-20/44-46.</p> <p><u>Additional submission</u></p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 		<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>
148.	[5.15]	<p>Not proper matters for expert opinion.</p>	<p>This evidence is:</p> <p><i>"Beyond the planned expansion of RGTCT to</i></p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the</p>	<p>The first sentence is something which forms part of, or is relevant to demonstrating, the conclusions which</p>	<p>(1) I adopt the defendants' suggested ruling.</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p><i>65mtpa, Mr Freeman claims that there were additional opportunities for GPC to expand RGTCT to 75-80mtpa through operational improvements or to 100 mtpa through infrastructure investment. Mr Freeman considers that, had there been sufficient demand for such capacity, by mid2005 GPC would have investigated and ultimately committed to such expansions, and that this could have occurred by mid-2007 in conjunction with GPC's other planned expansions. Mr Freeman has reviewed the additional and unredacted GPC documents made available in June 2019 and prepared a supporting analysis of how GPC has considered expansions or available capacity. In doing so, Mr Freeman remains of the view that GPC had opportunity for further expansions in 2005 (refer Appendix 5, paragraphs A5.11 to A5.12)."</i></p> <p>To the extent that this evidence is based on Mr Freeman summarising and drawing inferences from the documents in exercising his expertise, it is admissible.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Mr Freeman is qualified to give evidence based on facts observed in his experience. Otherwise, Mr Freeman is qualified to provide background information drawn from documents to support his reasoning and to draw inferences from those documents based on his expertise.</p> <p>The basis for the first sentence of this paragraph is set out in the 2 November Report [EXP.010.005.0001] at [254(a)] and [254(b)] pdf pp 0082-0083].</p>	<p>basis of the documents review ruling and the hypothetical conduct ruling.</p> <p>The objection should also be upheld on the basis that Mr Freeman does not have the required expertise. The plaintiffs concede that Mr Freeman does not have the expertise necessary to give evidence about the construction or expansion of the terminal: see T63-20/44-46.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply category 2, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion that rely on events after May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 	<p>would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development, and so is relevant evidence.</p> <p>[5.15] appears under the sub-heading "Project Feasibility Assessment" in section 5 which commences on pdf p.18.</p> <p>By this evidence, Mr Freeman identifies that there were additional opportunities for GPC to expand the RG Tanna Coal Terminal beyond those which had been announced. Information about prospective terminal expansions is something which Mr Freeman considers would have been discussed with GPC at the relevant time: see [254] of the 2 November 2018 report.</p> <p>He is not professing an opinion about the construction or expansion of the terminal; rather, he is expressing an opinion about what he considers an expert would have been told about proposed expansions in the course of conducting negotiations with the GPC.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
149.	[5.17]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p>This evidence is:</p> <p><i>"The experts disagree as to the application, and weighting, of factors that may have been considered by GPC in allocating capacity to coal customers."</i></p> <p>This goes to matters of fact observable by Mr Freeman in his experience.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.. 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development, and so is relevant evidence.</p> <p>[5.17] appears under the sub-heading "Project Feasibility Assessment" in section 5 which commences on pdf p.18.</p> <p>In this section, the experts are identifying what they considered to be the application, and weighting, of factors that may have been considered by GPC in allocating capacity, being a topic which is obviously relevant to a feasibility assessment. [5.17] records that the experts disagree about this issue. Later paragraphs contain the reasons for the disagreement.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(1) I rule on items 149 and 150 together.</p> <p>(1) I adopt the defendants' suggested rulings.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>
150.	[5.18]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the</p>	<p>This evidence is:</p> <p><i>"Mr Freeman considers that GPC would allocate capacity based on customer's willingness to sign a ToP contract and does not consider that GPC, nor its shareholding ministers, would get too concerned about project bona fides in executing a contract. Mr Freeman has reviewed the additional and unredacted GPC documents made available in June 2019 and prepared a supporting analysis</i></p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of</p>	<p>The first sentence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development, and so is relevant evidence.</p> <p>[5.18] appears under the sub-heading "Project Feasibility Assessment" in section</p>	<p>I rule in the same way as item 149.</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p><i>of how GPC behaved with competing mines and Monto during 2002-2006 (refer Appendix 5 - Mr Freeman's Supporting A) . In doing so, Mr Freeman remains of the view that Monto could have secured the capacity by entering either a conditional port contract from mid-2004, or HOA if that was GPC's preferred mechanism. Refer Appendix 5 paragraphs A5.1 to A5.1 0."</i></p> <p>This is evidence of facts observable by Mr Freeman in his experience. It is also based on Mr Freeman summarising and drawing inferences from the documents in exercising his expertise and is admissible.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p>	<p>opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 	<p>5 which commences on pdf p.18.</p> <p>By this evidence, Mr Freeman is explaining his reasons for disagreement with Mr Morton.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	
151.	[5.22]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a</p>	<p>This evidence is:</p> <p><i>"While Mr Freeman acknowledges that there was a 'window' within which there was sufficient available developable capacity for 10 mtpa in 2003-04, he maintains that there were still opportunities between mid-2004 and mid-2006, albeit with increased risk that Monto could be 'pipped at the post' by other customers signing ToP agreements. Mr Freeman stated in his Response Report that the contract would likely be negotiated over 2003-04 (paragraph 261 and 270), with conditions that would include relevant approvals to proceed with the development of Stage 2. Mr Freeman has reviewed the additional and unredacted confidential GPC documents made</i></p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint</p>	<p>The first two sentences are something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development, and so is relevant evidence.</p> <p>[5.22] appears under the sub-heading "Project Feasibility Assessment" in section 5 which commences on pdf p.18.</p> <p>By this evidence, Mr Freeman is explaining his reasons for disagreement with Mr Morton which is referred to in [5.21], and is therefore relevant to the topic of the conclusion which would have been</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p><i>available in June 2019 and prepared a supporting analysis of how the Port behaved toward competing mines and Monto during 2002-2006. In doing so, Mr Freeman remains of the view that Monto could have secured the capacity by entering either a conditional port contract from mid-2004, or Heads of Agreement (HOA) if that was the Port's preferred mechanism. Refer Appendix 5 paragraphs A5.1 to A5.10 and A5.33 to A5.36."</i></p> <p>This is evidence of facts observable by Mr Freeman in his experience. It is also based on Mr Freeman summarising and drawing inferences from the documents in exercising his expertise and is admissible. It is not evidence about what a third party would have done in hypothetical circumstances.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p> <p>As to the availability of capacity, this is addressed in paragraphs [242]-[250] of the 2 November Report [EXP.010.005.0001 at pdf pp 0077-0081].</p>	<p>Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 	<p>reached by the expert conducting the feasibility study as to the date by which a port agreement needed to be entered by the Joint Venture.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	
152.	[5.25]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p>	<p>This evidence is:</p> <p><i>"Mr Freeman considers that no other mine project would have been given preference ahead of Monto in securing capacity. Monto would have been allocated capacity on the basis that it was established with GPC through negotiations of Stage 1 and Stage 2 tonnage and would have signed a ToP contract (with conditions) in mid-2004. Mr Freeman has reviewed the additional and unredacted GPC documents made available in June 2019 and prepared a supporting analysis of how GPC and Shareholding Ministers considered capacity during 2002-2006. In doing so, Mr Freeman remains of the view that Monto could have secured the capacity by entering either a conditional port contract from mid-2004, or Heads of Agreement (HOA) if that was GPC's preferred mechanism to plan and allocate capacity. Refer Appendix 5 paragraphs A5.13 to A5.19."</i></p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>Pursuant to the defendants' submissions in reply category 2, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion that rely on events after May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman</p>	<p>The first two sentences are something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development, and so is relevant evidence.</p> <p>[5.25] appears under the sub-heading "Project Feasibility Assessment" in section 5 which commences on pdf p.18.</p> <p>By this evidence, Mr Freeman is explaining his reasons for disagreement with Mr Morton which is referred to in [5.27], and is therefore relevant to the topic of the conclusion which would have been reached by the expert conducting the feasibility study as to whether the Joint Venture would have been able to secure port capacity at Gladstone Port.</p> <p>The plaintiffs otherwise rely on their</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p>To the extent that this evidence is based on Mr Freeman summarising and drawing inferences from the documents in exercising his expertise, it is admissible.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Mr Freeman is qualified to give evidence based on facts observed in his experience. Otherwise, Mr Freeman is qualified to provide background information drawn from documents to support his reasoning and to draw inferences from those documents based on his expertise. Monto's status as being established with GPC is addressed in paragraph [215] of the 2 November Report [EXP.010.005.0001 at pdf p. 0069].</p>	<p>dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; <p>insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.</p>	<p>submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	
153.	[5.31]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p>	<p>This evidence is:</p> <p><i>"Mr Freeman considers that Stage 1 tonnages are relevant as it would have enabled Monto to establish a relationship with GPC and have access to information on 'who else' wanted capacity and their readiness to sign a contract with GPC. Mr Freeman notes that Mr Talbot of Macarthur was known within the Blackwater Corridor having set up Jellinbah mine prior to Coppabella, and given the industry and supply chain is small, the parties would have been aware of his achievements and reputation."</i></p> <p>This evidence is statements of fact observable by Mr Freeman in his experience, as well as assumptions made by him and comments about the track record of significant participants in the industry, such as Macarthur Coal (which would have been notorious in the industry): see <i>Cargill</i> at [50(19)].</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development, and so is relevant evidence.</p> <p>[5.31] appears under the sub-heading "Project Feasibility Assessment" in section 5 which commences on pdf p.18.</p> <p>By this evidence, Mr Freeman is explaining his reasons for disagreement with Mr Morton which is referred to in [5.32], and relates to the factors which would have been taken into account by GPC in allocating port capacity and therefore matters which would have been considered by the expert conducting the feasibility study as to whether the Joint Venture would have been able to secure port capacity at Gladstone Port.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in</p>	<p>(1) I adopt the defendants' suggested ruling, and would also uphold the objection on the basis of the state of mind ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
		<p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p>done in the circumstances. Mr Freeman is qualified to give evidence based on facts observed in his experience.</p> <p>As to the first sentence, Monto's relationship with GPC as a result of Stage 1 is addressed in paragraph [215] of the November Report [EXP.010.005.0001 at pdf p. 0069].</p> <p>As to the second sentence, the reputation of Mr Talbot and Macarthur Coal is addressed in response to the objections to paragraphs [25], [59], [67] and [214]-[219] of [EXP.010.005.0001] as set out above.</p>	<p>fallback argument because:</p> <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 	<p>relation to the defendants' suggested ruling.</p>	
154.	[5.34]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p>This evidence is:</p> <p><i>"Mr Freeman maintains that it is likely that GPC would have accepted a ToP agreement from Monto subject to mining lease approval, and possible that GPC would have accepted a ToP agreement from Monto subject to final investment decision. Mr Freeman has reviewed the additional and unredacted GPC documents made available in June 2019 and prepared a supporting analysis of the risk position GPC had in relation to timing and volumes. In doing so, Mr Freeman remains of the view that GPC would agree to conditions precedent, for achievement of ML and financial investment decision. Refer Appendix 5 paragraphs A5.22 to A5.32."</i></p> <p>To the extent that this evidence is based on Mr Freeman summarising and drawing inferences from the documents in exercising his expertise, it is admissible.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply category 2, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion that rely on events after May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on 	<p>The first sentence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>[5.34] appears under the sub-heading "Project Feasibility Assessment" in section 5 which commences on pdf p.18.</p> <p>By this evidence, Mr Freeman is explaining his reasons for disagreement with Mr Morton which is referred to in [5.35], and relates to the prospects of GPC entering into a conditional port contract with the Joint Venture in 2004.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
				<p>subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005;</p> <ul style="list-style-type: none"> ○ insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 		
155.	[5.37]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p>This evidence is:</p> <p><i>"Mr Freeman argues that commercial terms between Monto and GPC could have been locked in during 2003. Therefore, he maintains that prices would have reflected charges that prevailed in 2003 and then escalated to 2005 dollars. Mr Freeman has reviewed contracts and other documents released by GPC in June and maintains his position that the price during the negotiation period would have been incorporated into the agreement. This is addressed this further in Appendix 5 paragraphs A5.37 and A5.38."</i></p> <p>This is evidence of facts observable by Mr Freeman in his experience. It is also assumptions made by him. Moreover, to the extent that this evidence is based on Mr Freeman summarising and drawing inferences from the documents in exercising his expertise it is admissible. It is not evidence about what a third party would have done in a hypothetical situation.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances.</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> • they cannot be relied on for the purpose of supporting the unpleaded advice case; • even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; • they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> ○ insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 	<p>The first two sentences are something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>[5.37] appears under the sub-heading "Project Feasibility Assessment" in section 5 which commences on pdf p.18.</p> <p>It also appears under the sub-heading "Port Prices (for a BFS)" at pdf p.25.</p> <p>The reference to BFS is Bankable Feasibility Study: see pdf p.11.</p> <p>By this evidence, Mr Freeman is explaining his reasons for disagreement with Mr Morton which is referred to in [5.38], and relates to "the date at which port prices would have been set for the BFS": see [5.36].</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
				<p>2005;</p> <ul style="list-style-type: none"> ○ insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 		
156.	Appendix 3 paragraphs in the Mr Freeman's column at pp.30-33	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p>Refer to report.</p> <p>This evidence summarises Mr Freeman's opinions.</p> <p>Mr Freeman is qualified to give evidence as to what participants in the industry would have done in the circumstances. Mr Freeman is qualified to give evidence based on facts observed in his experience. Otherwise, Mr Freeman is qualified to provide background information drawn from documents to support his reasoning and to draw inferences from those documents based on his expertise.</p> <p>As to the entry on page 30, the possibility of a secondary market for port capacity was addressed in Mr Stephan's evidence ([TRA.500.029.0001] at T29-56/9-21). Otherwise, the bases for these matters are set out in the 2 November Report as cross-referenced in Appendix 3 [EXP.010.005.0001 at pdf p. 0146].</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> • they cannot be relied on for the purpose of supporting the unpleaded advice case; • even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; • they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> ○ insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; ○ insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards 	<p>These paragraphs sit under the heading "Project Feasibility Stage" which appears on pdf p. 31. They provide cross-references to the 2 November 2018 report and the Joint Expert Report itself in relation to the topics which the experts agree are relevant to that topic (as can be seen from elsewhere in the Joint Expert Report as identified above).</p> <p>This evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs otherwise rely on their submissions dated 6 September 2019 in relation to the defendants' suggested ruling.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 37(2) and (3).</p>

