

SUPREME COURT OF QUEENSLAND

CITATION: *Callide Power Management Pty Ltd & Ors v Callide Coalfields (Sales) Pty Ltd & Ors; CS Energy Ltd v Callide Coalfields (Sales) Pty Ltd & Ors (No 5)* [2016] QSC 199

PARTIES: **CALLIDE POWER MANAGEMENT PTY LTD**
ACN 082 468 700
(first applicant)
CALLIDE ENERGY PTY LIMITED
ACN 082 468 746
(second applicant)
IG POWER CALLIDE LTD (FORMERLY SHELL COAL POWER CALLIDE LTD)
ACN 082 413 885
(third applicant)
v
CALLIDE COALFIELDS (SALES) PTY LTD
ACN 082 543 986
(first respondent)
ANGLO COAL (CALLIDE) PTY LTD
ACN 081 022 228
(second respondent)
ANGLO COAL (CALLIDE) NO. 2 PTY LTD
ACN 004 784 454
(third respondent)
CS ENERGY LIMITED
ABN 54 078 848 745
(applicant)
v
CALLIDE COALFIELDS (SALES) PTY LTD
ACN 082 543 986
(first respondent)
ANGLO COAL (CALLIDE) PTY LTD
ACN 081 022 228
(second respondent)
ANGLO COAL (CALLIDE) NO. 2 PTY LTD
ACN 004 784 454
(third respondent)

FILE NO/S: SC No 12122 of 2013
SC No 12138 of 2013

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 31 August 2016

DELIVERED AT: Brisbane

HEARING DATE: 18 – 20 July 2016

JUDGE: Flanagan J

ORDERS: **The separate questions in SC No 12138 of 2013 are answered in the terms of Annexure A to these Reasons.**

The separate questions in SC No 12122 of 2013 are answered in the terms of Annexure B to these Reasons.

I will hear the parties as to costs.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where the respondents and the applicants are parties to Coal Supply Agreements – where the Coal Supply Agreements include a mechanism for review where a Change Event is notified – where a Change Event is a change in circumstances which has, or will have, a material effect on the competitiveness of either party in relation to the industry in which it operates – where the respondents issued notice of a Change Event to the applicants on 12 November 2013 – where the applicants dispute the validity of the 12 November 2013 notice issued by the respondents – where the parties agreed a list of separate questions for determination – whether the 12 November 2013 notice issued by the respondents to the applicants was valid under the terms of the Coal Supply Agreements – whether the alleged facts pleaded by the respondents are true – whether the alleged facts pleaded by the respondents give rise to the objective commercial purpose pleaded by the respondents – whether the 12 November 2013 notice issued by the respondents to the applicants was valid on its face – whether a mere increase in costs is capable of being a Change Event for the purposes of the Coal Supply Agreements – whether a change in a party's expectation of benefitting under the Coal Supply Agreement is capable of being a Change Event for the purposes of the Coal Supply Agreements – whether the time requirements in clauses 12.3(b)(i) and 12.3(b)(ii) of the Coal Supply Agreements are essential – whether the 12 November 2013 notice issued by the respondents to the applicants describes a Change Event under the terms of the Coal Supply Agreement – whether the 12 November 2013 notice issued by the respondents to the applicants describes the impacts, options and alternatives for a Change Event

AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd & Ors [2009] QSC 8, considered

AGL Sales (Qld) P/L v Dawson Sales P/L & Ors [2009] QCA 262, considered

AIB Group (UK) Limited v Martin [2002] 1 WLR 94, cited

Alliance Petroleum Australia NL & Ors v Australian Gas Light Company (1985) 39 SASR 84, cited

Amann Aviation Pty Ltd v Commonwealth of Australia (1990) 22 FCR 527, cited

Bremer v Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep 109, cited

British and Commonwealth Holdings PLC v Quadrex Holdings Inc [1989] 1 QB 842, cited

Callide Coalfields (Sales) P/L v CS Energy Ltd & Anor [2008] QCA 408, applied

Callide Power Management Pty Ltd & Ors v Callide Coalfields (Sales) Pty Ltd & Ors; CS Energy Ltd v Callide Coalfields (Sales) Pty Ltd & Ors (No 3) [2015] QSC 295, cited

Dilworth v Commissioner of Stamps [1899] AC 99, cited

Esso Exploration & Production UK Ltd v Electricity Supply Board [2004] EWHC 723 (Comm), cited

Great Elephant Corporation v Trafigura Beheer BV [2012] 2 Lloyd's Rep 503, considered

Jennings Construction Ltd v QH & M Birt Pty Ltd (1986) 8 NSWLR 18, considered

Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery AD (No 3) [2003] 1 Lloyd's Rep 1, cited

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, considered

McLellan & Anor v Australian Stock Exchange Ltd (2005) 144 FCR 327, cited

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37, cited

Opat Decorating Service (Aust) Pty Ltd v Hansen Yuncken (SA) Pty Ltd (1994) 11 BCL 360, considered

Patel v Earlspring Properties Ltd [1991] 2 EGLR 131 (CA), cited

R v Gray & Ors; Ex parte Marsh & Anor (1985) 157 CLR 351; [1985] HCA 67, considered

State of New South Wales v Austeel Pty Ltd [2003] NSWCA 392, considered

Superior Overseas Development Corporation and Phillips Petroleum (UK) Co Limited v British Gas Corporation [1982] 1 Lloyd's Rep 262, considered

Tradax Export SA v Andre and Cie SA [1976] 1 Lloyd's Rep 416, considered

United Scientific v Burnley Council [1978] AC 904, considered

Wormald Engineering Pty Ltd v Resources Conservations Co International (1988) 8 BCL 158, cited
YZ Finance Company Pty Ltd v Cummings (1964) 109 CLR 395; [1964] HCA 12, considered

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Introduction

- [1] On 28 October 2015 I determined that the present proceedings constituted appropriate cases for the hearing and determination of separate questions.¹ The separate questions in SC No 12138 of 2013 and my answers to those questions is “Annexure A” to these Reasons. The separate questions in SC No 12122 of 2013 and my answers to those questions is “Annexure B”.
- [2] Some of the applicants are owners of power stations located in central Queensland. The power station in SC No 12138 of 2013 is referred to as the Callide B Power Station and the power station in SC No 12122 of 2013 is referred to as the Callide C Power Station. Some of the respondents supply coal for the operation of these power stations pursuant to Coal Supply Agreements entered into on or about 11 May 1998. The Coal Supply Agreements are substantially identical. So too are the separate questions. For the purposes of answering the separate questions in each proceeding I will refer to the Coal Supply Agreement and relevant notices in respect of SC 12138 of 2013. CS Energy is the named applicant in those proceedings.
- [3] The separate questions raised for consideration the proper construction of the Coal Supply Agreements, in particular clause 12.3 which deals with “Change Events” and whether notices submitted to the applicants by the respondents, purportedly pursuant to clause 12.3(b)(ii) of each Coal Supply Agreement, constitute Change Event Notices under the agreements.

The relevant terms of the Coal Supply Agreements²

- [4] The respondents are referred to in the Coal Supply Agreement as the “Seller” or the “Coal Mine Owner”. CS Energy, as owner of the Callide B Power Station, is referred to as the “Buyer”.
- [5] The Coal Supply Agreement is for an initial term of 10 years. Under clause 3 the Buyer, has four successive options to extend the term of the Coal Supply Agreement, each option being for a period of five years. The potential period of the operation of the Coal Supply Agreement is therefore 30 years. To exercise the option under clause 3 the Buyer is required to issue a notice indicating that it wishes to exercise the option.³ This notice triggers an obligation on the parties to “meet and negotiate all terms and conditions including price, subject to the price review procedures set out in clause 12”.⁴ If the parties fail to agree on all the terms and conditions including price by certain dates, the Buyer has a sole and absolute discretion to exercise the option to extend the Coal Supply Agreement “on the same terms and conditions including the price, applying at the conclusion of the previous Initial Term or Option Term as the case may be”.⁵ If the parties

¹ *Callide Power Management Pty Ltd & Ors v Callide Coalfields (Sales) Pty Ltd & Ors; CS Energy Ltd v Callide Coalfields (Sales) Pty Ltd & Ors (No 3)* [2015] QSC 295.

² The Coal Supply Agreement referred to is that of CS Energy, which is Exhibit “AV-1” to the affidavit of Mr Vari CD2.

³ Clause 3.2(a)(i).

⁴ Clause 3.2(a)(ii).

⁵ Clause 3.2(a)(vi).

do agree the terms and conditions for the Option Term, the Buyer may exercise the option on those agreed terms and conditions.⁶

- [6] In 2009 CS Energy exercised the first option.
- [7] In one relevant respect it is necessary to refer to a difference in the Coal Supply Agreements. Both Coal Supply Agreements contain conditions precedent. Clause 2.1 of the CS Energy Agreement for Callide B provides:
- “This Agreement is subject to and conditional on the CS 93 Collapse Agreement and the Callide Power Project Coal Supply Agreement being executed contemporaneously with this Agreement, failing which the Seller may terminate this Agreement by giving seven days notice to the Buyer. The parties agree this Clause 2.1 is for the benefit of the Seller and may be waived, in respect of all or any such Agreements, by the Seller.”
- [8] Clause 2 of the Coal Supply Agreement for Callide C states:
- “This Agreement is subject to and conditional on: (a) all Project Approvals required for the construction and operation of the Power Station being obtained by the Station Owners by 31 December 1998 failing which the Buyer may terminate this Agreement by giving seven days notice to the Seller. The parties agree this Clause 2(a) is for the benefit of the Buyer and may be waived, in respect of all or any of the approvals forming the Project Approvals, by the Buyer; and (b) all the Related Agreements being executed contemporaneously with this Agreement, failing which the Seller may terminate this Agreement by giving seven days notice to the Buyer. The parties agree this Clause 2(b) is for the benefit of the Seller and may be waived, in respect of all or any of the Agreements forming the Related Agreements, by the Seller.”
- [9] These conditions precedent reflect that the Coal Mine Owners were supplying the Callide B Power Station from the Callide Mine prior to the construction of the Callide C Power Station. The Callide Mine is adjacent to the Callide B Power Station. The Callide C Power Station was to be constructed next to the Callide Mine. Initially the coal provided to the Callide B Power Station was pursuant to an agreement called CS 93. The Callide C Power Station was to be constructed pursuant to a joint venture. Both power stations were to be supplied with coal from the Callide Mine by means of delivery to relevantly either the Callide B Coal Conveyor System or the Callide C Coal Conveyor System. The CS 93 Collapse Agreement was an agreement to amend CS 93 to no longer apply to Callide B.
- [10] Clause 4 of the Coal Supply Agreement provides for the sale and purchase of coal. Clause 5 provides for quantities and rates of delivery.
- [11] By clause 7 the Coal Mine Owners warrant that at the start of the Coal Supply Agreement and every five years throughout the Coal Supply Agreement’s 30 years potential life, they

⁶ Clause 3.2(a)(v).

have enough coal to supply all the coal required to operate the Callide B Power Station. Clause 7.2 provides:

“7.2 Ongoing Representations, Warranties and Undertakings

The Seller hereby represents, warrants and undertakes to the Buyer that the Seller will, at the following times during the Term, ensure the Coal Mine Owners set aside from the Coal Reserves for the Buyer’s benefit the following amounts of Coal:

(a) at the commencement of the first eight and one half years of the Initial Term an amount of 99 million Tonnes Equivalent of Coal;

(b) at the commencement of the balance of the Initial Term an amount of Coal calculated in accordance with the following formula:

$$\text{amount of Coal} = \frac{99 \text{ million Tonnes Equivalent} \times 25}{33.5}$$

(c) at the commencement of the first Option Term, if exercised by the Buyer, an amount of Coal calculated in accordance with the following formula:

$$\text{amount of Coal} = \frac{99 \text{ million Tonnes Equivalent} \times 20}{33.5}$$

(d) at the commencement of the second Option Term, if exercised by the Buyer, an amount of Coal calculated in accordance with the following formula:

$$\text{amount of Coal} = \frac{99 \text{ million Tonnes Equivalent} \times 15}{33.5}$$

(e) at the commencement of the third Option Term, if exercised by the Buyer, an amount of Coal calculated in accordance with the following formula:

$$\text{amount of Coal} = \frac{99 \text{ million Tonnes Equivalent} \times 10}{33.5}$$

(f) at the commencement of the fourth Option Term, if exercised by the Buyer, an amount of Coal calculated in accordance with the following formula:

$$\text{amount of Coal} = \frac{99 \text{ million Tonnes Equivalent} \times 5}{33.5}”$$

[12] Clause 10 deals with the calculation of the Contract Price. Clause 10.1 provides for the escalation of the Base Price on a quarterly basis. The escalation is 90 per cent of increases in the CPI Index for Brisbane. Clause 10.2 contemplates the replacement of the CPI

Index's escalator in favour of an EMI escalation. "EMI" is defined in Schedule 1 to the Coal Supply Agreement to mean the electricity market based index that reasonably reflects the underlying long term trend in electricity prices and which is to be determined in accordance with clause 10.2. By clause 10.2(a) the method of calculating the Contract Price in clause 10 (including the method of calculating escalation) is subject to the review provisions set out in clause 12. By clause 10.2(c)(i) the parties agree that an EMI may be a more appropriate index for the escalation of the Contract Price than the CPI Index. By clause 10.2(e) the parties acknowledge and agree that a possible EMI must:

- (i) reflect underlying long term trends in electricity prices;
- (ii) exclude taxes; and
- (iii) incorporate on a basis acceptable to the parties any market movements or aberrations which occur and which cannot be taken as indicative over the Review Period of underlying long term trends in electricity.