(1) Item	(2) Page/paragraph	(3) Objection	(4) Response to objection	(5) Defendants' suggested ruling	(6) Plaintiffs' suggested ruling	(7) Final ruling
				an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.		
157.	Appendix 5	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>The statements concerning taking a calculated risk in the secondary market, accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p>Refer to report.</p> <p>This evidence is based on Mr Freeman summarising and drawing inferences from the documents in exercising his expertise and is admissible.</p>	<p>(I took the defendants' position as seeking to support the provisional ruling.)</p> <p><u>Additional submission</u></p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 		<p>(1) I uphold the objection. The appendix is not an expression of admissible expert opinion. It is simply an identification of the inferences which Mr Freeman would draw from the documents. In so doing he is not expression opinions on matters which are proper matters for expert opinion. See in particular the body of my reasons in <i>Sanrus No 5</i>. at [48] and [58].</p> <p>(2) In case the plaintiffs should be taken as submitting that the material in appendix 5 is admissible for the purpose of the plaintiffs' fallback argument:</p> <ul style="list-style-type: none"> The defendants have advanced the objection recorded in column 5. I agree that the impugned evidence cannot be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, I uphold the objection and would reject the submission that the impugned evidence may be admitted for the purpose of the plaintiffs' fallback argument. <p>(3) For the foregoing reasons, I uphold the objection.</p>

**SANRUS PTY LTD & ORS V MONTO COAL 2 PTY LTD & ORS
SUPREME COURT OF QUEENSLAND PROCEEDING NO 8609/07**

SCHEDULE 2

Ruling on the defendants' additional objections to reports of Mr Freeman

(1) No.	(2) Page/Paragraph	(3) Objection	(4) Response to Objection	(5) Defendants’ Suggested Ruling	(6) Plaintiffs’ Suggested Ruling	(7) Final ruling
Report of Jamie Freeman dated 2 November 2018 [EXP.010.005.0001] [AID.020.011.0001]						
1.	[68], last sentence	<p>Mr Freeman gives an opinion about what the Joint Venture, QR and GPC would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not proved by admissible evidence.</p>	<p>The sentence which is the subject of objection refers to what could have been done, not what would have been done. That is plain from the words “<i>would have been able to</i>”. It is the proper subject of opinion evidence by an expert who is concerned with addressing what a feasibility study would have contained.</p> <p>By this evidence, Mr Freeman is identifying that there was an opportunity for something to occur between late 2003 and mid-2004, in the context of evidence given in his report such as at [191] (.0061), [194] (.0061), [201] (.0063), [220] (.0071), [237] (.0075), [254] (.0082), [255] (.0083), [264] (.0087) and [265] (.0088) (without being exhaustive and noting that some parts or all of these paragraphs are not the subject of objection).</p> <p>Notably, the sentence to which objection is taken appears in a section of Mr Freeman’s report which is a summary response relating to rail: see [AID.020.011.0001] commencing at [36] (.0018) and concluding at [79] (.0031).</p> <p>The detailed response commences at page [80] (.0032).</p> <p>To form a view that the facts or assumptions underpinning the opinion are not <i>proven</i> requires an evaluation of the evidence given by Mr Freeman in the sections relating to rail and port and to make a determination now as to whether those facts are proven. It is premature for a determination of that kind to be made before the plaintiffs’ case has closed.</p>	<p>NB: This document uses the same terms defined by the defendants in the comparable column of Schedule 1.</p> <p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants’ submissions in reply category 1, the defendants argue the evidence does not fall within the plaintiffs’ fallback argument, and it concerns expression of opinion on events before May 2005.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs rely on the submissions in the Response to Objection column.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants’ suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6:</p> <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I took the plaintiffs’ submission to include the proposition that the impugned evidence was within the scope of the plaintiffs’ fallback argument. The defendants advanced the objection recorded in column 5. I agree that the impugned evidence cannot be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005. Accordingly, I uphold the objection and reject the submission that the impugned evidence may be admitted for the purpose of the plaintiffs’ fallback argument. <p>(3) For the foregoing reasons, I uphold the objection.</p>
2.	[72], last sentence	<p>Basis of opinions not set out.</p> <p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman’s opinions are based on:</p> <p>(a) Mr Freeman’s interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman’s observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p>	<p>The sentence which is the subject of objection refers to what needed to have occurred and by what date, and is the proper subject of opinion evidence by an expert who is concerned with addressing what a feasibility study would have contained.</p> <p>Notably, the sentence to which objection is taken appears in a section of Mr Freeman’s report which is a summary response relating to rail: see [AID.020.011.0001] commencing at [36] (.0018) and concluding at [79] (.0031). The detailed response commences at page [80] (.0032). It cannot be expected that the basis for opinion needs to be identified twice, including in a summary section.</p> <p>Further, and in any event, the sentence identifies the basis, namely the Technical Assessment for both rail and port. Those Technical Assessments appear in other parts of the report: see the Contents page at (.0002) which identifies the Technical Assessment sections of the report in relation to rail and port.</p> <p>In the sentence to which objection is taken, it is apparent that none of the objections identified in (a), (b) and (c) in the objections column can be sustained.</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling.</p> <p><u>Additional submission</u></p> <p>In the defendants’ submissions in reply, the defendants argue the evidence does not fall within the plaintiffs’ fallback argument, as it concerns expression of opinion that rely on events after May 2005.</p> <p>In the defendants’ submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on ‘Port’ of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs’ 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs rely on the submissions in the Response to Objection column.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants’ suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 1(2) and (3).</p>