[13] The critical provision is clause 12 which provides:

"12. REVIEW OF AGREEMENT

12.1 Principles

- (a) Each Party acknowledges and agrees:
 - (i) subject to Clause 12.1(a)(ii), the Coal Mine Owners and the Buyer have an expectation of benefiting under this Agreement;
 - (ii) subject to Clause 12.1(a)(iii), each Party supports the process of review set out in this Clause 12 to ensure both the Coal Mine Owners and the Buyer remain competitive in relation to their respective industries; and
 - (iii) during the Initial Term, the competitive position of the Power Station relative to other power stations operating in the Power Station's industry in Queensland as at the Effective Date should be restored, having regard to the viability of the Coal Mine Owners' mine in its industry.
- (b) Each Party agrees that circumstances may change during the Term of this Agreement which may require the terms of this Agreement to be reviewed to ensure those terms remain consistent with the principles set out in Clause 12.1(a).

12.2 Five Yearly Review Meeting

During this Agreement, the Parties must:

- (a) convene a meeting of the Parties within 30 days of the fifth anniversary of the Commercial Load Date for Unit 1;
- (b) at that meeting, review the consistency of the operation of this Agreement against the principles set out in Clause 12.1 (a);

- (c) within 14 days of that meeting, exchange all data which the Parties hold which is relevant to reviewing the consistency of the operation of this Agreement against the principles set out in Clause 12.1(a); and
- (d) use their best endeavours to review the consistency of the operation of this Agreement against the principles set out in Clause 12.1(a) within 90 days of that meeting.

12.3 Change Events

- (a) A '**Change Event**' is a change in circumstances which has, or will have, a material effect on the competitiveness of either the Coal Mine Owners or the Buyer (in the reasonable opinion of a Party) in relation to the industry in which it operates, and includes, without limitation:
 - (i) the Commercial Load Date of Unit 2 occurring more than 18 months after the Effective Date;
 - (ii) if the Buyer reasonably demonstrates, by the elimination of other relevant factors, that there is a change in coal prices being paid by other power stations. The Parties acknowledge that the Buyer must reasonably demonstrate, by the elimination of other relevant factors, that there is a material adverse change in the competitive position of the Power Station which is due to changes in coal prices being paid by other power stations, before the Parties will be obliged to review this Agreement against the principle set out in Clause 12.1(a)(iii).
 - (iii) major changes to working conditions within the coal mining industry, including, without limitation, advances in technology which were not foreseen at the date of this Agreement;
 - (iv) a demonstrated (by the Seller) increase in the long term (being at least five years) trend in electricity price occurring during the whole or any part of any period when an EMI is not operative; and
 - (v) a change in governmental policy, or a change in a law or regulation, relating to environmental standards and compliance with those standards.
- (b) If at any time after the date of execution of this Agreement there occurs, or either Party considers there may occur, a Change Event, then:
 - (i) a Party (the '**Notifying Party**') may notify the other (the '**Receiving Party**') in writing promptly when that Change Event becomes known to the Notifying Party that it is the Notifying Party's intention to initiate a review of this Agreement which may lead to an Adjustment;

- (ii) if it wishes to proceed with a review of this Agreement, the Notifying Party must, as soon as practicable in all the circumstances, submit a formal notice of a Change Event (the '**Change Event Notice**') to the Receiving Party, which will include:
 - (A) all data which the Notifying Party holds which is relevant both to the Change Event including detailed information regarding the nature, extent and quantum of the cost and revenue impacts of the Change Event and to calculating those costs and revenue impacts as they relate to all of the options and alternatives identified by the Notifying Party available to accommodate or mitigate the Change Event; and
 - (B) options and alternatives identified by the Notifying Party and the Notifying Party's recommended option, and a Change Event will be deemed to have occurred;
- (iii) As soon as possible after a Notifying Party becomes aware that an estimate of the financial effect is likely to be incorrect, the Notifying Party must amend that estimate and give copies of the amended estimate and the estimate it amends to the Receiving Party.
- (iv) The onus is upon the Notifying Party to establish the impact of the Change Event.
- (v) The Parties must use their best endeavours to review and to attempt to agree an Adjustment generally in accordance with the principles set out in Clause 12.1.

12.4 Receiving Party's Notice Not Accepting Options

- (a) If a Receiving Party notifies the Notifying Party that it does not accept any of the options proposed or financial effects estimated in the Change Event Notice, then it may propose alternative options for the Notifying Party's consideration.
- (b) The Notifying Party must respond within 10 Business Days of its receipt of any response from the Receiving Party pursuant to Clause 12.4(a).

12.5 Convene Meeting of Parties

The Change Event Notice issued pursuant to Clause 12.3(b)(ii) must specify a time (being at least 30 days but less than 45 days after the date of receipt of the Change Event Notice) and a place in Brisbane at which a meeting will be held and attended by a senior officer of the Notifying Party (who must be named in the Change of Event Notice) and a senior officer of the Receiving Party.

12.6 Receiving Party's Senior Officer

Within 7 days of receipt of the Change Event Notice, the Receiving Party must give the Notifying Party written notice of the name of a representative of the Receiving Party who must be its senior officer for the purpose of attending the proposed meeting specified under Clause 12.5.

12.7 Review of Options

- (a) The senior officers must attend the meeting specified under Clause 12.5 and must review the options set out in the Change Event Notice and the detailed information included in the Change Event Notice.
- (b) The senior officers must, as soon as practicable, attempt to:
 - (i) agree an option or determine an appropriate course of action; and
 - (ii) agree on the nature and quantum of the financial effect of the Change Event.

12.8 Mitigation

The Parties must have regard to the desirability to preclude the occurrence of, or to mitigate any adverse consequences flowing from or contributing to, any Change Event.”

- [14] The “Adjustment” contemplated by clause 12.3 is an adjustment to the Coal Supply Agreement.⁷
- [15] Other relevant clauses which will be referred to in the course of these Reasons are clause 13 which deals with dispute resolution and clause 14 which is the force majeure clause.

6 November 2013 Notice

- [16] On 6 November 2013, the relevant respondents delivered to the applicant a document described as a “Notice of Change Event” pursuant to clause 12.3(b)(i) of the Coal Supply Agreement (“**the First Notice**”). By the First Notice, the respondents purported to notify the applicant that a Change Event had occurred and that it was the respondents’ intention to initiate a review under clause 12 which may lead to an adjustment. The First Notice continues:

“Briefly, and without prejudice to the Change Event Notice, since the time of entry into the CSA [Coal Supply Agreement], there have been a number of changes in circumstances which, in the Seller’s reasonable opinion, have had, and continue to have, a material effect on its competitiveness in the coal mining industry such that a Change Event within the meaning of clause 12.3(a) has occurred. The effect of these changes is that the cost of production at the Callide Mine has substantially increased in circumstances where the Contract Price has remained relatively stable.

⁷ Coal Supply Agreement Schedule 1, Definitions.

The Seller will, pursuant to clause 12.3(b)(ii), submit a formal Change Event Notice as soon as practicable in all the circumstances.

As required under clause 12.3(b)(v), the Seller will use its ‘best endeavours’ to review and attempt to agree an Adjustment generally in accordance with the principles set out in clause 12.1. We expect that the Buyer will do the same.

The terms used in the CSA bear the same meaning in this letter.”

12 November 2013 – The Change Event Notice

[17] On 12 November 2013, the relevant respondents delivered to the applicant a second notice described as a “Change Event Notice” (“the 12 November notice”) purportedly pursuant to clause 12.3(b)(ii). The 12 November notice:

(a) provides, by [4.2] – [4.6] that:

“4.2 Since the time of entry into the CSA, there have been a number of changes in circumstances (identified below in this Notice) which, in the Seller’s reasonable opinion, have had, and continue to have, a material effect on the Coal Mine Owners’ competitiveness in the coal mining industry.

4.3 The effect of these changes in circumstances is a substantial increase in the cost of producing coal from the southern areas of Callide Coalfields (referred to as the **Callide Mine**), in circumstances where a significant proportion of the coal from the Callide Mine is sold to the Buyer under a contract which fixes the coal price paid by the Buyer at a rate far lower than market value. These changes in circumstances together and cumulatively constitute a Change Event, being a Change Event within the meaning of clause 12.3(1) [sic].

4.4 The Seller identifies the following changes in circumstances, the nature and extent of each of which is described in sections 5 to 16 of this Notice:

- (a) Changes to market and economic circumstances;
- (b) Changes to the mine planning conditions;
- (c) Extensive and ongoing rainfall initially constituting Force Majeure Events under the CSA, together with the frequency of such rainfall Force Majeure Events and their immediate, cumulative and ongoing effects;
- (d) Significant reduction in operating flexibility due to changes in government regulation resulting in changes to the mine’s water discharge and storage requirements;
- (e) Significant increases to the overall costs of production of coal at the mine;
- (f) Increases in labour and contractor costs at the mine;
- (g) Increases in the cost of diesel incurred by the mine;

- (h) Increases in the cost of explosives incurred by the mine;
- (i) Increases in maintenance costs incurred by the mine;
- (j) Increases in the cost of electricity incurred by the mine;
- (k) The Coal Mine Owners ceasing to benefit under the CSA;
and
- (l) Significant change in the coal prices paid by other power stations.⁸

4.5 Pursuant to clause 12.3(2)(2) [sic] upon the issuing of this Notice, a Change Event will be deemed to have occurred.

4.6 If any part of this Change Event Notice is determined to be ineffective or invalid for any reason whatsoever, such ineffectiveness or invalidity will not affect the validity or operation of the remainder of this Change Event Notice and such ineffective or invalid part will be deemed to be deleted from this Change Event Notice.”

- (b) sets out the nature and extent of each change in circumstances set out in paragraph 4.4 and is addressed in detail in sections 5 – 16;
- (c) provides by section 17 the quantum of the cost and/or revenue impacts of the changes in circumstances. Section 17 of the 12 November notice relevantly provides:

“17 Quantum of the Cost and/or Revenue Impacts of the Change in Circumstances

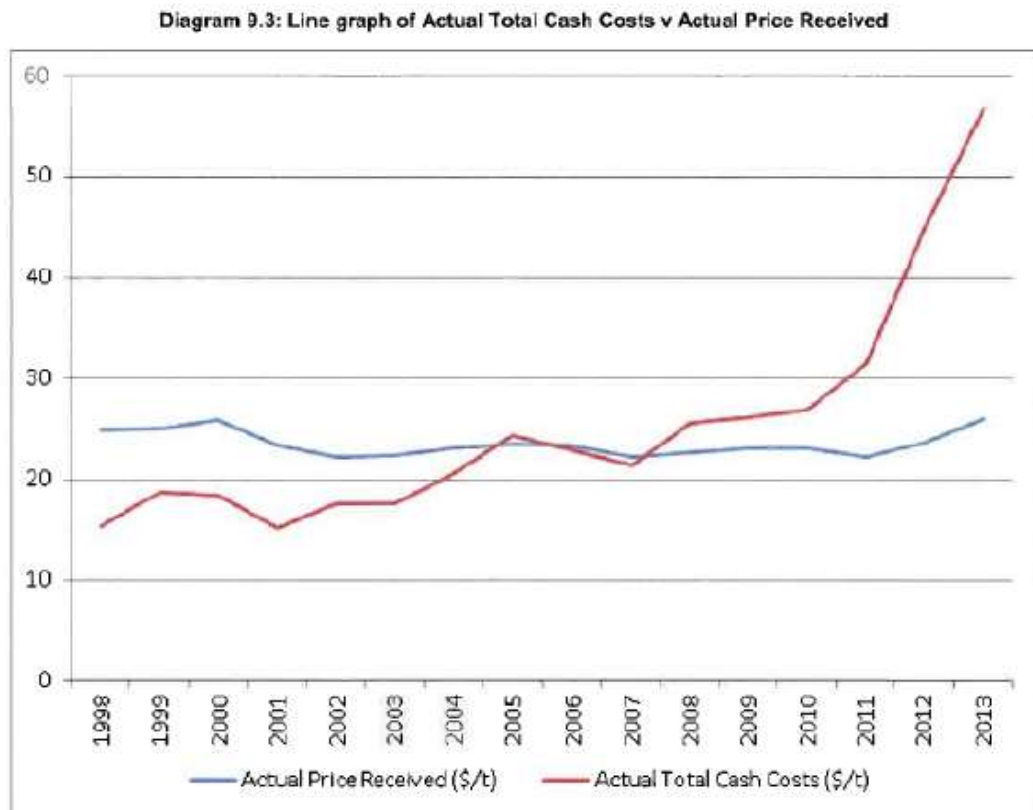
17.1 The overall cost and revenue impact of the changes in circumstances described in this Change Event Notice is set out in Annexures B and E to this Notice. Annexure B sets out the Life of Mine (**LOM**) forecast as at July 2013 if all 3option terms are exercised by the Buyer; that is, to 2031. It shows that the Seller currently stands to achieve a Cash Margin (Deficit) over the life of the CSAs going forward from 1 January 2014 of negative \$3.253 billion. By comparison, the original Life of Mine plan forecast a Cash Margin to be derived under the CSAs from 1 January 2014 to 2018 of positive \$70 million. To 2031, this is a difference of approximately \$3.323 billion. Annexure E sets out a historical summary of Callide Mine’s financial performance between 1998 and 2013.