(1) No.	(2) Page/Paragraph	(3) Objection	(4) Response to Objection	(5) Defendants' Suggested Ruling	(6) Plaintiffs' Suggested Ruling	(7) Final ruling
				<p>fallback argument because:</p> <ul style="list-style-type: none"> o insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; o insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 		
3.	[190], second sentence	<p>Mr Freeman gives an opinion about what the Joint Venture and QR would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not stated or proved by admissible evidence.</p>	<p>By this sentence, Mr Freeman does not refer to what the Joint Venture would have done.</p> <p>Mr Freeman expresses an opinion as to what would likely have occurred based on observations of other projects and the practices which were engaged in concerning those other projects. This is relevant to what would have been contained in a feasibility study because the timing of the construction of relevant infrastructure would be an important matter to be addressed.</p> <p>The facts or assumptions underpinning the opinion are found in [195] (.0062), which refers to certain tasks being undertaken concurrently which is “<i>industry practice</i>”.</p>	<p>The objection should be upheld on the basis of the hypothetical conduct ruling and the assumption identification ruling.</p> <p>Reserve whether Mr Freeman can give admissible factual evidence about what QR would have done in a hypothetical set of circumstances.</p>	No suggested ruling provided by the plaintiffs.	I dismiss the objection. Although it is not entirely clear because of the last phrase “in this instance being mid-2007”, I think that the impugned evidence is to be construed as factual evidence of a highly general nature about what the witness has observed about the behaviour of participants in large infrastructure projects. Later parts of the same section of the report cannot be so construed and are objectionable on the basis of the hypothetical conduct ruling and I have ruled accordingly.
4.	[192]	<p>Mr Freeman gives an opinion about what the Joint Venture and QR would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not stated or proved by admissible evidence.</p>	<p>Mr Freeman has been asked to assume that preparation of the hypothetical bankable feasibility study (BFS) would have occurred from 2002 to 2005: see [2.3] (.0008) of [EXP.500.027.0001]. He prepared his report to address what matters are relevant to rail which would have been considered by appropriately qualified and competent people who were preparing the hypothetical BFS and what conclusions those people would have reached: see [2.2] (.0008) of [EXP.500.027.0001].</p> <p>Further, when he said something would or would not have been decided or done, that is to be read in each case as expressing a conclusion that, in his opinion, those notionally preparing the hypothetical BFS would have reached on that “something”: see [2.4] (.0008) of [EXP.500.027.0001].</p> <p>Looking at the first sentence of [192] (.0061), Mr</p>	<p>The objection should be upheld on the basis of the hypothetical conduct ruling and the assumption identification ruling.</p> <p>Reserve whether Mr Freeman can give admissible factual evidence about what QR would have done in a hypothetical set of circumstances.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs rely on the submissions in the Response to Objection column.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 1(2) and (3).</p>

(1) No.	(2) Page/Paragraph	(3) Objection	(4) Response to Objection	(5) Defendants' Suggested Ruling	(6) Plaintiffs' Suggested Ruling	(7) Final ruling
			<p>Freeman is expressing an opinion about the minimum term of any rail and port agreement which is something which (in the case of rail at least) would be the subject of advice in a hypothetical BFS, as the experts call it.</p> <p>Looking at the second sentence of [192] (.0061), in circumstances where Mr Freeman has been instructed that the hypothetical BFS would have been prepared over a three year period (which is an assumption) and has been shown actual correspondence with QR (which is in evidence), it is acceptable for him to express a view that the agreement for both above and below rail would have been ramped up from the Stage 1 volumes to the Stage 2 volumes having regard to his experience within QR. This is something which he is concluding would have been contained in the hypothetical BFS to demonstrate the feasibility to the Management Committee of expanding to Stage 2.</p>			
5.	[195], the words ‘and would have be planned in this manner during the Stage 2 Feasibility Study period (2002-2005).’	<p>Mr Freeman gives an opinion about what the Joint Venture and QR would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not stated or proved by admissible evidence.</p>	The same general submissions in row 4 are repeated here, taking into account the assumption which Mr Freeman was asked to make and his opinion as to the manner in which the Stage 2 Feasibility Study would have been undertaken.	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the hypothetical conduct ruling and the assumption identification ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants’ submissions in reply category 1, the defendants argue the evidence does not fall within the plaintiffs’ fallback argument, and it concerns expression of opinion on events before May 2005.</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs rely on the submissions in the Response to Objection column.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants’ suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 1(2) and (3).</p>
6.	[235], the words ‘Even though I consider the Joint Venture would have secured port capacity’	<p>Mr Freeman gives an opinion about what the Joint Venture and GPC would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not stated or proved by admissible evidence.</p>	<p>This is a passing reference to a conclusion reached elsewhere in his report and so should not be regarded in isolation, with criticism that the facts or assumptions underlying it are not stated.</p> <p>Further, the issue of whether the Joint Venture would have secured port capacity and on what terms, in what tonnage, when and at what price is an important topic for an expert who is preparing a BFS. The part of the sentence which is the subject of objection is the conclusion which Mr Freeman considers that the expert preparing such a study would have reached and is a proper matter for expert evidence.</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the hypothetical conduct ruling and the assumption identification ruling.</p> <p><u>Additional submission</u></p> <p>In the defendants’ submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on ‘Port’ of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs’ fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs rely on the submissions in the Response to Objection column.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants’ suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 1(2) and (3).</p>

(1) No.	(2) Page/Paragraph	(3) Objection	(4) Response to Objection	(5) Defendants' Suggested Ruling	(6) Plaintiffs' Suggested Ruling	(7) Final ruling
				<p>subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005;</p> <ul style="list-style-type: none"> o insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 		
7.	[254], from 'This opinion is supported by the following' through to the end of the paragraph	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture)</p> <p>would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non- participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p> <p>Facts or assumptions underpinning the opinion not set out or proved by admissible evidence.</p> <p>(c) The statements concerning accelerating expansions and undertaking further expansions are irrelevant. Further, Mr Freeman has no demonstrated expertise in planning or constructing port expansions.</p>	<p>The issue of whether the Joint Venture would have secured port capacity and on what terms, in what tonnage, when and at what price is an important topic for an expert who is preparing a BFS. Part of this exercise involves consideration of the appetite of the GPC to increase its capacity, which is referred to in the first part of [254] (.0082). The part of [254] (.0082) which is the subject of objection is an expression of an opinion which would have been expressed by an expert preparing a BFS and is stated as being supported by publicly available documents which have been admitted into evidence. In other words, in considering whether port capacity was available and could be secured, Mr Freeman is considering and assessing the likelihood of port expansion to accommodate the tonnages proposed by the Stage 2 mine.</p> <p>The part of the paragraph which is the subject of objection are the conclusions which Mr Freeman considers that the expert preparing such a study would have reached and is a proper matter for expert evidence.</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p>The objection should also be upheld on the basis that Mr Freeman does not have the required expertise. The plaintiffs concede that Mr Freeman does not have the expertise necessary to give evidence about the construction or expansion of the terminal: see T63-20/44-46.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply category 2, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion that rely on events after May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> • they cannot be relied on for the purpose of supporting the unpleaded advice case; • even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; • they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> o insofar as they rely on confidential, internal GPC documents obtained on 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>While it is correct that Mr Freeman does not have expertise in planning or constructing port expansions, he is an infrastructure expert who would be expected to take into account of potential capacity increases at the port (based on information obtained by him or provided to him by the GPC) when conducting the Stage 2 Feasibility Study.</p> <p>The plaintiffs rely on the submissions in the Response to Objection column.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 1(2) and (3). I observe further that the material to which [254] refers is all material which long post-dates 2005.</p>

(1) No.	(2) Page/Paragraph	(3) Objection	(4) Response to Objection	(5) Defendants’ Suggested Ruling	(6) Plaintiffs’ Suggested Ruling	(7) Final ruling
				<p>subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005;</p> <ul style="list-style-type: none">○ insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.		
8.	<p>[265], the words ‘and preparedness to enter a port agreement, preferably with the Stage 2 element conditional on the approval from the Joint Venture in late 2005.’</p>	<p>Mr Freeman gives an opinion about what the Joint Venture and GPC would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Facts or assumptions underpinning the opinion not stated or proved by admissible evidence.</p>	<p>Again, this evidence needs to be read in the context that Mr Freeman is considering that the Stage 2 BFS would have been prepared between 2002 and 2005, and he is responding to Mr Morton’s report in which Mr Morton was asked to consider, if he was an expert advising on the preparation of the BFS, issues associated with the likely availability and cost of rail and port services.</p> <p>Having regard to what is stated in [264] (.0087), it is Mr Freeman’s position that, in circumstances where the BFS is prepared during the period from 2002 to 2005 and there was increasing demand for port capacity (as referred to in [264] (.0087), one way for the Joint Venture to manage the risk of not obtaining port capacity was to enter a conditional agreement – that is, to obtain the capacity conditional on the Joint Venture deciding to proceed with Stage 2 in 2005.</p> <p>Further, the experts agreed that a conditional agreement could be entered: see item 10 at [AID.020.010.0001] at (.0008). No objection is taken to the expert’s agreement at that part of the joint expert report.</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the hypothetical conduct ruling and the assumption identification ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants’ submissions in reply category 1, the defendants argue the evidence does not fall within the plaintiffs’ fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants’ submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on ‘Port’ of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none">• they cannot be relied on for the purpose of supporting the unpleaded advice case;• even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules;• they could not be regarded as falling within the scope of the plaintiffs’ fallback argument because:<ul style="list-style-type: none">○ insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005;○ insofar as they are directed to proof of the existence of a hypothetical anterior fact, they	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs rely on the submissions in the Response to Objection column.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) The statement does not assert anything about what either the Joint Venture or the GPC would have done. It does not say “would have managed” but rather says “would have to manage”.</p> <p>(2) However it does assert a normative statement about how a person in the position of the Joint Venture should behave and what they should be prepared to do. As I ruled in <i>Sanrus No. 5</i> at [60] in discussing the various statements of opinion evidence concerning the joint venture “Mr Freeman does not purport to qualify himself as an expert in the field of mining joint venture decision making or equity investor decision making.”</p> <p>(3) Accordingly, the statement is not a proper matter for his expert opinion and I uphold the objection on that basis.</p> <p>(4) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 1(2) and (3).</p>