17.2 This cash loss is largely the result of the increase in the overall costs of production caused by the cumulative effect of the changes in circumstances described in this Notice, in circumstances where the Contract Price is essentially fixed at a rate far below market price for the life of the CSA. The overall impact of the Change Event on the costs of production to date is described in Section 9 above, and the costs

⁸ These purported “changes in circumstances” are further explained in [20] below.

impacts of each of the various changes in circumstances contributing to the Change Event are described in Sections 5 to 16 above.”⁹

The respondents assert that the estimated extent of these financial consequences up to the time of the 12 November notice, is captured visually in diagram 9.3 of the 12 November notice. The respondents were, at the outset of the Coal Supply Agreement, supplying coal at a contract price which exceeded their costs and allowed for a reasonable return on investment. That position began to deteriorate in about 2004. Between 2012 and 2013 there was a significant change with the result that the costs of production far exceeded the price received under the Coal Supply Agreement.¹⁰



(d) provides, by paragraph 18.1:

“18 Options and Alternatives Identified by the Seller

18.1 The Seller has identified five possible options or alternatives to take account of the changed circumstances described in this Notice. Four of the possible alternatives proposed by the Seller contain a number of adjustments to the CSA relating to:

- Options terms;

⁹ CPM’s Written Submissions, [37].

¹⁰ Respondents’ Written Submissions, [9].

- Tonnage requirements and notice;
 - Coal quality; and
 - Contract and Invoice Price.”
- (e) sets out, in paragraphs 18.2 – 18.6, four of the five alternatives referred to in paragraph 18.1 (identified as Alternatives 1 and 2 and 1A and 2A) and proposed in paragraph 18.7, as Alternative 3, the early and orderly termination of the Coal Supply Agreement;
- (f) identifies, in paragraph 19.1, the quantum of the costs and/or review impacts of the options and alternatives; and
- (g) provides, by section 20, that the Seller’s recommendation was Alternative 2 as described in Annexure 2 to the 12 November notice.
- [18] The narrative part of the 12 November notice runs approximately 80 pages. As identified above it refers to 12 matters which are alleged to constitute a “Change Event” within the meaning of the Coal Supply Agreement. The 12 November notice includes approximately 60 annexures which, when printed single-sided, occupy more than seven lever arch volumes.
- [19] The 12 November notice also annexes detailed cost models, which were served in electronic Excel spreadsheet form. These models set out:
- (a) historical physical and financial data, including costs and revenue data, for the Callide Mine for the period 1998 until 2013;
 - (b) forecast physical and financial data, including costs and revenue data, for the Callide Mine for the period from 2014 until 2031; and
 - (c) separate forecast physical and financial data, including costs and revenue data, for the Callide Mine for the period from 2014 until 2031, assuming that the options and alternatives proposed in the notice were implemented.
- [20] It may be accepted, as submitted by the applicants, that the Coal Mine Owners rely upon there having been one Change Event. That Change Event is a conglomeration of twelve changes in circumstances. The disparate nature of the changes in circumstances said to give rise to the one Change Event is apparent from even the briefest review of the 12 November notice. The changes include:
- (a) a change in the market and economic conditions since 1998 by virtue of the increase in demand for Australian resources as a result of the “mining boom” between 2003 and 2011 (section 5);

- (b) the mining strip ratio¹¹ for the Callide Mine being substantially greater than had been forecast by the Coal Mine Owners (section 6);
- (c) two extended periods of severe rain fall, in 2010/2011 and then in 2013, and their physical effects on mining the coal mine (section 7);
- (d) a change in 2010 to the Callide Mine's Environmental Authority conditions in relation to water discharge (section 8);
- (e) an instruction from the Department of Environment and Heritage Protection in 2013 to cease discharging water in 2013 (section 8);
- (f) increases in the costs of production for every year between 1998 and 2013 at an average of 15% per year (section 9);
- (g) increases in labour costs for every year between 1999 and 2013 at an average of 5% year on year growth (section 10);
- (h) increases in cost of diesel used for the mine for every year between 1999 and 2013, a total increase over that period of 1160% (section 11);
- (i) increases in the cost of explosives for every year between 1999 and 2012, a total increase over that period of 250% (section 12);
- (j) increases in the cost of maintenance material costs for every year between 1999 and 2012, a total increase over that period of 193% (section 13);
- (k) increases in the cost of electricity for every year between 1999 to 2012, a total increase over that period of 159% (section 14);
- (l) the Coal Mine Owners ceasing to benefit under the Coal Supply Agreement (section 15); and
- (m) increases in the prices paid for coal by other power stations for every year between 1999 to 2012, a total increase during that period of over 300% (section 16).¹²

[21] The cost and revenue impacts identified in the 12 November notice are for the cumulative effect of all twelve changes in circumstances.¹³ Cost and revenue impacts are not provided for each change in circumstances or any subset of the changes in circumstances.¹⁴

¹¹ The strip ratio typically measures the prime overburden to coal ratio.

¹² CPM's Written Submissions, [35].

¹³ Section 17 of the 12 November notice.

¹⁴ See [203]-[209] below.

- [22] The possible options and alternatives to take account of the changed circumstances described in the 12 November notice are also for the cumulative effect of all twelve changes in circumstances. Options and alternatives are not provided for each change in circumstances nor for any subset of changes in circumstances.¹⁵
- [23] The applicants submit that, in broad terms, the 12 November notice appears to be an attempt to:
- (a) identify all of the disparate factors that may have contributed to the Coal Supply Agreement being less profitable than may have been expected at the outset;
 - (b) lump those factors together as a single “Change Event”;
 - (c) claim as the impact of that “Change Event” the difference between what the respondents hoped the Coal Supply Agreement would yield over the life of mine, and what is actually being achieved.¹⁶
- [24] According to the applicants, at the heart of the present dispute are the following issues:
- (a) whether such a wide notice complies with the Coal Supply Agreement;
 - (b) whether certain factors identified in the 12 November notice fall within the definition of “Change Event” in clause 12.3(a) of the Coal Supply Agreement;
 - (c) whether the global life of mine assessment of impacts complies with the Coal Supply Agreement;
 - (d) whether a Change Event Notice must be given within the timeframes stipulated in cl. 12.3(b)(i) and (ii) of the Coal Supply Agreement;
 - (e) the consequences of failure to comply with the content and timing requirements of the notice provisions in the Coal Supply Agreement.¹⁷

The separate questions

- [25] On the first and second days of trial leave was granted to both the applicants and the respondents to amend their pleadings. As a result of those amendments questions 1(a), (b) and (c) in respect of alleged fact 1(e), questions 2, 12 and 24 in SC No 12138 of 2013 and questions 1(a), (b) and (c) in respect of alleged fact 1(e) and questions 2, 12, 22 and 23 in SC No 12122 of 2013 are no longer required to be answered.

¹⁵ Section 18 of the 12 November notice. See [219]-[220] below.

¹⁶ CS Energy’s Written Submissions, [9].

¹⁷ CS Energy’s Written Submissions, [10].

[26] The separate questions can be divided into two broad categories. The first category of questions relates to the construction of the Coal Supply Agreement. The second category relates to the construction of the 12 November notice.

[27] The separate questions may be further divided into the following subcategories:

In respect of the construction of the Coal Supply Agreement:

- (a) background facts and the objective commercial purpose of the Coal Supply Agreement (Questions 1, 3 & 4);
- (b) what is a "Change Event" and what is required to appear on the face of a valid Change Event Notice? (Questions 5 to 10);
- (c) are increases in costs and a failure to benefit capable of being a "Change Event"? (Questions 11 and 22); and
- (d) what are the time requirements for Change Event notices and do they affect the validity of such a notice? (Questions 13 to 15).

In respect of the construction of the 12 November notice:

- (e) does the 12 November notice describe a "Change Event" and if it does not is it invalid? (Questions 16 to 30); and
- (f) does the 12 November notice describe the impacts, options and alternatives for a "Change Event" and if it does not is it invalid? (Questions 31 to 36).

Background facts and the objective commercial purpose of the Coal Supply Agreement (Questions 1, 3 and 4)

Question 1

"1. At the time Callide Coalfields (Sales) Pty Ltd (Callide Sales) (acting on behalf of Anglo Coal (Callide Pty Ltd (Anglo Coal Callide) and AMP Life Limited (AMP Life)) and CS Energy Limited (CS Energy) entered into an agreement pursuant to which Callide Sales agreed to supply coal to CS Energy on 11 May 1998 (Coal Supply Agreement),

- (a) were the alleged facts set out in subparagraphs (d) to (h) true?**
- (b) were the alleged facts in subparagraphs (d) to (h) known by each of CS Energy, Callide Sales, Anglo Coal Callide (then Shell Coal (Callide) Pty Ltd) and AMP Life?**
- (c) alternatively to (b), would the alleged facts in subparagraphs (d) to (h) have been known by reasonable persons in the position of each of those parties?**

The alleged facts are:

- (d) **clauses 9.1.3 and 17.6 of CS93 contain a limited review mechanism in the event of any major change to prescribed working conditions within the coal mining industry (as alleged in paragraph 4A(e)(iii) of the defence);**
 - (f) **CS Energy, Callide Energy Pty Ltd and IG Power (Callide) Ltd (then Shell Coal Power (Callide) Ltd) estimated that the Contract Price agreed under the Coal Supply Agreement and the Callide Power Project Coal Supply Agreement for the supply of coal would result in them being competitive and profitable in their operations (as alleged in paragraphs 4A(k) of the defence);**
 - (g) **Anglo Coal Callide and AMP Life (the Original Coal Mine Owners) estimated that the Contract Price agreed under the Coal Supply Agreement and the Callide Power Project Coal Supply Agreement for the supply of coal would result in them being competitive and profitable in their operations (as alleged in paragraph 4A(k) of the defence);**
 - (h) **a change to the estimates referred to in subparagraphs 4A(k) and (l) of the defence would amount to a change to conditions affecting the competitiveness and profitability of the Callide Mine and the Callide B Power Station and the Callide C Power Station (as alleged in paragraph 4A(n) of the defence).**
3. **May the facts alleged in paragraph 4A of the defence be taken into account in interpreting the Coal Supply Agreement?**
 4. **Do the facts alleged in paragraph 4A of the defence give rise to the inference of the objective commercial purpose of the Coal Supply Agreement alleged in paragraph 4B of the defence?"**

[28] In construing the Coal Supply Agreement and in particular clause 12, the respondents seek to rely on certain background facts and other extrinsic evidence. Nearly all of these background facts are admitted. Each of those facts were known by the parties to the Coal Supply Agreement.¹⁸ These facts and evidence are relied on for a number of purposes. First, by reference to the background facts, the respondents seek to identify the objective commercial purpose of the Coal Supply Agreement. The relevant background facts are pleaded in paragraph 4A of the Sixth Further Amended Defence.¹⁹ By that paragraph, the Respondents allege that at the time of the execution of the Coal Supply Agreement:

- (a) **CS Energy owned and operated a coal fired electricity generation facility (Callide B Power Station);**
- (b) **Anglo Callide Coal Pty Ltd (then Shell Coal (Callide) Pty Ltd) and AMP Life (Original Coal Mine Owners) owned and operated the Callide Coal Mine;**

¹⁸ CPM's Written Submissions, [55].

¹⁹ Ninth Further Amended Defence of the Respondents, [4A] (SC No 12122 of 2013).

- (c) the Callide B Power Station was adjacent to the Callide Coal Mine and connected to it by a conveyor system;
- (d) the Original Coal Mine Owners supplied coal from the Callide Coal Mine to CS Energy for the Callide B Power Station and the Gladstone Power Station pursuant to an agreement dated 23 February 1994 (**CS93**);
- (e) CS93:
 - (a) was for a term of 12 years commencing on 1 January 1994;
 - (b) contained an escalation mechanism based upon general changes in the costs of labour and materials in the Australian economy, changes in specified statutory charges applicable to the coal industry in Queensland and increases in cost due to changes in the price of electricity sold to the Callide Coal Mine;
 - (c) contained a limited review mechanism in the event of any major change to prescribed working conditions within the coal mining industry;
- (f) CS Energy and Shell Coal Pty Ltd (then a related company of Anglo Callide Coal (then Shell Coal (Callide) Pty Ltd)) had entered into a written agreement dated 4 December 1997 (**Interim Joint Venture Agreement**) pursuant to which they formed an interim joint venture:
 - (a) to call for tenders to engineer, procure and construct a coal fired electricity generating facility adjacent to the Callide B Power Station and the Callide Coal Mine (**Callide C Power Station**);
 - (b) to complete negotiations and execute documents for:
 - (A) a joint venture between them or related entities for the construction and operation of the Callide C Power Station and the sale of electricity generated by it (**Callide Power Project**);
 - (B) an agreement for the supply of coal from the Callide Mine (as defined in paragraph 7(d)(ii) of the Respondents' counterclaim) to the Callide C Power Station;
 - (C) an agreement for the supply of coal from the Callide Mine to the Callide B Power Station;
 - (D) a variation to CS93 in consequence of the agreement referred to in paragraph (C) above;

- (g) as contemplated by the Interim Joint Venture Agreement, between about December 1997 and about May 1998, the following written agreements (amongst others) were negotiated:
- (a) an agreement between:
 - (A) Callide Energy as a participant;
 - (B) IG Power (Callide) Ltd (then Shell Coal Power), a related company of Shell Coal and Anglo Callide Coal Pty Ltd (then Shell Coal (Callide) Pty Ltd), as a participant;
 - (C) CPM as manager, for the establishment and operation of the Callide Power Project (**Joint Venture Agreement**);
 - (b) an agreement between Callide Sales (on behalf of Anglo Callide Coal (then Shell Coal (Callide) Pty Ltd) and AMP Life) and CS Energy for the supply of coal from the Callide Mine to the Callide B Power Station on substantially the same terms as the Coal Supply Agreement (**Callide B Coal Supply Agreement**);
 - (c) an agreement to vary CS93 to no longer apply to the supply of coal from the Callide Mine to the Callide B Power Station (**CS93 Collapse Agreement**);
 - (d) the Coal Supply Agreement;
 - (h) the Joint Venture Agreement, the Callide B Coal Supply Agreement, the CS93 Collapse Agreement and the Coal Supply Agreement were executed contemporaneously;
 - (i) the Callide Mine was (and was likely to remain) the sole source of supply of coal to the Callide B Power Station and was likely to be the sole source of supply of coal to the Callide C Power Station;
 - (j) the Callide B Power Station and the Callide C Power Station were likely to be the predominant customers of coal from the Callide Mine;
 - (k) the Contract Price for coal to be supplied under the Callide B Coal Supply Agreement and the Coal Supply Agreement had been agreed in an amount that was estimated to result in CS Energy, Callide Energy and IG Power (then Shell Coal Power) on the one hand and the Original Coal Mine Owners on the other hand being competitive and profitable in their respective operations;
 - (l) the coal resources and coal reserves of the Callide Mine referred to in cl 3.2(c) and Schedule 3 of the Callide B Coal Supply Agreement and cl 3.2(c) and Schedule 3 of the Coal Supply Agreement and their geological characteristics;

- (a) were estimated based upon exploration activities which were typical of exploration activities carried out for open cut coal mines at that time;
 - (b) could not and would not be known with certainty until the coal had been exposed in the actual mining process;
- (m) by the Callide B Coal Supply Agreement and the Coal Supply Agreement, the Original Coal Mine Owners were committing to:
- (a) supply a large proportion of the coal resources and coal reserves of the Callide Mine to the Callide B Power Station and the Callide C Power Station;
 - (b) doing that for a term of at least 10 years and, potentially, approximately 30 years;
- (n) during the actual or potential term of the Callide B Coal Supply Agreement and the Coal Supply Agreement:
- (a) there might be changes to conditions affecting the competitiveness and profitability of the Callide Mine and the Callide B Power Station and the Callide C Power Station;
 - (b) the type, nature and extent of such changes could not accurately be predicted but might include changes to market and economic conditions, changes to working conditions, changes to input costs and prices and changes to the estimates referred to in subparagraphs (k) and (l) above;
 - (iii) such changes might affect the competitiveness and profitability of the Callide Mine and the Callide B Power Station and the Callide C Power Station:
 - (A) suddenly or over a period of time (including weeks, months or years);
 - (B) with short, medium or long term consequences and effects which may not be capable of being promptly ascertained;
 - (C) distinctly and independently of other changes, or concurrently with other changes or because of the cumulative and interdependent consequences and effects of several changes over a period of time;
 - (iv) there might be changes to the mining process at Callide Mine that would have a cumulative and interdependent effect on each other;

- (v) whether and the extent to which such changes might occur could not accurately be predicted; and
- (o) Callide Energy, IG Power (then Shell Coal Power), Callide Sales, Anglo Callide Coal and AMP Life knew each of the matters referred to in paragraphs (a) to (n) above, or alternatively reasonable persons in the position of each of those parties would have known the matters.
- [29] These background facts are relied upon by the respondents to support what they assert is the overall objective commercial purpose of the Coal Supply Agreement pleaded in paragraph 4B of the Sixth Further Amended Defence:

“4B. It is to be inferred from the matters referred to in paragraph 4A above and the terms of the Coal Supply Agreement referred to in paragraph 7 of the statement of claim and paragraph 7 below, that the objective commercial purpose:

- (a) of the Coal Supply Agreement was for the sale by the Coal Mine Owners and the purchase by CPM of coal from the Callide Mine on terms that were competitive and economic over the term or potential term of the Coal Supply Agreement:
- (b) of clause 12 of the Coal Supply Agreement was to provide a mechanism for reviewing and, as required, changing the terms of the Coal Supply Agreement so as to ensure that those terms fulfilled the purpose referred to in subparagraph (a) above.”²⁰
- [30] The Court of Appeal in *Callide Coalfields (Sales) P/L v CS Energy Ltd & Anor*²¹ did not have recourse to these background facts for the purposes of identifying the objective commercial purpose of the same Coal Supply Agreement. In that appeal the Court considered whether a failure to agree on the outcome of the five yearly review provided for in clause 12.2 of the Coal Supply Agreement fell within the general provision for dispute resolution in clause 13. That question was answered in the negative. Fraser JA (with whom Keane JA and Chesterman J (as their Honours then were) agreed) identified that the commercial objective of the Coal Supply Agreement was:
- “... to provide for appropriate adjustments of contractual terms to cater for significant changes during the course of this long term contract.”²²

- [31] Fraser JA considered the “commercial aim of the transaction” as follows:

“[37] In this contract the parties have chosen to express the object of cl 12 by stating the relevant guiding principles in cl 12.1(a) and their agreement in cl 12.1(b) concerning the effect to be given to those principles. The appellant emphasises the unequivocal expression in cl 12.1(b) of the parties’ agreement that changes in circumstances during the term of the contract may “require the terms of this Agreement to be reviewed to ensure those terms remain consistent with the principles. . .” Whilst I would affirm the Chief Justice’s

²⁰ CPM’s Written Submissions, [53]-[54].

²¹ [2008] QCA 408.

²² [2008] QCA 408, [49] (Fraser JA).

conclusion that the word “review” is used elsewhere in the contract as connoting only a “survey”, the context compels the conclusion that in cl 12.1(b) “review” comprehends adjustments of the contractual terms. That is the most obvious way, if not the only way, in which terms which have become inconsistent with the relevant principles may be made to be consistent with them.

[38] The respondents argue that cl 12.1 does not itself explicitly oblige the parties to adjust the contractual terms even where that is necessary to give effect to the cl 12.1(a) principles. So much may be accepted, but cl 12.1(b), read in the context in which it appears (including the statement in cl 12.1(a)(ii) of the parties’ support for the ‘process of review set out in this cl 12 to ensure both the Coal Mine Owners and the Buyer remain competitive in relation to their respective industries...’), nevertheless conveys the parties’ aim of establishing a process under which the parties may become bound by contractual adjustments where that is necessary to give effect to the cl 12.1(a) principles. It is a most unlikely construction of this long term contract, made at a time of significant uncertainty about the future direction of the electricity industry, that although the parties agreed in cl 12.1 that changes in circumstances might “require” the terms to be reviewed to ‘ensure’ consistency with their agreed underlying principles, they stopped short of binding themselves to the contractual adjustments necessary to achieve that desired result.

[39] ...I have concluded that cll 12.3–12.8 (and, in the event of a dispute under that ‘change event’ process, cl 13) exclusively fulfil this aspect of the contractual object expressed in cl 12.1.”²³

- [32] Putting aside any questions of the admissibility of the background facts and other extrinsic evidence, the commercial objective identified by the respondents in paragraph 4B of the Sixth Further Amended Defence adds nothing to that identified by the Court of Appeal. Nor does the objective commercial purpose suggested by the respondents add anything to the principles expressly identified in clause 12.1. As conceded by the respondents, there is little disparity between the respondents’ pleaded commercial purpose and that articulated by the Court of Appeal.²⁴ To the extent of any disparity, the background facts do not permit the identification of the objective commercial purpose as submitted by the respondents.
- [33] I accept the applicants’ submission that the clause 12.1 principles do not speak of the purpose of the Coal Supply Agreement as being the purchase of coal on terms that are “competitive and economic over the term or potential term” of the Coal Supply Agreement. The language used in clause 12.1 is very different.²⁵ By clause 12.1(a)(i) the parties acknowledge and agree that the Coal Mine Owners and the Buyer would have an expectation of benefiting under the Coal Supply Agreement. In the context of a long term coal supply agreement it should be accepted that the word “benefiting” includes, at least, each party benefiting financially under the Coal Supply Agreement. This expectation of financial benefit however, is not unlimited. As submitted by the applicants

²³ [2008] QCA 408, [37]-[39] (Fraser JA) cited in CPM’s Written Submissions, [26].

²⁴ T2-37, lines 40-44.

²⁵ CPM’s Written Submissions, [87].

there is no unconditional expectation of either party benefiting under the Coal Supply Agreement.²⁶ The expectation of benefiting is made subject to each party supporting the process of review under clause 12 to ensure both the Coal Mine Owners and the Buyer remain competitive in relation to their respective industries. No part of the language of clauses 12.1(a)(i) or (ii) uses the word “economic”. In my view, the word “economic” adds nothing to the concepts in clause 12.1 and does not assist with the construction of the Coal Supply Agreement. As correctly submitted by the applicants, the clause 12.1 principles reflect a different commercial purpose to that which the respondents posit. The true purpose of clause 12 is to provide a mechanism to adjust the terms of the Coal Supply Agreement in the event of a change of circumstances occurring that has or will have a material effect on competitiveness.²⁷

- [34] Secondly, the background facts are relied on by the respondents for the purpose of demonstrating the interdependence of the parties. The parties accept that the coalfields and the power stations are physically adjacent; delivery of coal is from a coal loader operated under a conveyor; the sole source of coal for the power stations is from the Coal Mine Owners’ fields and the Power Station Owners constitute the main customers of the Coal Mine Owners.²⁸ The terms of the Coal Supply Agreement make this interdependence obvious. Clause 6.1 for example, provides that the Coal Mine Owners must deliver coal on to the Callide B Coal Conveyor System. By clause 7.1 the Coal Mine Owners warrant that the Mining Titles contain “the Coal Reserves”. This is a defined term in Schedule 1 and refers to the coal resources set out in Schedule 3. The warranties in clause 7.2²⁹ reinforce the importance of the security of the long term supply of coal to the Station Owners.³⁰ The interdependence of the parties is also demonstrated by reference to the principles identified in clause 12.1. These clauses reflect the fact that the Station Owners rely on the Coal Mine Owners to supply the coal to power the stations and the Coal Mine Owners rely on the Station Owners to purchase their coal in the context of a long term contract. The Court does not need to have regard to any extrinsic material in order to discern the interdependence of the parties under the Coal Supply Agreement.
- [35] Thirdly, the respondents rely on the background facts to identify the nature of the industries in which the parties operate. Within these industries a party’s competitiveness and profitability may be affected by changes:
- (a) suddenly or over a period of time (including weeks, months or years);
 - (b) with short, medium or long term consequences and effects which may not be capable of being promptly ascertained; and
 - (c) distinctly and independently of other changes, or concurrently with other changes or because of the cumulative and interdependence consequences and effects of several changes over a period of time.³¹

²⁶ CPM’s Written Submissions, [89].

²⁷ CPM’s Written Submissions, [101].

²⁸ T2-38, lines 17-23.

²⁹ Clause 7.2 is set out in [11] above.

³⁰ CPM’s Written Submissions, [15].

³¹ T2-29, lines 45-50 to T 2-30, lines 1-2 and see Respondents’ Written Submissions, [127(g)].

The respondents submit that these factors are relevant to making a constructional choice between various competing constructions of clause 12.3 of the Coal Supply Agreement.³²

- [36] The respondents rely on the expert report of Stephen Gye who has been involved in the coal industry for more than 40 years in various roles including geologist, project manager, marketer, consultant and industry adviser. Mr Gye in his report (to which the applicants object in full) refers to various changes that may occur in relation to the operations of a coal mine and which may affect that mine's current and future operating costs and therefore its competitiveness and profitability. According to Mr Gye these changes may be subtle and only detectable over a period of time. Further, because of the interdependent and cumulative effect of some of these factors, the effectiveness of steps taken to attempt to mitigate any detrimental impacts may not be fully understood for some time. These matters are, in my view, readily apparent from the nature and terms of the Coal Supply Agreement itself. That circumstances may change in the ways outlined in paragraph 35(a), (b) and (c) above was contemplated by the parties and is reflected in the review process for the Contract Price in clause 10.2. By clause 10.2(c)(i) the parties agree that an EMI may be a more appropriate index for the escalation of the Contract Price than the CPI Index. That circumstances may change is also expressly contemplated in the general language of clause 12.1(b) and clause 12.3. In any event, the applicants do not challenge that changes may occur suddenly or over a period of time.³³ The applicants also accept the proposition in paragraph 35(b) above.³⁴ As to paragraph 35(c) the applicants submit that a "change in circumstances" within the meaning of the Coal Supply Agreement must be an occurrence, comprised of either a single change in circumstances or alternatively multiple changes in circumstances, each of which is of the same nature.³⁵ For the reasons given in my answers to questions 7(a)(i) and (ii)(B), I have rejected this limitation as to what constitutes a "change of circumstances" for the purposes of clause 12.3(a). In rejecting this limitation I have not been assisted by reference to the background facts or other extrinsic evidence.
- [37] Fourthly, the respondents rely on the fact that at the time of entering into the Coal Supply Agreement the coal resources and the coal reserves of the Callide Mine and their geological characteristics were estimated based upon exploration activities which were typical of exploration activities carried out for an open cut coal mine at the time. The geological characteristics could not and would not be known with certainty until the coal had been exposed in the actual mining process. The respondents rely on the affidavit of Trevor James Hulme who was formerly employed by the Shell Coal Group as the Manager of Business Planning at the Callide Coal Mine.³⁶ He was involved in the negotiations leading to the Coal Supply Agreement. He refers to the Coal Mine Owners sharing certain geological data with the predecessor to CS Energy. The respondents also tendered, subject to objection, certain disclosed documents (Exhibit 3). CS Energy obtained a report in relation to the geology, mining and reserves of the Callide Mine over a minimum period of 20 years.³⁷ The respondents also rely, over objection, on the evidence of Mr Gye and another expert, Mr Nethercote. Their evidence is to the effect that it was well known in the Coal Mine Owners' industry that estimates of a mine's coal

³² Respondents' Written Submissions, [121(c)].