(1) No.	(2) Page/Paragraph	(3) Objection	(4) Response to Objection	(5) Defendants' Suggested Ruling	(6) Plaintiffs' Suggested Ruling	(7) Final ruling
				are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.		
9.	[351], final sentence	Mr Freeman gives an opinion about what the Joint Venture and Powerlink would have done in a hypothetical situation. Not proper matters for expert opinion. Facts or assumptions underpinning the opinion not stated or proved by admissible evidence.	In this sentence, Mr Freeman is identifying (in a summary way) that the capital contribution arrangement applicable to the contract which Mr Harradine considers would have been entered with Ergon would not apply for the solution which he has identified with Powerlink. The part of the paragraph which is the subject of objection are the conclusions which Mr Freeman considers that the expert preparing a BFS would have reached and is a proper matter for expert evidence. The facts underpinning the opinion are contained elsewhere in the report, such as [373] (.0122), [376] (.0123), [377] (.0123), [381] (.0124), [389] (.0126), [396] (.0129) and [398] (.0130).	<u>Suggested ruling</u> The objection should be upheld on the basis of the hypothetical conduct ruling.	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs rely on the submissions in the Response to Objection column. The plaintiffs otherwise rely on the submissions dated 6 September 2019.	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 1(2) and (3).
10.	[368], the words 'and would be planned in this manner during the Stage 2 Feasibility Assessment.'	Mr Freeman gives an opinion about what the Joint Venture and Powerlink would have done in a hypothetical situation. Not proper matters for expert opinion. Facts or assumptions underpinning the opinion not stated or proved by admissible evidence.	Mr Freeman has been asked to assume that preparation of the hypothetical BFS would have occurred from 2002 to 2005: see [2.2] (.0007) of [AID.020.008.0001]. He prepared his report to address what matters are relevant to offsite power supply which would have been considered by appropriately qualified and competent people who were preparing the hypothetical BFS and what conclusions those people would have reached: see [2.1] (.0007) of [AID.020.008.0001]. Further, when he said something would or would not have been decided or done, that is to be read in each case as expressing a conclusion that, in his opinion, those notionally preparing the hypothetical BFS would have reached on that "something": see [2.3] (.0007) of [AID.020.008.0001]. So in this context, Mr Freeman is expressing an opinion as to what would have been done by the expert during the period when the Stage 2 BFS was being prepared. This is a proper matter for expert evidence, especially from a witness who has been engaged in preparing numerous feasibility studies.	<u>Suggested ruling</u> The objection should be upheld on the basis of the hypothetical conduct ruling. <u>Additional submission</u> Pursuant to the defendants' submissions in reply category 1, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs rely on the submissions in the Response to Objection column. The plaintiffs otherwise rely on the submissions dated 6 September 2019.	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 1(2) and (3).

(1) No.	(2) Page/Paragraph	(3) Objection	(4) Response to Objection	(5) Defendants' Suggested Ruling	(6) Plaintiffs' Suggested Ruling	(7) Final ruling
11.	[381]	Mr Freeman purports to give evidence about how Powerlink would have acted in a hypothetical situation. Not proper matters for expert opinion. Facts or assumptions underpinning the opinion not stated or proved by admissible evidence.	The submissions in row 10 are repeated here. The issue of the options available to the Joint Venture in terms of pricing options for offsite power supply is something which would be the subject of advice by an expert preparing a BFS. The basis for the opinion is found at [373] (.0122).	The objection should be upheld on the basis of the hypothetical conduct ruling.	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs rely on the submissions in the Response to Objection column. The plaintiffs otherwise rely on the submissions dated 6 September 2019.	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by the plaintiffs in column 6: <ul style="list-style-type: none"> I have ruled that the plaintiffs may not advance the unpleaded advice case. I take the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants did not contend the contrary. Accordingly, the evidence may be admitted for the limited purpose of supporting the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified. (3) For the foregoing reasons, subject only to the exception stated in the previous paragraph, I uphold the objection.
Response Report (Actual Costs) of Jamie Freeman dated 22 November 2018 [EXP.010.007.0001] [AID.020.012.0001]						
12.	[13]	Mr Freeman gives an opinion about what the Joint Venture (and others) would have done in a hypothetical situation. Not proper matters for expert opinion. Facts or assumptions underpinning the opinion not stated or proved by admissible evidence.	This sentence is contained the executive summary. It follows [12] (.0006) which refers to Mr Freeman's earlier report and so identifies the facts underpinning the opinion stated in [13] (.0006). The paragraph which is the subject of objection contains the conclusion which Mr Freeman considers that the expert preparing a BFS would have reached and is a proper matter for expert evidence.	<u>Suggested ruling</u> The plaintiffs no longer contend that this report falls within the scope of the 'fallback argument'. The objection should be upheld on the basis of the hypothetical conduct ruling. <u>Additional submission</u> Pursuant to the defendants' submissions in reply category 3, the evidence in the Response Report (Actual Costs) of Jamie Freeman dated 22 November 2019 does not fall within the plaintiffs' fallback argument.	The plaintiffs rely on the submissions in the Response to Objection column. The plaintiffs otherwise rely on the submissions dated 6 September 2019. This evidence is a repetition of the conclusions reached in the 2 November 2018 report. The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.	(1) I adopt the defendants' suggested ruling. (2) It is not clear to me whether the defendants are correct to say that the plaintiffs do not contend this falls within the scope of their fallback argument. But if they do make that contention, then I would I rule in the same way as item 1(2) and (3).
13.	[24]	Mr Freeman gives an opinion about what the Joint Venture and QR would have done in a hypothetical situation. Not proper matters for expert opinion. Facts or assumptions underpinning the opinion not stated or proved by admissible evidence.	This sentence is reiterating what was stated in Mr Freeman's earlier report so as to provide the context for what follows. It refers to Mr Freeman's earlier report and so identifies the facts underpinning the opinion. The paragraph which is the subject of objection contains the conclusion which Mr Freeman considers that the expert preparing a BFS would have reached and is a proper matter for expert evidence.	The plaintiffs no longer contend that this report falls within the scope of the 'fallback argument'. The objection should be upheld on the basis of the hypothetical conduct ruling. <u>Additional submission</u> Pursuant to the defendants' submissions in reply category 3, the evidence in the Response Report (Actual Costs) of Jamie Freeman dated 22 November 2019 does not fall within the plaintiffs' fallback argument.	The plaintiffs rely on the submissions in the Response to Objection column. The plaintiffs otherwise rely on the submissions dated 6 September 2019. This evidence is a repetition of a conclusion reached in the 2 November 2018 report. The evidence is therefore something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.	I rule in the same way as item 12.
Joint Expert Report on Offsite Power Supply of Jamie Freeman and Gary Harradine (D) dated 15 July 2019 [EXP.500.011.0001_2] [AID.020.008.0001]						
14.	[5.20], the words 'which would be	Mr Freeman gives an opinion about what the Joint Venture and	Mr Freeman has been asked to assume that preparation of the hypothetical BFS would have occurred from	<u>Suggested ruling</u> The objection should be upheld on the	The evidence is something which forms part of, or is relevant to	(1) I adopt the defendants' suggested ruling. (2) As to the further submissions advanced by