³³ T3-28, lines 30-37

³⁴ T1-81, lines 30-50 and T1-82, lines 1-6.

³⁵ See separate questions 7(a)(i) and (ii)(B) and [89]-[111] below.

³⁶ The applicants also object in full to Mr Hulme's affidavit.

³⁷ Disclosed document C.01.02.017; Exhibit 3, tab 8.

resources and reserves and the geological characteristics typically change when geological phenomena not previously encountered during the mining process are uncovered. Material changes to estimates of the coal resources and reserves at an open cut coal mine and the geological characteristics will affect the mine's competitiveness and profitability. Mr Nethercote's evidence is to the effect that it would have been known by an experienced participant in the coal fired power generation industry entering into the Coal Supply Agreement that there may be changes to the modelled estimates of the resources and reserves and the geological characteristics over the term of the Coal Supply Agreement. Given the nature and sophistication of the contracting parties reference to extrinsic evidence is not necessary. The relevant separate question is 18. In answering this question in the respondents' favour I have not been assisted by reference to the background facts and extrinsic evidence.

- [38] Fifthly, the respondents rely on the fact that each party conducted financial modelling prior to entering into the Coal Supply Agreement which resulted in the contract price for coal being agreed in an amount that was estimated to result in the parties being competitive and profitable in their respective operations. The parties separately undertook this financial modelling to determine that the contract price for coal would satisfy certain internal rates of return. This was a fact known to each party.³⁸ This evidence adds nothing to the detailed and express principles acknowledged and agreed to by the parties in clause 12.1 of the Coal Supply Agreement.
- [39] Sixthly, the respondents rely on the wider review mechanism provided in clause 12 which was a departure from the review mechanism under the existing contract for the supply of coal to Callide B, CS93. CS93 commenced in 1994 and had only run for three years of its initial 12 year term when the Coal Supply Agreement was negotiated. I deal with this evidence in paragraphs [41] to [42] below.
- [40] Having identified the six aspects in which the pleaded background facts and other evidence is said to be relevant, I turn then to a specific consideration of questions 1, 3 and 4.

Subparagraph 1(d)

- [41] The relevant background fact is that clauses 9.1.3 and 17.6 of CS93 contain a limited review mechanism in the event of any major change to prescribed working conditions within the coal mining industry (as alleged in paragraph 4A(e)(iii) of the Sixth Further Amended Defence). The question posed by 1(a) is simply whether the fact is true. Clause 9.1.3 of CS93 provided:

“9.1.3 The parties confirm that the proposed changes in Contract Price are not intended to reflect changes in either productivity in the coal mining industry or costs specific to coal mining and that the parties agree that the price should remain linked to generalised indices of the Australian economy as a whole. In the event of any major change to prescribed working conditions within the coal mining industry, the Agreement shall be reviewed in accordance with Clause 17.6.

³⁸ Ex 3, tabs 1, 4 and 5.

Arbitration relating to the Contract Price will be limited to the consideration of the suitability of the indexes selected to reflect the real purchasing power of the Australian dollar within the Australian economy.”³⁹

Clause 17.6 of CS93 provided:

“17.6 Mutual Collaboration

The Commission and the Sellers recognize that circumstances may arise which could not have been reasonably foreseen at the time the Agreement was entered into. The parties agree that they will use their best efforts to resolve any problems due to any such unforeseeable circumstances including continuation of any force majeure condition in the spirit of mutual understanding and collaboration.”⁴⁰

[42] The question in terms does not call for a comparison of the review mechanism in clause 12.3 of the Coal Supply Agreement with that in CS93. Under CS93 the review is only triggered by any major change to prescribed working conditions within the coal mining industry. Further, the review under clause 17.6 dealing with arbitration, is limited to the consideration of the suitability of certain indexes. A review under clause 17.6 is in relation to circumstances which could not have been reasonably foreseen at the time CS93 was entered into. It may therefore be accepted that the review mechanism under CS93 was more limited than the review mechanism under clause 12.3 of the Coal Supply Agreement. The applicants submit that whilst the arbitration referred to in clause 9.1.3 was limited, the review was not. The review was at large.⁴¹ Whilst the review of the terms of CS93 was at large any arbitration relating to the Contract Price was constrained to a consideration of the suitability of certain indexes selected to reflect the real purchasing power of the Australian dollar within the Australian economy. Therefore, even without comparing the review mechanisms under CS93 with clause 12.3 of the Coal Supply Agreement, the review mechanism under CS93 was limited in the ways I have identified. The alleged fact set out in paragraph 1(d) is true and the question should be answered “yes”. It was also a fact known to the parties. Question 1(b) in respect of fact 1(d) should also be answered “yes”. It is unnecessary to answer question 1(c).

[43] Whether this background fact is true or not is, in my view, irrelevant and of no assistance in construing the Coal Supply Agreement. I accept the applicants’ submission that this background fact relates to a different question of construction of a different term of a different agreement, and does not establish any objective background fact that bears on any particular question of construction before the Court.⁴²

Subparagraphs 1(f) and (g)

[44] The relevant facts are that:

³⁹ Ex “TJH-1”, Affidavit of Hulme, 24-25.

⁴⁰ Ex “TJH-1”, Affidavit of Hulme, 42.

⁴¹ CS Energy’s Written Submissions, [8] and CPM’s Written Submissions, [59].

⁴² CS Energy’s Outline of Submissions, Questions 1 to 4 and Admissibility of Evidence, [9].

- (f) CS Energy, Callide Energy Pty Ltd and IG Power (Callide) Ltd (then Shell Coal Power (Callide) Ltd) estimated that the Contract Price agreed under the Coal Supply Agreement and the Callide Power Project Coal Supply Agreement for the supply of coal would result in them being competitive and profitable in their operations (as alleged in paragraphs 4A(k) of the Sixth Further Amended Defence);
- (g) Anglo Coal Callide and AMP Life (the Original Coal Mine Owners) estimated that the Contract Price agreed under the Coal Supply Agreement and the Callide Power Project Coal Supply Agreement for the supply of coal would result in them being competitive and profitable in their operations (as alleged in paragraph 4A(k) of the Sixth Further Amended Defence).

[45] There is no dispute that the parties entered into the Coal Supply Agreement in circumstances where each had obtained estimates of the likely financial return that it would obtain under the Coal Supply Agreement. Each party knew that the other party had also obtained such estimates. The applicants, however, query the imprecise terminology of “competitive and profitable”.⁴³ Apart from this imprecision in terminology, the background fact is true and the answers to questions 1(a) and 1(b) in respect of the facts in 1(f) and (g) should be “yes”. Question 1(c) is unnecessary to answer.

[46] I do not consider however, that these background facts are of any assistance in construing the Coal Supply Agreement. The respondents submit that these two background facts assist in identifying what the parties contemplated by the use of the word “benefiting” in clause 12.1(a)(i) of the Coal Supply Agreement. The respondents further submit that the objective background facts assist in identifying the financial sense in which the term was used.⁴⁴ Neither of these background facts assist in construing the word “benefiting” in clause 12.1(a)(i) of the Coal Supply Agreement. In the context of the Coal Supply Agreement, the word “benefiting” at least includes an expectation that all parties would financially benefit under the Coal Supply Agreement. Any such expectation however, was not unlimited and was specifically made subject to the principle identified in clause 12.1(a)(ii) which itself was made subject to the principle in clause 12.1(a)(iii).

Subparagraph 1(h)

[47] The background fact is that a change to the estimates referred to in subparagraphs 4A(k) and 4A(l) of the Sixth Further Amended Defence would amount to changes to conditions affecting the competitiveness and profitability of the Callide Mine, the Callide B Power Station and the Callide C Power Station (as alleged in paragraph 4A(n) of the Sixth Further Amended Defence).

[48] The estimates referred to in paragraphs 4A(k) and 4A(l) are the financial estimates and the estimates of coal resources, coal reserves and their geological characteristics. There is no dispute that the parties conducted such estimates. Nor is there any apparent dispute that the geological characteristics of the coal could not and would not be known with

⁴³ CS Energy’s Written Submissions, [20] and CPM’s Written Submissions, [64]-[65].

⁴⁴ Respondents’ Written Submissions, [246].

certainty until the coal had been exposed in the mining process.⁴⁵ The real dispute is whether the change in estimates constitutes a “change of conditions”. The difficulty with this background fact is that it requires the drawing of a conclusion, namely whether the change in estimates constitutes a “change in conditions”. Even if this extrinsic evidence was admissible the background fact itself is of no assistance in construing the Coal Supply Agreement. In any event, by reference to the terms of the Coal Supply Agreement I have concluded that a change in the respondents’ knowledge of the geology of the Callide Mine may constitute a “change of circumstances” within the meaning of clause 12.3(a).⁴⁶ Although the background fact in 1(h) is irrelevant to the proper construction of the Coal Supply Agreement, questions 1(a) and (b) in respect of 1(h) should be answered “yes”. Question 1(c) is unnecessary to answer.

Question 3

“3. May the facts alleged in paragraph 4A of the defence be taken into account in interpreting the Coal Supply Agreement?”

[49] I have answered the separate questions by reference to the terms of the Coal Supply Agreement alone. I do not consider the background facts and other evidence sought to be tendered as being of any assistance in construing the Coal Supply Agreement. It is therefore unnecessary to determine the admissibility of the extrinsic evidence.

Question 4

“4. Do the facts alleged in paragraph 4A of the defence give rise to the inference of the objective commercial purpose of the Coal Supply Agreement alleged in paragraph 4B of the defence?”

[50] For the reasons stated in [32]-[33] above the answer to question 4 is “no”.

What is a Change Event? (Questions 5 to 10)

Question 5

“5. In order for a notice to be a notice within the terms of, and given in accordance with, clause 12.3(b)(ii) of the Coal Supply Agreement is it the case that:

- (a) **the matters set out in the notice must, on the face of the notice, fall within the definition of “Change Event”?**⁴⁷
- (b) **the notice must, inter alia, include detailed information regarding the nature, extent and quantum of the cost and revenue impacts of the “Change Event”?**⁴⁸

⁴⁵ Sixth Further Amended Defence, [4A(L)(ii)] which is admitted and see generally Mr Gye’s report, paras. 3.1 to 3.5, 5.4 to 5.5.

⁴⁶ See [114]-[119] below.

⁴⁷ Further Amended Statement of Claim, [9(c)(ii)] and Sixth Further Amended Defence, [9(c)(i), 9(c)(ii)(A)].

⁴⁸ Further Amended Statement of Claim, [9(c)(iii)] and Sixth Further Amended Defence, [9(c)(ii)(B)].

- (c) **the notice must, inter alia, state options and alternatives identified by the Notifying Party as being available to accommodate or mitigate the Change Event?**⁴⁹

Question 5(a)

- [51] For a notice to be a notice within the meaning of and given in accordance with clause 12.3(b)(ii) of the Coal Supply Agreement, the notice must be of a Change Event. The respondents have admitted this in their relevant defences.⁵⁰ The respondents accept that if a Change Event Notice does not contain notification of a Change Event as defined under the Coal Supply Agreement, such a notice would be invalid. That is, if the notice does not contain a notification of a Change Event then it cannot be a Change Event Notice.⁵¹
- [52] This concession accords with the observation of Fraser JA in *Callide Coalfields (Sales) P/L*:⁵²
- “... Before an obligation to “review this Agreement” arises under clause 12.3, there must be a “change event”, meaning a change in circumstances which has or will have a material effect on the competitiveness of either the Coal Mine Owners or the buyer in relation to the industry in which it operates. Furthermore, clause 12.3(a) specifies another objective criterion: the opinion of the relevant party that the change of circumstances has or will have the specified effect must be a “reasonable opinion”.”
- [53] The real dispute between the parties in answering 5(a) arises from the applicants’ use of the words “on the face of the notice”. The applicants submit that it is clear from the terms of clause 12.3(b)(ii) and a consideration of the Change Event review procedure detailed in clauses 12.3 to 12.8, that a Change Event notice must, on its face, set out matters which fall within the definition of a “Change Event”.⁵³ The applicants further submit that clause 12.3(b)(ii), in its opening paragraph, provides that the notice to be provided is a “formal notice of a Change Event” (emphasis added).⁵⁴ The applicants therefore submit that it is difficult to see how a notice could be said to be a formal notice of a Change Event unless the notice on its face sets out matters that fall within the definition of “Change Event”. The applicants also rely on the mandatory language used in clause 12.3(b)(ii)(A) which provides that the notice “will include ... all data which the Notifying Party holds which is relevant ... to the Change Event”.⁵⁵ The applicants also rely on the procedure outlined in clauses 12.3 to 12.8 to support a conclusion that the notice must on its face describe matters which fall within the definition of a Change Event:

“The effect of the delivery of a valid Change Event Notice is that it triggers a procedure whereby the party receiving the notice must respond to it (including whether they accept the proposed adjustment or wish to propose an alternative option), the parties have to negotiate in an attempt to agree an

⁴⁹ Further Amended Statement of Claim, [9(c)(iv)] and Sixth Further Amended Defence, [9(c)(ii)(C)].