(1) No.	(2) Page/Paragraph	(3) Objection	(4) Response to Objection	(5) Defendants' Suggested Ruling	(6) Plaintiffs' Suggested Ruling	(7) Final ruling
	entered into in mid-2004'	Powerlink would have done in a hypothetical situation. Not proper matters for expert opinion. Basis of opinions not set out.	2002 to 2005: see [2.2] (.0007) of [AID.020.008.0001]. He prepared his report to address what matters are relevant to offsite power supply which would have been considered by appropriately qualified and competent people who were preparing the hypothetical BFS and what conclusions those people would have reached: see [2.1] (.0007) of AID.020.008.0001]. Further, when he said something would or would not have been decided or done, that is to be read in each case as expressing a conclusion that, in his opinion, those notionally preparing the hypothetical BFS would have reached on that "something": see [2.3] (.0007) of [AID.020.008.0001]. So in this context, Mr Freeman is expressing an opinion as to what would have occurred during the period when the Stage 2 BFS was being prepared by the expert. This is a proper matter for expert evidence, especially from a witness who has been engaged in preparing numerous feasibility studies. This extract should not be viewed in isolation but is a reference back to Mr Freeman's experience in another project as referred to in [5.10] (.0016) and [5.19] (.0018).	basis of the hypothetical conduct ruling. <u>Additional submission</u> Pursuant to the defendants' submissions in reply category 1, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005	demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs rely on the submissions in the Response to Objection column. The plaintiffs otherwise rely on the submissions dated 6 September 2019.	the plaintiffs in column 6, I rule in the same way as item 1(2) and (3).
Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton (D) dated 23 July 2019 [EXP.500.026.0001_2] [AID.020.010.0001]						
15.	Page 0006, Item 5, third bullet point (beginning with the words 'Once GPC and the mine had...')	Not proper matters for expert opinion. Rather, Mr Freeman's opinions are based on: (a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge; (b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact; (c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates. Otherwise, basis of opinions not set out.	As to proposition (a): Many of the documents produced by Gladstone Ports Corporation (GPC) or which relate to the Gladstone Port do require the application of specialised knowledge to understand their meaning in their context. To take a simple example, the document which is [GPC.001.002.5614] (which is a confidential exhibit and so it will not be set out here in detail) refers to the following terms which require explanation by an expert as to their meaning in the context of the Gladstone Port and whether it had or would have had capacity for the Stage 2 tonnages by 2007: (a) third shiploader; (b) third rail receipt facility; (c) stockpiles 17 and 18; (d) outloading conveyor belts. Other documents refer to, for example, "receipt, stockpiling and shiploading" of coal and take or pay agreements (or ToP contract). As to the latter, the Court inquired of the defendants' Senior Counsel as to what this meant: [TRA.500.062.0001] at (.0045) lines 7 – 13. This exemplifies that the Court requires the assistance of an expert to understand documents containing particular terminology relating to the GPC and contained in its and other associated documents. Mr Freeman's expertise in this regard has not been challenged and his evidence in both his reports and the	<u>Suggested ruling</u> The objection should be upheld on the basis of the documents review ruling and the state of mind ruling. <u>Additional submission</u> In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton – • they cannot be relied on for the purpose of supporting the unpleaded advice case; • even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; • they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none">◦ insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May	The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development. The plaintiffs rely on the submissions in the Response to Objection column. The plaintiffs otherwise rely on the submissions dated 6 September 2019.	(1) I adopt the defendants' suggested ruling. For completeness, I observe that if, as the plaintiffs contend, technical terms used in documents require proof of the meaning of technical definitions, there are recognised ways to provide that proof. Having an expert read the document and simply use it as part of his knowledge base for expressing inferential conclusions is not such a way. (2) As to the further submissions advanced by the plaintiffs in column 6: <ul style="list-style-type: none">• I have ruled that the plaintiffs may not advance the unpleaded advice case. I am otherwise not persuaded by the defendants' arguments as to irrelevance, sufficient to rule the impugned evidence out on that basis.• I took the plaintiffs' submission to include the proposition that the impugned evidence was within the scope of the plaintiffs' fallback argument. The defendants advanced the objection recorded in column 5. I think it is arguable that the impugned evidence could be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005.• However the expression of opinion is inadmissible because of the assumption identification and statement of reasoning

(1) No.	(2) Page/Paragraph	(3) Objection	(4) Response to Objection	(5) Defendants’ Suggested Ruling	(6) Plaintiffs’ Suggested Ruling	(7) Final ruling
			<p>joint expert report is not based solely on confidential documents produced by the GPC but also on his own experience and publicly available documents or documents which were in the possession of the parties (including those referred to in Mr Freeman’s first report which were not produced pursuant to a subpoena and are not the subject of a confidentiality regime: see Annexure 2 (.0179) – (.0180) [AID.020.011.0001]; also, for example, [228] (.0073)[AID.020.011.0001].</p> <p>As to proposition (b):</p> <p>With respect, this mischaracterises Mr Freeman’s evidence, including in relation to his statements as to factual matters (which, contrary to the defendants’ submissions in ‘reply’: [TRA.500.063.0001] (.0035) at lines 26 – 29, are not, and should not be ruled as being limited to, assumptions).</p> <p>Rather, it is essential that Mr Freeman’s statements as to factual matters be read in the context in which they are made: see, for example, [AID.020.011.0001] at [212] (.0068) especially the second sentence; [234] – [235] (.0074) – (.0075); [243] (.0077); [254]; (.0082); [255] (first sentence) (.0083); [264] (0087).</p> <p>Mr Freeman makes clear that the factual matters identified by him, including opinions expressed by him about and based upon those factual matters, are those which he considers that the expert undertaking the Stage 2 Feasibility Study would have considered and, in the case of available capacity, “incorporated in the risk profiling of the port capacity strategy”.</p> <p>This is not speculation; rather, it is a statement by an expert as to what an appropriate qualified expert who was tasked with advising on the preparation of a feasibility study for the development and operation of Stage 2 would have considered.</p> <p>As to proposition (c):</p> <p>Based on his own observations and experience in dealing with the GPC (which is explained in paragraphs [12] – [15] (.0003) - .0006) of [SBM.010.029.0001]), Mr Freeman is able to give evidence about <i>facts</i> concerning GPC’s conduct in relation to how it dealt with other mining projects during the period in question (such as, for example, GPC’s attitude to allocating capacity to a mine when the mine had not finalised a rail agreement).</p> <p>As to the final proposition, it is not clear that this objection is advanced in the alternative. Objections (a), (b) and (c) identify the <i>basis</i> for the opinion but the final proposition then states that the basis for the opinion is not set out, which is inconsistent.</p> <p>In any event, each sentence which is contained in Mr Freeman’s reports which contains an opinion (if it does) does not itself need to identify, on each and every occasion, the basis on which that particular opinion is stated if the basis for the opinion is stated or is apparent elsewhere in the report.</p>	<p>2005;</p> <ul style="list-style-type: none">○ insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.		<p>rules. These rules must be met by the expression of expert opinion. Failure so to do cannot be remedied after the fact by way of a lawyer’s submission attempting to identify the requisite assumptions.</p> <ul style="list-style-type: none">• Accordingly, that evidence may be not be admitted for the purpose of supporting the plaintiffs’ fallback argument. <p>(3) For the foregoing reasons, I uphold the objection.</p>

(1) No.	(2) Page/Paragraph	(3) Objection	(4) Response to Objection	(5) Defendants' Suggested Ruling	(6) Plaintiffs' Suggested Ruling	(7) Final ruling
			<p>For this reason, the reports need to be read as a whole, and the joint expert reports should be read as a whole and in the context of two or more experts attempting to identify areas of agreement and disagreement based on and in the context of their existing expert reports.</p> <p>It is therefore an artificial and dangerous exercise to submit that a particular sentence or paragraph of a report or joint expert report does not identify the basis on which the opinion is stated. This is especially so in the case of a joint expert report when it cannot be expected that the experts will repeat the entire content of their respective expert reports in the joint expert report.</p> <p>Dealing now with the particular objection, the paragraph to which objection is taken forms part of what is described as a 'high level summary of the respective positions of each expert': see [AID.020.010.0001] at (.0005).</p> <p>The experts referred to their earlier reports at [1.3] and [1.4] (.0003) and to the further documents to which they had regard at [1.8] (.0004). The paragraph to which objection is taken appears again at [3.12] (.0012).</p> <p>This is a matter on which the experts <i>agreed</i>. No reasons were required to be provided by them about matters on which they <i>agreed</i>.</p> <p>According to the letter of instructions provided to the experts, to which the parties agreed, the experts were not required to identify the reasons for their agreement upon any issues or matters in the joint conclaves: see <i>Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 4)</i> [2019] QSC 199 at [24] at paragraph 2.</p> <p>Objection therefore cannot now be taken to an identification in any joint expert report of a matter or issue on which the experts agreed without identifying the basis for the opinion when the experts were not asked to do this in the joint expert report and, indeed, would not have complied with their express instructions if they had done so.</p> <p>The same submission can be made about [3.7] (.0012) and [3.12] (.0012) of the Port JER [AID.020.010.0001].</p>			
16.	Page 0009, Item 11, under the heading 'Mr Freeman's opinion'	<p>Mr Freeman gives an opinion about what the Joint Venture and GPC would have done in a hypothetical situation.</p> <p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of</p>	<p>As to propositions (a), (b) and (c), the same general submissions made in row 15 above are made here.</p> <p>By this evidence, Mr Freeman is identifying the pricing for port.</p> <p>This is something which Mr Freeman addressed in his report dated 22 November 2018 which was in response to Part 4 of the reports of Mr Hunter and Mr Morton (see [5] (.0003) of [AID.020.012.0001]).</p> <p>Notably, at [39] (.0013) at of that report [AID.020.012.0001], Mr Freeman identifies what "could have been done" and not, as he stated in the joint expert report, what would have been done.</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply category 1, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port</p>	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs rely on the submissions in the Response to Objection column.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 1(2) and (3).</p>

(1) No.	(2) Page/Paragraph	(3) Objection	(4) Response to Objection	(5) Defendants' Suggested Ruling	(6) Plaintiffs' Suggested Ruling	(7) Final ruling
		<p>specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p>	<p>In other words, the opinion in the joint expert report is, in truth, that the prices could be negotiated and agreed in 2003 (albeit that a coal handling agreement was not entered at that time) and, had the prices been negotiated and agreed in 2003, the 2003 pricing would have been applied escalated to 2005 dollars.</p> <p>Further, his opinion is given in the context of the matters addressed by Mr Freeman's first expert report [AID.020.011.0001] at [231] (.0074), [237] (.0075), [238] (.0075), [239] (.0076), [242] (.0077) – [244] (.0077) (which addresses considerations for an expert undertaking a Stage 2 Feasibility Study), [254] (.0082) (first sentence), [255] (.0083)(first sentence) and [263] (.0087) – [265] (.0088).</p> <p>Further, the paragraph to which objection is taken forms part of what is described as a 'high level summary of the respective positions of each expert': see AID.020.010.0001] at [2.1] (.0005). The experts referred to their earlier reports at page [1.3] (.0003) and [1.4] (.0003) and to the further documents to which they had regard at [1.8] (.0004).</p> <p>The basis on which the opinion is expressed appears at [5.37] (.0025) and (as noted in [5.37]) in Appendix 5 [A.5.37] (.0057) and [A5.38] (.0057).</p> <p>When one turns to [A5.37] (.0057), it is plain that Mr Freeman is referring to his first expert report in which he responded to Mr Morton. He could not be expected to repeat what he stated in his expert report in the joint expert report; however, he does refer to it makes it clear that what he stated in that report provides part of the basis for his opinion.</p> <p>The submission that the basis of the opinion is not set out is incorrect when one has regard to the joint expert report (and the expert reports which are behind them).</p>	<p>section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 		
17.	[5.26]	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations,</p>	<p>Paragraph [5.26] (.0022) refers to and repeats one aspect of what is contained in Appendix 5 to the (port) joint expert report, and contains his explanation for his disagreement with Mr Morton's opinion in [5.27] (.0022) of the joint expert report.</p> <p>As noted above, the experts were required to provide the reasons for their disagreement with the other expert's opinion in the joint expert report. That is what this paragraph does and nothing more.</p> <p>Further, what Mr Freeman states in [5.26] (.0022) is, had something happened at a particular time, he considers that something else is a matter of speculation. In making this statement, he is not doing the things identified in the objection column.</p> <p>The objection is not made out.</p> <p>If the true basis for the objection is because it refers to Appendix 5, and Appendix 5 is the subject of objection, then the submissions made in row 15 above are repeated here. In particular, it can be seen from</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply category 1, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs rely on the submissions in the Response to Objection column.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 1(2) and (3).</p>

(1) No.	(2) Page/Paragraph	(3) Objection	(4) Response to Objection	(5) Defendants' Suggested Ruling	(6) Plaintiffs' Suggested Ruling	(7) Final ruling
		<p>as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p>	<p>Appendix 5 that it contains statements of fact and opinion which are in turn based upon Mr Freeman's expert reports <i>as well as</i> his own experience <i>as well as</i> the new confidential GPC documents which the experts considered <i>as well as</i> other documents, with the documents identified in detail in footnotes to Appendix 5.</p>	<p>of supporting the unpleaded advice case;</p> <ul style="list-style-type: none"> even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' fallback argument because: <ul style="list-style-type: none"> insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005; insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005. 		
18.	<p>Page 0035,</p> <p>Attachment 3, second paragraph in the 'Mr Freeman' column under the 'Port Prices' heading</p>	<p>Not proper matters for expert opinion.</p> <p>Rather, Mr Freeman's opinions are based on:</p> <p>(a) Mr Freeman's interpretation of documents prepared by Gladstone Ports Corporation, which does not require the application of specialised knowledge;</p> <p>(b) Speculation as to how Gladstone Ports Corporation (and the Joint Venture) would have acted in a hypothetical factual situation, which is a question of fact;</p> <p>(c) Mr Freeman's observations, as a non-participating onlooker, of how Gladstone Ports Corporation operates.</p> <p>Otherwise, basis of opinions not set out.</p>	<p>This is a summary of Mr Freeman's opinion which is expanded upon in more detail elsewhere as noted in row 16 above, and the submissions in row 16 above are repeated and relied upon here.</p>	<p><u>Suggested ruling</u></p> <p>The objection should be upheld on the basis of the documents review ruling and the hypothetical conduct ruling.</p> <p><u>Additional submission</u></p> <p>Pursuant to the defendants' submissions in reply category 1, the defendants argue the evidence does not fall within the plaintiffs' fallback argument, and it concerns expression of opinion on events before May 2005.</p> <p>In the defendants' submissions in reply, the defendants contend the evidence in the port section of the Report of Jamie Freeman dated 2 November 2019 and the Joint Expert Report on 'Port' of Jamie Freeman and Euan Morton –</p> <ul style="list-style-type: none"> they cannot be relied on for the purpose of supporting the unpleaded advice case; even if they were so construed, they would be inadmissible because of the assumption identification and statement of reasoning rules; they could not be regarded as falling within the scope of the plaintiffs' 	<p>The evidence is something which forms part of, or is relevant to demonstrating, the conclusions which would have been reached in a Stage 2 Feasibility Study undertaken during the Mine 1 Stage Development.</p> <p>The plaintiffs rely on the submissions in the Response to Objection column.</p> <p>The plaintiffs otherwise rely on the submissions dated 6 September 2019.</p>	<p>(1) I adopt the defendants' suggested ruling.</p> <p>(2) As to the further submissions advanced by the plaintiffs in column 6, I rule in the same way as item 1(2) and (3).</p>

(1) No.	(2) Page/Paragraph	(3) Objection	(4) Response to Objection	(5) Defendants' Suggested Ruling	(6) Plaintiffs' Suggested Ruling	(7) Final ruling
				<p>fallback argument because:</p> <ul style="list-style-type: none">○ insofar as they rely on confidential, internal GPC documents obtained on subpoena they could not reasonably be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005;○ insofar as they are directed to proof of the existence of a hypothetical anterior fact, they are not directed towards an opinion which could be read as informing the content of a hypothetical Stage 2 Feasibility Study as at May 2005.		

**SANRUS PTY LTD & ORS V MONTO COAL 2 PTY LTD & ORS
SUPREME COURT OF QUEENSLAND PROCEEDING NO. 8609/07**

SCHEDULE 3

Schedule expressing the Court’s ruling on the defendants’ objections to further supplementary report of Mr Freeman dated 9 September 2019

(1) Item	(2) Paragraph of Further Supplementary Report	(3) Basis for objection	(4) Paragraph of defendants' 9 September 2019 submissions [SBM.020.064.0001]	(5) Final ruling
1.	Whole	The opinions expressed in the report are not admissible as a conclusion an expert would have reached for a hypothetical Stage 2 feasibility study for the Monto Coal Project.	<p>It is therefore apparent that this opinion:</p> <p>(a) Is as to entry into a conditional port agreement before May 2005 rather than any input by way of advice or opinion as to the prospective terms of such an agreement that an expert would have incorporated into a feasibility study report provided to the JV in May 2005.</p> <p>(b) Is not based on any expertise or personal experience. He had none and did not deal with GPC until 2007 at the earliest.</p> <p>(c) Is based substantially on specific hearsay, his unexplained observations of others as a non-participant, a review of documents that would not have been available to an expert for a feasibility study in 2002-2005 and post 2005 experiences in unidentified circumstances and which are not linked to the period in question.</p> <p>(d) Cannot bear the character of a conclusion an expert would have reached for a feasibility study in 2005, and does not state such a conclusion admissibly.</p>	<p>(1) Upon analysis, the report advances the following contentions (emphasis added):</p> <ul style="list-style-type: none"> For the reasons set out in the report at [6] to [14], there was an opportunity for the Monto Project to enter a port agreement with GPC by early 2004 and an expert conducting a Stage 2 feasibility study would have identified this opportunity, identified the likely contract terms and negotiated the contract arrangements: see report at [5] to [14]. An expert conducting the Stage 2 feasibility study would have recognised that the Joint Venture could have negotiated a port agreement in 2003 – 2004, with the costs of the port services stated in the contract in line with that recorded by GPC for 2003, and provision made for CPI escalation throughout the negotiation period until contract execution, and such an expert would have identified the likely contract terms and negotiated the contract arrangements: see report at [15] and [16]. For the reasons set out in the report at [18] to [23], there was an opportunity for the Monto Project to enter a rail agreement by early 2004 and an expert conducting a Stage 2 feasibility study would have identified this opportunity and would have identified the likely contract terms and negotiated the contract arrangements: see report at [17] to [23]. For the reasons set out in report at [25], in relation to the possibility of entering into a commercial arrangement with QR in January 2005 for long lead procurement for items such as sleepers and rails, QR would have sought to mitigate loss if Stage 2 did not proceed: see report at [24] and [25]. For the reasons set out in report [29] to [34], had the Monto Project wished to do so, it had an opportunity to enter into a Connection Agreement with Powerlink in mid-2004 on terms and conditions which would cover both the early works requirements, provisions such as that if the project did not achieve financial close the Connection Agreement would be terminated (and the project liable for costs incurred by Powerlink up to that point), the scope of works and with capital expenditure amortised over a 20 year terms applied on a monthly basis with payments escalating at CPI. An expert conducting a Stage 2 feasibility study would have identified this opportunity and would have identified the likely contract terms and negotiated the contract arrangements: see report at [26] to [34]. An expert involved in a Stage 2 Feasibility Study would have identified in 2003 to 2004 that an Early Works Deed of the nature referred to in report [38] needed to be entered into with SunWater by July 2004, for the reasons set out at report [39] and [40]. He had previously opined that an expert involved in a Stage 2 Feasibility Study would have identified that a Water Transport and Supply Agreement would be entered into with SunWater in July 2005, with Sunwater having managed the environmental approvals and land requirements prior to this date under the Early Works Deed, and that Sunwater would seek to recover actual

(1) Item	(2) Paragraph of Further Supplementary Report	(3) Basis for objection	(4) Paragraph of defendants’ 9 September 2019 submissions [SBM.020.064.0001]	(5) Final ruling
				<p>outturn costs under the Water Transport Agreement (i.e. amortised capital charge). In the further supplementary report at [38], [41] and [42], he set out factual evidence concerning conduct by SunWater, on projects after 2005.</p> <ul style="list-style-type: none">• The appendix 12 schedules in his 2 November Report set out how the matters with which they deal would have been planned during the Stage 2 Feasibility Period (2002 – 2005). They set out schedules identifying his proposed timing and sequence for the matters with which they deal (rail, water, and power infrastructure) leading up to the decision to proceed with Stage 2 and then for delivering the Stage 2 solution. In each case “, the schedule of works, and its progress, are regularly communicated between the infrastructure provider and those carrying out the feasibility study for the producer. The key outstanding tasks for delivery of the infrastructure as at the date of the study are then also included in the final feasibility study document which is provided to the producer to enable a decision to be made as to whether to proceed”: see report at [43]. <p>(2) The defendants’ argument here was that if I ruled in the defendants’ favour that the plaintiffs could not be permitted to run the unpleaded advice case, then the whole report should be excluded because it could only be seen as directed to that case and could not be characterised as expressing support for an input by way of opinion into a Stage 2 Feasibility Study in May 2005.</p> <p>(3) As a general proposition, I agree with that submission. It can be seen from my summary of the propositions which the report seeks to justify, that the report is generally directed to the unpleaded advice case. Indeed, that much was made clear in the plaintiffs’ submissions on leave to receive the report, when they identified why they said they would be prejudiced if leave was refused. With only limited exceptions, the ruling made in the body of my reasons that the plaintiffs cannot be permitted to advance that case means the report is irrelevant. The exceptions are:</p> <ul style="list-style-type: none">• Report at [7] – [8], [18] and [29] described the practice of experts involved in feasibility studies, and even though the evidence cannot be relied on for the purpose of the unpleaded advice case, the evidence is relevant to the plaintiffs’ fallback argument referred to in the body of my judgment, but subject to the limitations there expressed.• Report at [12] and [14] (but see item 5(1) below) contain material arguably capable of being regarded as relevant factual evidence concerning conduct by the GPC.• Report at [15] and [16] are arguably capable of being regarded as relevant factual evidence “the standard industry approach”.• Report at [23] is arguably capable of being regarded as relevant factual evidence concerning previous conduct by QR.• Report at [24] and [25] are arguably capable of being regarded as relevant factual evidence concerning previous conduct by QR.