⁵⁰ Sixth Further Amended Defence, [9(c)] (SC No 12138 of 2013) and Ninth Further Amended Defence, [10] (SC No 12122 of 2013).

⁵¹ T2-33, lines 1-6.

⁵² [2008] QCA 408, [44] (Fraser JA).

⁵³ CPM’s Written Submissions, [105].

⁵⁴ CPM’s Written Submissions, [106].

⁵⁵ CPM’s Written Submissions, [106].

Adjustment to the Coal Supply Agreement generally in accordance with the 12.1 principles (12.3(b)(v)) and which has as its purpose an attempt to “preclude the occurrence of, or to mitigate any adverse consequences flowing from or contributing to” the Change Event (cl 12.8), failing which the question of an adjustment will be determined by the cl 13 dispute resolution procedure. Without a clear delineation on the face of the Change Event Notice of what the Change Event is, it is difficult to see how the party receiving the Change Event Notice will be able to assess: (a) whether the Change Event occurred; (b) what the impacts of the Change Event were; (c) whether the proposed adjustment precludes the occurrence of, or mitigates the adverse consequences flowing from or contributing to, the Change Event; (d) whether to accept the proposed adjustment; and (e) whether alternative options should be proposed to preclude the occurrence of, or mitigate the adverse consequences flowing from or contributing to, the Change Event. It is also difficult to see how the negotiation (and determination under cl 13 absent agreement) of whether there should be an Adjustment could be practically undertaken without a clear delineation on the face of the Change Event Notice of what the Change Event is. As Fraser JA observed in *Callide*, the dispute under the Change Event procedure is “not at large” (at [52]). The Change Event Notice, with its requirement of a formal notice including a raft of information about the Change Event and proposed adjustment, “and the provision for the party receiving the notice (the “Receiving Party”) to propose alternative options (cl 12.4), are aptly designed to assist in the definition of any dispute, including as to any adjustment of the contractual terms sought by the parties” (at [45]).”⁵⁶

- [54] The applicants refer to the deeming provision in clause 12.3(b)(ii) which states “and a Change Event will be deemed to have occurred.” The applicants submit:

“That it is an essential requirement that the Change Event Notice state on its face matters that fall within the definition of a Change Event is confirmed by the deeming provision at the end of cl 12.3(b)(ii). The deeming provision provides that if a Change Event Notice is given (that is a Change Event Notice which complies with the requirements in cl 12.3(b)(ii)), a “Change Event will be deemed to have occurred”. As is explained further below, the deeming provision has the effect that, for the purposes of triggering the obligation to negotiate an Adjustment in relation to the Change Event described in the Change Event Notice, a Change Event is taken to have occurred on the delivery of the notice. It should be noted that cl 12.3(b)(iv) makes it clear that the deeming provision does not alter the fact that the onus is upon the notifying Party to establish the impact of the Change Event and, ultimately, that the adjustment sought should be made.

The deeming provision has the effect that, on the delivery of a notice that complies with cl 12.3(b)(ii), the receiving party must comply with the tight timeframes for a response and for meetings of the parties. For that process to be able to work practically, the receiving party must be able to ascertain from a review of the notice itself whether what is described as having occurred is

⁵⁶ CPM’s Written Submissions, [108].

in fact a Change Event so that the notice is a valid Change Event Notice. Any alternative construction of cl 12.3 would be uncommercial and impractical.”⁵⁷

[55] The flaw in these submissions, as identified by the respondents, is that there is no express requirement to describe the Change Event itself “on the face of the notice”. Clause 12.3(b)(ii) refers to “all data” which the Notifying Party holds which is relevant to the Change Event. Clause 12.3(b)(ii) also refers to calculating cost and revenue impacts as they relate to all options and alternatives identified by the Notifying Party as available to accommodate or mitigate the Change Event. The respondents therefore submit that there is an overriding qualification, namely that the data is confined to that which the Notifying Party holds. There is therefore, as submitted by the respondents, no textual, legal or commercial justification to impose “universal requirements, essential to validity, about what must appear “on the face” of a Change Event Notice in every case.”⁵⁸

[56] The respondents refer to the decision in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*⁵⁹ where the House of Lords found a notice to be effective, notwithstanding that, on its face, it contained an incorrect date. Lord Steyn stated:

“The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering this question the notices must be construed taking into account the relevant objective contextual scene.”

[57] The respondents rely on the fact that clause 12.3(b)(i) does not contemplate any information about a Change Event being included in the initial notice. Clause 12.3(b)(ii) only contemplates that data relating to the Change Event will be provided but does not in terms require the Change Event Notice to contain some narrative or other description of the Change Event itself. The respondents further submit that even if there is to be found in the text of clause 12.3 some implicit general requirement that certain things always appear on the face of a Change Event Notice, there is no justification for concluding that strict compliance with these requirements is an essential pre-condition to validity.⁶⁰

[58] The parties’ submissions turn upon the proper construction of clause 12.3(b)(ii). This clause was considered by Fraser JA in *Callide Coalfields (Sales) P/L*:⁶¹

“Then cl 12.3(b)(i) obliges any party who wishes subsequently to give a “change event notice” under cl 12.3(b)(ii) first to notify the other party in writing promptly when the relevant “change event” becomes known to the notifying party of that party’s intention to initiate the proposed review. If the “Notifying Party” wishes to proceed cl 12.3(b)(ii) obliges it “as soon as practicable in all the circumstances” to submit a formal “change event notice”. Importantly, the notice must include all data held by the notifying party that is relevant to the suggested “change event” and the change event notice must identify the “options and alternatives . . . available to accommodate or mitigate the “change event””. This, and the provision for the

⁵⁷ CPM’s Written Submissions, [109]-[110].

⁵⁸ Respondents’ Written Submissions, [210].

⁵⁹ [1997] AC 749, 767 (Steyn LJ).

⁶⁰ Respondents’ Written Submissions, [211]-[212].

⁶¹ [2008] QCA 408, [45] (Fraser JA).

party receiving the notice (the “Receiving Party”) to propose alternative options (cl 12.4), are aptly designed to assist in the definition of any dispute, including as to any adjustment of the contractual terms sought by the parties.”

- [59] The reference in clause 12.3(b)(ii) to “a formal notice of a Change Event” does not, in my view, require such a notice on its face to set out the matters which fall within the definition of “Change Event”. The use of the word “formal” denotes at least two matters. First, the word “formal” distinguishes a notice given under clause 12.3(b)(ii) from the first notice given under clause 12.3(b)(i). As to the first notice, the Notifying Party has a discretion whether to issue such a notice. This is denoted by the word “may” in clause 12.3(b)(i). Such a notice is given “promptly” when the Change Event becomes known to the Notifying Party. The only role of the first notice is to notify the Receiving Party of the Notifying Party’s intention to initiate a review of the Coal Supply Agreement which may lead to an adjustment. As already noted, the word “adjustment” means an adjustment to the Coal Supply Agreement.⁶² A notice under clause 12.3(b)(i) does not require the Receiving Party to do anything. Nor does it oblige either the Notifying Party or the Receiving Party to proceed with a review. The review mechanisms under clauses 12.4 to 12.8 and ultimately the dispute resolution procedures under clause 13 of the Coal Supply Agreement are only engaged upon the submitting of a “formal” notice pursuant to clause 12.3(b)(ii). This is the second aspect which denotes the use of the word “formal”. The notice in clause 12.3(ii) is referred to as “formal” because it is the notice that actually initiates the review mechanism. Beyond these two aspects it cannot be implied that the word “formal” carries with it the requirements submitted by the applicants, including stating “on the face of the notice” those matters which fall within the definition of “Change Event”.
- [60] Clause 12.3(b)(ii) does however state what the formal notice must include. Clause 12.3(b)(ii)(A) commences by identifying what a notice must include by reference to “all data which the Notifying Party holds”. The word “data” is not defined in the Coal Supply Agreement. The Macquarie Concise Dictionary defines “data” to mean “figures, statistics, etc, known or available; information collected for analysis or reference.”⁶³ It may be expected that the Notifying Party would be in possession of such information because it is the party that initiates the process. Before sending a “formal notice” under clause 12.3(b)(ii) the Notifying Party must hold the reasonable opinion that there has been a change in circumstances which has or will have a material effect on its competitiveness in relation to the industry in which it operates. Further, the Notifying Party must have given a notice under clause 12.3(b)(i) stating its intention to initiate a review of the Coal Supply Agreement which may lead to an adjustment. To hold such a reasonable opinion and to send the first notice the parties contemplated that the Notifying Party would be in possession of data which would enable it to identify the relevant Change Event.
- [61] The formal notice must include all data held by the Notifying Party relevant to two matters. That the data must be relevant to two matters is apparent from the use of the word “both” in clause 12.3(b)(ii)(A). The notice must include all data which the Notifying Party holds which is relevant to the Change Event including detailed information regarding the nature, extent and quantum of the cost and revenue impacts of the Change Event. Secondly, the notice must include all data which the Notifying Party

⁶² Schedule 1 to the Coal Supply Agreement.

⁶³ *Macquarie Concise Dictionary*, 5th ed (2009), 315.

holds which is relevant to calculating those cost and revenue impacts as they relate to all of the options and alternatives identified by the Notifying Party available to accommodate or mitigate the Change Event. Clause 12.3(b)(ii)(A) contemplates that the Notifying Party will hold such data relevant to both matters. It is by reference to that data included in the notice that the Receiving Party is informed of the following:

- (i) the nature of the Change Event;
- (ii) the extent of the Change Event;
- (iii) the quantum of the cost and revenue impacts of the Change Event; and
- (iv) the calculation of those cost and revenue impacts as they relate to all of the options and alternatives identified by the Notifying Party available to accommodation or mitigate the Change Event.

[62] Clause 12.3(b)(ii)(A) does not expressly require this information to appear on the face of the notice. Rather, what is required of the Notifying Party is to include in the notice all data which it holds which is relevant both to the Change Event and to calculating the cost and revenue impacts as they relate to all of the options and alternatives identified by the Notifying Party. What the clause requires is for this data to be provided to the Receiving Party by inclusion in the notice. The data which the Notifying Party holds which is relevant to both of the matters identified in clause 12.3(b)(ii)(A) must, at least objectively, notify a Change Event. To the extent, however, that question 5(a) requires these matters to appear “on the face of the notice”, no such requirement arises from a consideration of clause 12.3(b)(ii). Question 5(a) as worded should therefore be answered “no”.

[63] Although the answer to question 5(a) is “no”, the type of data to be included in the notice, including detailed information regarding the nature, extent and quantum of the cost and revenue impacts of the Change Event, does assist in the proper construction of what constitutes a “Change Event”. A Change Event, whilst being defined as a change in circumstances which has or will have a particular effect is at least, as contemplated by the parties, something capable of having its nature and extent identified. A Change Event also permits an identification of the quantum of the cost and revenue impacts of the Change Event. It also permits the identification of options and alternatives available to accommodate or mitigate the Change Event. If the Notifying Party does not hold data which contains detailed information regarding the nature, extent and quantum of the cost and revenue impacts of the Change Event which it can include in the notice, then in all probability the Notifying Party will be unable to give notice of a Change Event. Similarly if the data included in the notice does not permit a reasonable recipient to identify those relevant aspects of a Change Event then the notice will not constitute a Change Event Notice.

[64] I note that a number of the separate questions incorporate the words “on the face of the notice”⁶⁴. I have answered these questions by treating the words “on the face of the

⁶⁴ Separate Questions (SC No 12138/13) 16, 17, 18, 19, 20, 21, 22, 23 and 28; Separate Questions (SC No 12122/13) 18, 19, 20, 21, 23, 25, 26, 27, 28 and 31.

notice” as being qualified in the respects I have identified in paragraphs [58] to [62] above.

Question 5(b)

- [65] The applicants submit that properly construed each of the matters referred to in question 5(b) is expressly required by clause 12.3(b)(ii)(A) to be included in a Change Event Notice. It may be accepted that the terms “nature” and “extent” qualify the Change Event, not the “cost and revenue impacts of the Change Event”. As correctly submitted by the applicants, to do otherwise would be repetitive. “Extent” and “quantum”, so far as their cost and revenue impacts are concerned, mean the same thing.⁶⁵
- [66] The applicants accept that any obligation on the part of the Notifying Party to include in the notice detailed information regarding the nature, extent and quantum of the cost and revenue impacts of the Change Event, is limited by clause 12.3(b)(ii)(A) to the data which the Notifying Party holds which is relevant to the Change Event. A Change Event is a change of circumstances which has, or will have, the relevant material effect. A Change Event therefore includes a change of circumstances even if the relevant effect is yet to materialise. The data held by a Notifying Party may therefore differ according to the type of Change Event which is being notified. One would ordinarily expect a Notifying Party to be in a better position to provide more detailed information as to the quantum of the cost and revenue impacts of a Change Event where those impacts have already occurred and are known. This makes plain why the obligation to include all data which is relevant to the two aspects specified in clause 12.3(b)(ii)(A) is limited to that held by the Notifying Party.
- [67] A Change Event Notice is however, only given by a Notifying Party where that party has given the first notice under clause 12.3(i) indicating the party’s intention to initiate a review of the Coal Supply Agreement which may lead to an adjustment. Further, the Change Event Notice is only submitted if the Notifying Party wishes to proceed with a review of the Coal Supply Agreement.
- [68] Accepting that the obligation to provide the relevant detailed information stated in clause 12.3(b)(ii)(A) is limited to “all data which the Notifying Party holds”, if a Notifying Party does not hold this detailed information, it is difficult to see how it could proceed with the type of review contemplated under clauses 12.3 to 12.8. This review process includes amending any incorrect estimates of the financial effect of the Change Event, pursuant to clause 12.3(b)(iii), together with the detailed steps pursuant to clauses 12.4 to 12.8.
- [69] The question as framed should be answered “no” because in terms it is not limited to “all data which the Notifying Party holds”. It may however, be accepted that in order for a notice to be a notice within the terms of and given in accordance with clause 12.3(b)(ii) the notice must include all data which the Notifying Party holds which is relevant to the Change Event including detailed information regarding the nature, extent and quantum of the cost and revenue impacts of the Change Event.