(1) Item	(2) Paragraph of Further Supplementary Report	(3) Basis for objection	(4) Paragraph of defendants' 9 September 2019 submissions [SBM.020.064.0001]	(5) Final ruling
				<ul style="list-style-type: none"> Report at [31] and [39] described the practice of experts involved in feasibility studies and assumptions this witness makes, and even though the evidence cannot be relied on for the purpose of the unpleaded advice case, the evidence is relevant to the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there expressed. Report at [43] is arguably relevant to an input by way of opinion into a Stage 2 Feasibility Study in May 2005 because even though it could not be relied on in support of an unpleaded advice case that the relevant plans would have been communicated from time to time, it still might be probative to identify key outstanding tasks which would be included in a Stage 2 Feasibility Study in May 2005 if the tasks had not been performed as at the date of the study. The evidence may be admitted as is relevant to the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there expressed. <p>(4) It follows that with those exceptions, I would uphold the defendants' objection to the entirety of the report. The parts of the report which I have identified as exceptions may (unless I uphold a further specific objection to them below) be admitted for the limited purposes I have identified.</p> <p>(5) In case I am wrong in the foregoing, I will continue to deal with the other specific objections in items 2 to 10 below.</p>
2.	5, 13(b) (second and third sentences), 16 (first and second sentences), 17, 23, 28	<p>Not a proper matter for expert opinion.</p> <p>Mr Freeman's (P) opinion that 'there was an opportunity' for the Monto Project to enter into a contract with GPC/QR/Powerlink necessarily assumes that the other party would be willing to do so. Mr Freeman (P) cannot give opinion evidence about what third parties would have done: <i>Sanrus No 5</i> at [61(a)].</p> <p>Although in <i>Sanrus No 5</i> at [61(b)] the Court declined to make findings at that time on whether Mr Freeman (P) could give admissible factual evidence on what QR would have done, it is apparent from para 23 of the Supplementary Report that Mr Freeman's (P) opinion that QR would have entered into a conditional contract during the period 2002-2005 is not based on any personal experience, but on team meetings where others provided updates as to the status of contract negotiations. Mr Freeman is therefore not in a position to give factual evidence about whether his corporate employer would have entered into a conditional contract with the Joint Venture during that period.</p>	<p>Paragraph 9:</p> <p>For port, Mr Freeman (P) expresses the opinion that there was an opportunity to enter into a conditional port agreement with GPC by early 2004 that would have been identified by an expert conducting a Stage 2 feasibility study: para 5. The change in his language from "would" or "could" to "opportunity" does not diminish that he is expressing an opinion about what GPC was prepared to do.</p> <p>Paragraph 13:</p> <p>For rail, Mr Freeman (P) expresses the opinion that there was an opportunity to enter into a conditional rail agreement with QR by early 2004 that would have been identified by an expert conducting a Stage 2 feasibility study: para 17. Again, the change in his language from "would" or "could" to "opportunity" does not diminish that he is expressing an opinion about what QR was prepared to do.</p> <p>Paragraph 14(c):</p> <p>This opinion is based on:</p> <p>[...]</p> <p>(c) Specific hearsay from team members about agreements entered into in unidentified circumstances and which he had no involvement in negotiating and post-2010 agreements which he negotiated in unidentified circumstances and which are not linked to the period in question: para 23.</p> <p>Paragraph 16:</p>	<p>(1) During the course of oral argument the defendants confined their hearsay objection to only paragraphs [32](b) and [33] of the further supplementary Freeman report. Accordingly, I do not rule on the hearsay objections to the paragraphs impugned on that basis.</p> <p>(2) I uphold the objection to report at [5], [13](b) and the first and second sentences of [16], [17] and [28] for the reasons expressed by the defendants (other than the hearsay objection). I also uphold the objection for the reasons expressed in relation to item 1.</p> <p>(3) Report at [23] deals with Rail. In the absence of a hearsay objection, I would not rule at this time on whether Mr Freeman can give admissible factual evidence on the topic dealt with in report at [23]. The paragraph may be admitted for the limited purposes identified in item 1.</p>

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			For power, Mr Freeman (P) expresses the opinion that, had the Monto Project wished to do so, it had the opportunity to enter into a Connection Agreement with Powerlink in mid-2004 on particular terms and conditions, including as to the term amortisation of capital expenditure and termination: paras 26-27. Again, the change in his language from “would” or “could” to “opportunity” does not diminish that he is expressing an opinion about what Powerlink was prepared to do.	
3.	7-8, 18, 29, 32	<p>Not an opinion based wholly or substantially on Mr Freeman’s (P) expertise.</p> <p>His opinions as to what would have occurred in 2002-2005 are based on (para 8):</p> <ul style="list-style-type: none"> (a) His observations as a non-participant as to what other experts involved in feasibility studies did during that period; (b) It being ‘similar’ to what QR did in relation to rail from the perspective of a rail infrastructure provider; (c) His experience post-2005, in circumstances where he does not explain whether he expected that experience to have been the same in 2002-2005. <p>The objection should also be upheld on the basis of the statement of reasoning rule, because Mr Freeman (P) does not explain how these experiences inform his view about the process an expert involved in a feasibility study in 2002-2005 would have adopted.</p>	<p>Paragraph 10(a):</p> <p>This opinion is based on:</p> <ul style="list-style-type: none"> (a) His opinion about the process that would have been adopted by an expert involved in a feasibility study for a miner in the period 2002-2005 (assert to have been standard industry practice), which is in turn based upon: <ul style="list-style-type: none"> (i) His unexplained observations as a non-participant of what other experts involved in feasibility studies for coal mines did during that period in relation to rail on an unidentified number of occasions an in unidentified circumstances: para 8(a). (ii) It being “similar” to what he did at QR in relation to rail from the perspective of a rail infrastructure provider: para 8(b) (iii) It being what he did at Xstrata in 2007-2008, the Bowen Central Coal JV in 2008-2010 and what his firm, Balanced Advisory, has done since 2010: paras 8(c) & 8(d). <p>Paragraph 14(a):</p> <p>This opinion is based on:</p> <ul style="list-style-type: none"> (a) His opinion that the process adopted by an expert would have been similar to port: para 18. <p>Paragraph 17(a) (the reference to para 27 is an error)</p> <p>This opinion is based on:</p> <ul style="list-style-type: none"> (a) His opinion that the process adopted by an expert would have been similar to port: para 27. In reference to power, he does not even identify any non-participant observations about this. 	<p>(1) Except for report at [32](b) no hearsay objection was pressed for reasons already explained.</p> <p>(2) As to report [7] – [8], [18] and [29]:</p> <ul style="list-style-type: none"> • Such criticisms as the defendants’ advance do not to my mind establish Mr Freeman was expressing a view outside his expertise or breach of the statement of reasoning rule. I think the reasoning is evident: he had certain experience in the relevant time, but more experience later, and his assessment of the whole supported his expressions of opinions concerning the practice at the relevant time. • The defendants’ criticisms may be relevant to weight, but that is question for another time. • The paragraphs may be admitted for the limited purposes identified in item 1. <p>(3) As to report at [32], the position is different. No legitimate process of reasoning is present. Paragraph [32](b) is not pressed because it is hearsay. And once that is excluded there is no legitimate basis to regard the opinion as wholly or substantially based on Mr Freeman’s expertise, because his experience entirely post-dated the relevant time frame and that experience was the only reason nominated in the report for the expression of opinion. I uphold the objection to the report at [32]. I also uphold the objection for the reasons expressed in relation to item 1.</p>
4.	12	<p>Not an opinion based wholly or substantially on Mr Freeman’s (P) expertise.</p> <p>Mr Freeman’s opinion is based on:</p> <ul style="list-style-type: none"> (a) Second hand specific hearsay about port providers being flexible in an unidentified way, but which does not reference conditional contracts; (b) His reading of 2 Xstrata contracts, which he had no involvement in negotiating and which were entered into in unidentified circumstances; (c) His discussing the idea with GPC on a single occasion in 2014 in unidentified circumstances and it not being rejected out of hand (however no contract was entered into). 	<p>Paragraph 10(e):</p> <p>This opinion is based on:</p> <p>[...]</p> <ul style="list-style-type: none"> (e) His conclusion that GPC displayed flexibility, in particular in relation to conditional contracts, which is in turn based on: <ul style="list-style-type: none"> (i) Second hand specific hearsay about port providers being flexible in an unidentified way, but which does not reference conditional contracts: para 12(a). (ii) His reading of 2 Xstrata contracts, which he had no involvement in negotiating and which were entered into in unidentified circumstances: para 12(b). 	<p>(1) No hearsay objection was pressed for reasons already explained.</p> <p>(2) As mentioned in item 1, I would read the paragraph as arguably capable of being regarded as relevant factual (rather than opinion) evidence concerning conduct by the GPC both before and after the relevant times. The generality of its expression goes to weight rather than admissibility.</p> <p>(3) The paragraph may be admitted for the limited purposes identified in item 1.</p>

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		<p>The objection should also be upheld on the basis of the statement of reasoning rule, because Mr Freeman (P) does not explain how these experiences inform his view that GPC displayed flexibility in relation to entering into conditional contracts with customers.</p> <p>In relation to Mr Freeman's (P) reliance on specific hearsay, a fact asserted by another person upon which an expert's report is based ordinarily would not be construed as involving any statement about the truth of that fact: <i>Beavan v Wagner Industrial Services Pty Ltd</i> [2018] 2 Qd R 542 at [4]-[5]. This is distinct from non-specific hearsay, such as work produced by others in the area in which the expert has expertise: see <i>Bodney v Bennell</i> (2008) 167 FCR 84 at [92].</p>	(iii) His discussing the idea with GPC on a single occasion in 2014 in unidentified circumstances and it not being rejected out of hand (however no contract was entered into).	
5.	10, 11, 14, 20	<p>Not an opinion based wholly or substantially on Mr Freeman's expertise, but on his review of confidential GPC documents: <i>Sanrus No 5</i> at [62].</p> <p>Mr Freeman does not say that the information contained in the confidential GPC documents would otherwise have been known to an expert conducting a feasibility study in the period 2002-2005.</p>	<p>Paragraph 10(b)-(d) and (f):</p> <p>This opinion is based on:</p> <p>[...]</p> <p>(b) His opinion that an expert would have identified a "window" within which there was sufficient developable capacity for 10mtpa in 2003-2004 (but not based upon any information in the confidential GPC documents being known to the expert): para 10.</p> <p>(c) His opinion that an expert would have identified the risk of missing out to other projects (but not based upon any information in the confidential GPC documents being known to the expert): para 10.</p> <p>(d) His opinion that an expert would seek to manage this risk by discussion GPC's preparedness to enter into a conditional contract: para 11.</p> <p>[...]</p> <p>(f) His view that capacity can be handed back based on his review of confidential GPC documents (which he accepts an expert would not be aware of) and his later experience in negotiating a condition which a different entity in unidentified circumstances: para 14.</p> <p>Paragraph 14(b):</p> <p>This opinion is based on:</p> <p>[...]</p> <p>(b) His opinion that a risk to port would have been identified: paras 20-21.</p>	<p>(1) In report [14] the third sentence ("There are instances [...]") and the first clause of the fourth sentence ("while an expert [...] 2002 – 2005") were not pressed by the plaintiffs.</p> <p>(2) Otherwise, the objection regarding the opinions being expressed in a way which relied on confidential information were not pressed during oral argument by the defendants.</p> <p>(3) I rule in relation to these paragraphs in the way identified in item 1.</p>
6.	30	<p>Not an opinion based wholly or substantially on Mr Freeman's (P) expertise.</p> <p>Mr Freeman's (P) opinions are based on his post 2005 observations of others and his experiences in relation to other projects in unidentified circumstances which are not linked to 2002-2005.</p> <p>The objection should also be upheld on the basis of the statement of reasoning rule.</p>	<p>Paragraph 17(b):</p> <p>This opinion is based on:</p> <p>[...]</p> <p>(b) For the notion of a Connection Agreement, his post 2005 observations of others and experience in relation to other projects in unidentified circumstances and which are not linked to the period in question: para 30.</p>	<p>(1) It is apparent from the wording of the paragraph that the statement is not based on any expertise which Mr Freeman had at the relevant time because his only experience was experience which post-dated the relevant time.</p> <p>(2) Accordingly, I uphold the objection for the reasons advanced by the defendants. I also uphold the objection for the reasons expressed in relation to item 1.</p>
7.	32-34	Not an opinion based wholly or substantially on Mr Freeman's (P) expertise. Rather, Mr Freeman's (P) opinions are based on:	Paragraph 17(c):	(1) The objection to report at [32](b) and [33] is upheld because during the course of oral argument the defendants confined their hearsay

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		<p>(a) his experiences in 2009 (for a 'coal project west of Mackay' and 'an operating mine near Coppabella') in relation to projects in unidentified circumstances and which are not linked to 2002-2005;</p> <p>(b) specific hearsay from Professor Simon Bartlett, a consultant within Balanced Advisory; and</p> <p>(c) due diligence on a number of coal mines and coal projects post-2005 and in unidentified circumstances.</p> <p>The objection should also be upheld on the basis of the statement of reasoning rule.</p>	<p>This opinion is based on:</p> <p>[...]</p> <p>(c) For the terms of Connection Agreement, his experiences in 2009 in relation to projects in unidentified circumstances and which are not linked to the period in question, and specific hearsay from a consultant within Balanced Advisory: paras 32 and 33. His views on amortisation are based on 2 experiences in unidentified circumstances that are not linked to the period in question and specific hearsay. His views on a termination provision is based on a single experience in unidentified circumstances that are not linked to the period in question and specific hearsay.</p>	<p>objection to only [32](b) and [33] of the further supplementary Freeman report. The plaintiffs then advised that those paragraphs were not pressed.</p> <p>(2) That leaves report at [32](a) and [34].</p> <p>(3) As to [32](a):</p> <ul style="list-style-type: none"> With [32](b) not pressed, the paragraph is reduced to a proposition about managing risk which is not based on any expertise which Mr Freeman had at the relevant time because his only experience was experience which post-dated the relevant time. Accordingly the objection is upheld for the reasons advanced by the defendants. <p>(4) The same conclusions must be reached in relation to report at [34].</p>
8.	38, 41, 42	<p>Not an opinion based wholly or substantially on Mr Freeman's (P) expertise. Rather, Mr Freeman's (P) opinions are based on:</p> <p>(a) Post-2005 discussions with SunWater about Early Works Deeds in unidentified circumstances and which are not linked to 2002-2005;</p> <p>(b) A single occasion on which amortisation was agreed and another on which it was agreed in principle;</p> <p>(c) Mr Freeman's (P) observations of contracts which he managed, but does not appear to have negotiated; and</p> <p>(d) unidentified public announcements</p> <p>The objection should also be upheld on the basis of the statement of reasoning rule.</p>	<p>Paragraph 21:</p> <p>This opinion is based on post 2005 discussions with SunWater about Early Works Deeds in unidentified circumstances and which are not linked to the period in question: paras 38 to 42. Mr Freeman (P) references a single occasion on which amortisation was agreed and another on which it was agreed in principle and otherwise only discussions. As to the terms, Mr Freeman (P) references his observations of contracts, unidentified public announcements and discussions with SunWater in unidentified circumstances and which are not linked to the period in question. His views are based substantially on a review of documents and hearsay.</p>	<p>(1) The impugned paragraphs set out factual observations and opinions based only on projects which it was common ground all post-dated 2005.</p> <p>(2) It follows that insofar as the paragraphs set out opinions, they are not based on any expertise which Mr Freeman had at the relevant time because his only experience was experience which post-dated the relevant time. The objection would be upheld for the reasons advanced by the defendants and for the reasons also expressed in relation to item 1.</p> <p>(3) Insofar as the evidence is capable of being regarded as factual evidence of SunWater's conduct after 2005, the relevance of such conduct has not been demonstrated absent a basis for connecting it up with the relevant period.</p> <p>(4) The objection should be upheld.</p>
9.	31, 39	<p>Content of the assumption is not identified, in particular the time at which the export date should have been known or locked in for the purpose of Mr Freeman's retrospective assumption.</p>	<p>Paragraphs 18 and 22 (identical):</p> <p>Mr Freeman (P) also makes an assumption of coal exports in July 2007, for which he works backwards: para 31. He does not identify the content of that important assumption, in particular as to the time at which the export date would have to be known or locked in for the purposes of his retrospective conclusion.</p>	<p>As I noted at item 1 above, the report at [31] and [39] described the practice of experts involved in feasibility studies and assumptions this witness makes, and even though the evidence cannot be relied on for the purpose of the unpleaded advice case, the evidence is relevant to the plaintiffs' fallback argument referred to in the body of my judgment, and may be admitted for that purpose but subject to the limitations expressed in my judgment.</p>
10.	43	<p>Mr Freeman's opinions on Appendix 12 are dependent on his view that the Joint Venture would have entered into a Stage 2 infrastructure contract prior to May 2005 which, for the reasons identified in <i>Sanrus No 5</i> at [60(c)] and [61], are inadmissible.</p>	<p>Paragraph 24:</p> <p>Mr Freeman's (P) schedules are based on his inadmissible views about the entry into Stage 2 infrastructure contracts, which are inadmissible.</p>	<p>(1) I agree that Mr Freeman's expert opinions that the Stage 2 infrastructure contracts would have been entered into as and when he opines, are inadmissible to prove those facts.</p> <p>(2) However as I said in item 1 above, although report at [43] and the appendix 12 schedules cannot be admitted for the purpose of the unpleaded advice case, they are arguably relevant to an input by way of opinion into a Stage 2 Feasibility Study in May 2005 because they might be probative of the key outstanding tasks which would be identified in such a study if the tasks had not been performed as at the date of the study. Thus if there was a task which no admissible evidence demonstrated would have been performed by May 2005, the presently impugned evidence would suggest it would be identified as a key outstanding task in a Stage 2 Feasibility Study. Accordingly, the</p>

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				<p>information therein is arguably relevant to the nature of inputs by way of opinion into a Stage 2 Feasibility Study in May 2005.</p> <p>(3) It follows that the schedules may be admitted for the limited purpose of supporting the plaintiffs' fallback argument referred to in the body of my judgment, but subject to the limitations there identified.</p>