⁶⁵ CPM’s Written Submissions, [112].

Question 5(c)

- [70] Clause 12.3(b)(ii)(A) requires the Notifying Party to include in the notice all data which the Notifying Party holds relevant to calculating the cost and revenue impacts as they relate to all of the options and alternatives, identified by the Notifying Party, available to accommodate or mitigate the Change Event. Clause 12.3(b)(ii)(B) requires the notice to include options and alternatives identified by the Notifying Party and the Notifying Party's recommended option. What the notice includes therefore is all the options and alternatives identified by the Notifying Party. A Notifying Party may identify only one option and alternative available to accommodate or mitigate the Change Event. Clause 1(a) of Schedule 2 to the Coal Supply Agreement provides that words denoting the singular include the plural and vice versa. The words "options and alternatives" may therefore denote the singular. If only one option and alternative is identified then it will constitute the Notifying Party's recommended option for the purposes of clause 12.3(ii)(B).
- [71] The requirement to identify an option is made evident from an examination of other provisions such as clauses 12.4, 12.7(a) and 12.7(b)(i). Clause 12.4, for example, permits a Receiving Party to notify the Notifying Party of proposed alternative options. Pursuant to clause 12.7(a) what is reviewed by the senior officers of the Notifying Party and the Receiving Party are the option or options set out in the Change Event Notice as well as the detailed information included in the Change Event Notice. Clause 12.7(b) requires the senior officers as soon as practicable to attempt to agree an option or determine an appropriate course of action.
- [72] With the qualification that one reads question 5(c) in the context of clause 1(a) of Schedule 2 of the Coal Supply Agreement, the answer to the question is "yes".

Question 6

"6. Is strict compliance with the requirements referred to in 5(a) to (c) (if those requirements are found to exist) necessary for a notice under clause 12.3(b)(ii) to be valid or may a notice be valid if it substantially complies with the requirements of clause 12.3(b)(ii)?"

- [73] The parties agree that the issue raised by question 6 no longer requires to be determined.⁶⁶ As correctly stated in the respondents' submissions, the question is not whether the provisions are "mandatory" or "directory", but what consequences the parties intended to flow from non-compliance (whether strict or substantial).⁶⁷

Question 7

"7. Must the "change in circumstances" comprising a "Change Event" within the meaning of the Coal Supply Agreement:

(a) be an occurrence, comprised of either:

⁶⁶ T1-44, lines 10-12.

⁶⁷ Respondents' Written Submissions, [188]-[189] citing *Australian Foods Co Pty Ltd v Pars Ram Brothers (Australia) Pty Ltd* [2002] NSWSC 1180, [42] (Macready AJ) and *Kudewah v T & J Kelleher Builders Pty Ltd* [1990] VR 701, 715 (Ormiston J).

- (i) **a single change in circumstances? or**
- (ii) **alternatively, one or more changes in circumstances which:**
 - (A) **do not constitute more than one Change Event;**
 - (B) **further or alternatively, are the same nature?**
- (b) **subject to any express exception, be supervening or external in nature, such that a mere failure to meet one party’s own expectations or forecasts would not fall within the definition?”**

[74] Question 7 requires a consideration of the scope of what comprises a Change Event as that term is defined in clause 12.3(a). The respondents seek to construe the words a “change in circumstances” as broadly as possible, whereas the applicants seek a narrower construction as is evident from the wording of question 7. Clause 12.3 should be read in context and be given a commercially sensible construction.⁶⁸ Both Keane JA and Fraser JA in *Callide Coalfields (Sales) P/L* recognised the primacy of the principles stated in clause 12.1. Those principles are expressly acknowledged and agreed by the parties.⁶⁹

[75] In the context of a long term agreement where the parties are interdependent, the parties expressly agree by clause 12.1(b) that circumstances may change during the term of the Coal Supply Agreement which may require terms to be reviewed to ensure those terms remain consistent with the principles set out in clause 12.1(a). There are three principles identified in clause 12.1(a). First, the parties have an expectation of benefiting under the Coal Supply Agreement. This expectation of benefiting is not unlimited. It is subject to the second principle whereby each party supports the process of review set out in clause 12 to ensure both parties remain competitive in relation to their respective industries. This second principle is itself made subject to the third principle stated in clause 12.1(a)(iii). The third principle only applies during the initial 10 year term of the Coal Supply Agreement. The parties agree that the competitive position of the power stations relative to other power stations as at the effective date “should be restored, having regard to the viability of the Coal Mine Owners’ mine in its industry”.

[76] Keane JA, in considering clause 12, observed:⁷⁰

“[2] Clauses 12.3 to 12.8 of the agreements appear in the context of a contract in which, absent an effective review mechanism, the intention of the parties evident in cl 12.1(b) to ensure that the terms of the agreement should be adjusted upon the occurrence of a change event to ensure conformity with the principles in cl 12.1(a) could be defeated by honest but self-interested recalcitrance on the part of the respondents. By virtue of cl 3.2(a)(iv) of each agreement, the respondents are empowered unilaterally to extend the duration of the agreements; if the parties fail to reach agreement on proposals by the respondents for an adjustment in changed circumstances, then, on the respondents’

⁶⁸ [2008] QCA 408, [35] (Fraser JA).

⁶⁹ Clause 12.1(a).

⁷⁰ [2008] QCA 408, [2]-[3] (Keane JA).

approach, the appellant would be left without any means of giving effect to the evident intention of cl 12.1(b) over the duration of the contract extended at the exclusive choice of the respondents.

- [3] The terms of cl 12.3 expressly require that the parties engage in a process of review with the objective of ensuring that the terms of each agreement are adjusted to ensure consistency with the principles in cl 12.1(a). Bearing in mind that the obvious possibility that the negotiation which cl 12.3 contemplates will not lead to agreement, it is hardly to be supposed that the parties contemplated that a failure of the negotiations could utterly defeat the objective of ensuring that a failure of the terms of the agreement should be adjusted so as to remain consistent with the principles in cl 12.1(a).”

- [77] Keane JA recognised that the review mechanism under clauses 12.3 to 12.8 was the effective mechanism for ensuring conformity with the principles in clause 12.1(a). To similar effect, are the observations of Fraser JA. Fraser JA concluded that clauses 12.3 to 12.8 (and, in the event of a dispute under that “Change Event” process, clause 13) exclusively fulfilled the contractual mechanism by which the contemplated contractual adjustments are to be effected.⁷¹ Fraser JA considered that the “dominant effect” should be given to the clear expression in clause 12.1 of the parties’ intention that necessary adjustments should be made to ensure that the contractual terms remain consistent with the fundamental principles expressed in that clause.⁷² His Honour continued:

“The references in cl 13 to determination by a court or arbitrator are aspects of the machinery provided to give effect to that basic agreement. That machinery should be seen as subsidiary to the underlying commercial object of the transaction to provide for appropriate adjustments of the contractual terms to cater for significant changes during the course of this long term contract.”⁷³

- [78] Whilst Fraser JA was referring to the machinery in clause 13 which deals with dispute resolution, his Honour’s observations apply with equal force to the machinery in clauses 12.3 to 12.8. So much is made clear by his Honour’s further observation:

“It is implicit in cl 12.1 that the contractual terms were initially consistent with cl 12.1(a) and that the task is to undo inconsistency with the stated principles created by subsequent changes in circumstances. In the view I take, this is a reference to changes of the character described in clause 12.3, which introduces the additional objective criteria I mentioned earlier.”⁷⁴

- [79] It may be accepted that clauses 12.3 to 12.8 provide the machinery for ensuring that the terms of the Coal Supply Agreement are brought back into conformity with the principles in clause 12.1(a) where circumstances have changed.⁷⁵ The machinery in clauses 12.3 to

⁷¹ [2008] QCA 408, [39] (Fraser JA).

⁷² [2008] QCA 408, [54] (Fraser JA).

⁷³ [2008] QCA 408, [54] (Fraser JA).

⁷⁴ [2008] QCA 408, [57] (Fraser JA).

⁷⁵ T2-45, lines 25-30.

12.8 itself gives rise to certain obligations. As stated by Fraser JA before an obligation to “review this agreement” arises under clause 12.3, there must be a Change Event.⁷⁶

[80] As is evident from the wording of question 7, the applicants seek to impose a number of limitations as to what may constitute a Change Event. The respondents submit that the Court should reject “the highly constrained view of the operation of the Change Event mechanism” upon which these limitations are based primarily because the text of clause 12.3 does not support such limitations.⁷⁷

[81] The heading to clause 12.3 refers to “Change Events” in the plural. Clause 3 of Schedule 2 of the Coal Supply Agreement which deals with rules of interpretation provides that headings are for ease of reference only and do not affect the meaning of the Coal Supply Agreement. A Change Event, as defined in clause 12.3(a), has two aspects, namely:

(a) a change in circumstances; and

(b) which has or will have a material effect on the competitiveness of either of the parties (in the reasonable opinion of a party) in relation to the industry in which it operates.

[82] The first limb “mirrors”⁷⁸ the phrase “circumstances may change” in clause 12.1(b), including by incorporating the plural reference to “circumstances”.

[83] The applicants submit that the basic structure of the definition of “Change Event” permits the “change in circumstances” to be identified as the cause and the relevant material effect on competitiveness as the effect. The change in circumstances therefore constitutes the cause which has or will have the relevant effect. A “change in circumstances” according to the applicants is objective in the sense that it is something which is objectively discernible. To discern a change in circumstances one should be able to take the circumstances existing at one point in time and compare it to the circumstances at another point in time.⁷⁹ The applicants therefore submit that a change in circumstances is constituted by an external objectively discernible cause.⁸⁰

[84] The applicants rely on the term that is defined by clause 12.3(a) namely “Change Event”. The use of the word “event” within the expression is the first textual indicator of its meaning.⁸¹ “Event” means:

“Anything that happens or is regarded as happening; an occurrence, especially one of some importance.”⁸²

⁷⁶ [2008] QCA 408, [44]-[45] (Fraser JA).

⁷⁷ Respondents’ Written Submissions, [12].

⁷⁸ [2008] QCA 408, [42] (Fraser JA).

⁷⁹ T1-74, lines 25-35.

⁸⁰ T1-75, lines 20-22.

⁸¹ CS Energy’s Written Submissions, [102].

⁸² *Macquarie Concise Dictionary*, 5th ed (2009), 423.

- [85] Initially, in oral submissions, Mr Doyle QC for the respondents ascribed no meaning to the word “event”.⁸³ The word is part of the term “Change Event” which has a defined meaning. Mr Doyle contrasted the use of the word “event” in clause 12.1(a) with its use in clause 14 which defines “event of force majeure” to mean an event of a certain type. He did however, accept that “event” does at least mean “anything that happens or is regarded as happening”.⁸⁴ I accept that a Change Event permits a comparison of a set of circumstances at two different times in order to discern a change in those circumstances.⁸⁵
- [86] The word “event” should be given its ordinary meaning. In *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*,⁸⁶ Bell and Gageler JJ observed:

“The issue is not to be resolved by invocation of the structures of logic presumptively applicable to the interpretation of a defined expression within a complex statutory scheme. It is to be resolved instead by reference to the overriding criterion of how reasonable business persons can be taken to have understood the term ... it is therefore appropriate to proceed on the assumption that the words chosen as the label for the defined term were not chosen arbitrarily but as ‘a distillation of ... a concept intended to be more precisely stated in the definition’.”⁸⁷

- [87] That a Change Event is something that happens is apparent from the use of the words “occur” or “occurrence” in clause 12.3(b) and 12.8. The introductory words of clause 12.3(b) state:

“If at any time after the date of execution of this Agreement there occurs, or either party considers there may occur, a Change Event ...”.

Clause 12.8 refers to the desirability to preclude the occurrence of any Change Event. What the parties contemplated therefore was the happening or occurrence of a change in circumstances which has or will have the relevant effect. The applicants however seek to limit the occurrence to one that is singular in nature or alternatively, if more than one occurrence, is of the same nature. There are a number of difficulties with the imposition of these limitations. The first is that clause 1(a) of Schedule 2 to the Coal Supply Agreement provides that the singular includes the plural. The applicants seek to overcome this rule of interpretation by submitting that the context indicates otherwise. The rule of interpretation in clause 1(a) of Schedule 2 to the Coal Supply Agreement is not expressly made subject to the qualification identified by the applicants. The applicants refer to two authorities in support of the propositions that a generic provision will give way in the face of other contextual indications and that it is not the purpose of interpretative clauses to enlarge the parties’ rights and obligations beyond the operative clauses. In *AIB Group (UK) Limited v Martin*⁸⁸ Lord Millett referred to the second proposition in the context of an interpretation clause which, if applied, had the effect of creating guarantees in circumstances where none of the documents contained an express guarantee. As observed by Lord Millett:

⁸³ T2-47, lines 30-33.

⁸⁴ T2-56, lines 23-26.

⁸⁵ T2-48, lines 5-10.

⁸⁶ (2015) 256 CLR 104, 135 [121] (Bell and Gageler JJ).

⁸⁷ Citing *Chartbrook Limited v Persimmon Homes Limited* [2009] 1 AC 1101, [17].

⁸⁸ [2002] 1 WLR 94, [8] (Millett LJ).

“If there is such a guarantee, it derives exclusively from the way in which the interpretation clause in the joint mortgage is applied to the operative provisions.”⁸⁹

[88] This is a very different situation from the present case, where the relevant rule of interpretation simply permits a change in circumstances to be read as changes in circumstances. In *McLellan & Anor v Australian Stock Exchange Ltd*⁹⁰ Finkelstein J decided that the definitions of “Creditors”, “Unsecured Creditors” and “Unsecured Debt” must give way to the circumstances in which a deed was approved as well as the provisions in the deed that were inconsistent with a narrow reading of “Creditors” and “Unsecured Creditors”. This construction ensured that a creditor with a contingent claim or an unliquidated claim was not excluded from the operation of the deed.⁹¹ The type of inconsistency identified by Finkelstein J does not arise by reading the words “a change of circumstances” in clause 12.3(a) as “changes in circumstances”.

[89] The applicants submit however, that there is a causal relationship between event and effect. That is to say, the clause contemplates identification of a single event, and the attribution of an effect to that event.⁹² The applicants also point to the absence of a combination clause such as “event or circumstance or combination of events or circumstances” as was considered by Philip McMurdo J (as his Honour then was) in *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd & Ors.*⁹³ I discuss this case in a different context below. In my view, the applicants’ submissions in this respect should be rejected. Clause 12.3(a) in defining a “Change Event” identifies and includes, without limitation five examples. As correctly submitted by the respondents, the non-exhaustive particular instances of Change Events listed in clause 12.3(a)(i) to (v) are relevant in two respects:

“They give some indication of the breadth of matters which are intended to be encompassed by the definition of Change Event. At the same time, however, the quoted words mandate that the examples cannot be used to limit the “change in circumstances” that may give rise to a Change Event.”⁹⁴

[90] The first example is the Commercial Load Date of Unit 2 occurring more than 18 months after the Effective Date. The “Commercial Load Date” is defined in Schedule 1 of the Coal Supply Agreement as being the date Unit 2 achieves practical completion. It was a term defined in the EPC contract relating to the construction of the Callide C Power Station. The parties expected that the Commercial Load Date of Unit 2 would occur within 18 months after the Effective Date. A change of circumstances would occur if the Commercial Load Date occurred more than 18 months after the Effective Date. That is, the parties had an expectation that the Commercial Load Date of Unit 2 would occur within 18 months after the Effective Date. If this expectation was not fulfilled and the Commercial Load Date was more than 18 months after the Effective Date then a change of circumstances would occur.

⁸⁹ [2002] 1 WLR 94, [10] (Millett LJ).

⁹⁰ (2005) 144 FLR 327.

⁹¹ (2005) 144 FLR 327, 330 (Finkelstein J).

⁹² CS Energy’s Written Submissions, [106(b)(iii)].

⁹³ [2009] QSC 8, [14] (Philip McMurdo J).

⁹⁴ Respondents’ Written Submissions, [55].

- [91] The example in clause 12.3(a)(ii) refers to the Buyer reasonably demonstrating, by the elimination of other relevant factors, that there is a change in coal prices being paid by other power stations. The Buyer must also reasonably demonstrate, again by the elimination of other factors, that there is a material adverse change in the competitive position of the power station which is due to changes in coal prices being paid by other power stations. As is correctly submitted by the respondents:

“The example is of a change in an input cost for other power stations without any test being imposed as to whether it was caused by a particular circumstance, by multiple circumstances of the same nature or by general economic circumstances. ... Moreover, it is not to be expected that a change in coal prices being paid by other power stations would be occasioned by a single circumstance or by multiple circumstances of the same nature or occur suddenly. Coal prices can be influenced by many factors, including cost to production, cost of transportation, domestic and international supply and demand, domestic and international economic conditions and the like. Such changes may be the product of one or more causes operating independently or cumulatively and may occur relatively quickly or gradually over time.”⁹⁵

- [92] The third example in clause 12.3(a)(iii) refers to major changes to working conditions within the coal mining industry. What is contemplated here, as a change in circumstances, is more than one major change or multiple major changes to one or multiple working conditions. The example suggests changes in circumstances occurring over an extended period.
- [93] The example in clause 12.3(a)(iv) also supports the respondents’ submission that a change in circumstances can be constituted by numerous changes of circumstances that occur over an extended period. This example refers to a demonstrated (by the Seller) increase in the long term (being at least five years) trend in electricity price occurring over the whole or any part of any period when an EMI is not operative. As submitted by the respondents, the example is of a mere increase in power station revenues without that being triggered by a single circumstance or by multiple circumstances of the same nature. This is because electricity prices can be influenced by numerous factors.⁹⁶ The applicants accept that a relevant change in circumstances may occur over a long period of time before it becomes a Change Event. An obvious example is a drought. A drought may go on for some years before it has the relevant material effect on the competitiveness of either party in relation to the industry in which that party operates.⁹⁷
- [94] The applicants submit, however, that the five examples in clause 12.3(a) extend the meaning of the general words of the definition of “Change Event”. The examples are not, according to the applicants, within the general words of that definition.⁹⁸ The applicants refer to *YZ Finance Company Pty Ltd v Cummings*.⁹⁹ In that case the High Court considered s 24 of the *Money Lenders and Infants Loans Act 1941 to 1961* (NSW) which

⁹⁵ Respondents’ Written Submissions, [56(b)].

⁹⁶ Respondents’ Written Submissions, [56(b)].

⁹⁷ T1-81, lines 30-47 and T1-82, lines 1-6.

⁹⁸ T2-5, lines 35-42.

⁹⁹ (1964) 109 CLR 395, 398 (McTiernan J).

defined “security” to include certain things. McTiernan J cited Lord Watson’s statement in *Dilworth v Commissioner of Stamps*¹⁰⁰:

“The word ‘include’ is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the Statute; and when it is used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include. But the word ‘include’ is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it is not merely employed for the purpose of adding to the natural significance of the words or expressions defined.”

- [95] In *R v Gray; Ex parte Marsh & Anor*¹⁰¹ Gibbs CJ considered an inclusive definition of the word “irregularity” as defined in the *Conciliation and Arbitration Act (1904)* (Cth). The Chief Justice construed the definition of “irregularity” to be inclusive and not exclusive. In other words the definition was intended to comprehend such things as the word would ordinarily mean as well as those specifically included.¹⁰² The applicants’ submission should be rejected. The words in clause 12.3(a) are more extensive than the word “includes” as considered in the two cases cited above. The words are “and includes, without limitation”. These words suggest that the opening words themselves are broader and are not to be read down by reference to the particular added on components.¹⁰³ Further, the example in clause 12.3(a)(v) being a change in governmental policy or a change in a law or regulation relating to environmental standards and compliance with those standards, falls within the general words of the definition of a “Change Event”. Given that “Change Event” is defined in the context of a process permitting review of the Coal Supply Agreement for the purposes of ensuring consistency with the principles, there is in my view, no reason to read down the general words of the definition as submitted by the applicants.
- [96] The applicants’ alternative submission, namely that if there are changes in circumstances they must be of the same nature, should also be rejected. The definition of a “Change Event” in clause 12.3(a) does not expressly limit a change in circumstances to circumstances of the same nature. Whilst clause 12.3(b)(ii)(A) requires the Notifying Party to include in the notice all data which it holds including detailed information regarding the nature of the Change Event, this does not mean that a change or changes in circumstances must be of the same nature. Such a construction impermissibly seeks to limit the operation of the second limb of the definition which is concerned with the effect on competitiveness. If for example, the Coal Mine Owners suffer a flood event which does not have a material effect on their competitiveness (in their reasonable opinion) then a Change Event would not occur. If however, legislation is enacted which requires the flood waters to be treated in a certain way before being released into the environment and the combination of these two changes in circumstances has or will have the relevant effect, then a Change Event would occur. The changes in circumstances are not of the same nature (one being natural and the other being legislative) but combined they have or will have the relevant effect. If this is not a Change Event then the affected party is

¹⁰⁰ [1899] AC 99, 105-106 (Watson LJ).

¹⁰¹ (1985) 157 CLR 351.

¹⁰² (1985) 157 CLR 351, 365 (Gibbs CJ).

¹⁰³ T2-49, lines 5-10.

unable to initiate a review under clause 12 to ensure that the terms of the Coal Supply Agreement remain consistent with the principles set out in clause 12.1(a).

- [97] The third limitation sought by the applicants is that a “change in circumstances” constituting a “Change Event” must be an occurrence comprised of one or more changes in circumstances which do not constitute more than one Change Event.
- [98] This limitation should not be understood as requiring a Change Event Notice to notify only one Change Event.¹⁰⁴ If more than one Change Event occurs at or about the same time the applicants accept that all may be notified in the one notice as separate Change Events. Question 7(a)(ii)(A) raises for consideration the issue whether a Change Event can include a change or changes in circumstances for which an opinion had been separately formed (by the Notifying Party) that the change or changes in circumstances has or will have a material effect on the competitiveness of that party in its industry.
- [99] The applicants submit the terms of the Coal Supply Agreement support the conclusion that the parties contemplated the effect of the Change Event procedures would be that if a Change Event occurred, it would be the subject of notices and procedures in clause 12.3 to 12.8 and, absent agreement, the subject of a final determination as to whether an adjustment should be made.¹⁰⁵ I accept this submission. The first consideration is the timing requirements of the notices under clauses 12.3(b)(i) and (ii). Such notices are given if at any time after the date of execution of the Coal Supply Agreement there occurs, or either party considers there may occur, a Change Event. As observed by Fraser JA:

“... cl 12.3(b)(i) obliges any party who wishes subsequently to give a “change event notice” under cl 12.3(b)(ii) first to notify the other party in writing promptly when the relevant “change event” becomes known to the Notifying Party of that party’s intention to initiate the proposed review.”¹⁰⁶

His Honour continued in respect of clause 12.3(b)(ii):

“If the “Notifying Party” wishes to proceed cl 12.3(b)(ii) obliges it “as soon as practicable in all the circumstances” to submit a formal “change event notice”.”¹⁰⁷

- [100] I have already observed by reference to clause 12.3(b)(ii)(A) that a Change Event is something that is capable of having its nature and extent described. The quantum of the cost and revenue impacts of a Change Event may also be identified. The options and alternatives identified by the Notifying Party are those which are available to accommodate or mitigate the particular Change Event. This is important in light of clause 12.8 which requires the parties to have regard to the desirability to preclude the occurrence of or to mitigate any adverse consequences flowing from or contributing to, any Change Event. The Receiving Party may itself propose alternative options for the Notifying Party’s consideration. Those alternative options are ones to accommodate or

¹⁰⁴ See Respondents’ Written Submissions, [19(b)] and [21].

¹⁰⁵ CPM’s Written Submissions, [124].

¹⁰⁶ [2008] QCA 408, [45] (Fraser JA).

¹⁰⁷ [2008] QCA 408, [45] (Fraser JA).

mitigate the Change Event.¹⁰⁸ All these aspects, in my view, require the identification of one Change Event. Whilst it may be accepted that a notice may notify more than one Change Event, the nature, extent, impacts and options should be able to be ascertained in relation to each of those Change Events. Question 7(a)(ii)A should be answered “yes”.

[101] The final limitation submitted by the applicants is that a Change Event must be something supervening or external in nature and not comprise merely a change from the conditions or state of affairs which a party expected at the time of the Coal Supply Agreement to encounter in the future. The applicants submit that a change in circumstances does not contemplate a situation where the circumstances have not changed, but only a party’s appreciation of them:

“That is not a change of circumstances in the relevant sense. If it were otherwise clause 12.3 would be a charter for rewriting the contract to allow for any mis-estimation by either party of its cost, revenues or risk. That could not have been what the parties intended when one considers all of the terms of the Coal Supply Agreement and the commercial context, namely an arms-length multimillion dollar supply agreement between large commercial enterprises.”¹⁰⁹

[102] The respondents submit that a change in the respondents’ knowledge of geological conditions may constitute a change in circumstances for the purposes of a Change Event. The applicants submit that if the respondents are correct in this respect, the parties would be obliged to negotiate, and failing agreement a third party could rewrite the Coal Supply Agreement under the dispute resolution clause:

- (a) where there had been no change in the actual circumstances (as distinct from one party’s appreciation of them); and
- (b) merely because one party’s forecast turned out to be inaccurate.

This, according to the applicants, seeks impermissibly to transfer the risk of forecasting mistakes from the mistaken party to the other party (even though the other party was not responsible for the mistake).¹¹⁰

[103] The issue is not an easy one to resolve. It requires a consideration of the various reviews contemplated under the Coal Supply Agreement and the nature and purpose of a review under clause 12.3.

[104] There are a number of review mechanisms under the Coal Supply Agreement. First, in respect of option terms if the applicants exercise an option to extend the term clause 3.2(a)(ii) requires the parties to meet and negotiate all terms and conditions including price, subject to the price review procedures set out in clause 12. Clause 3.2(a)(iv) provides that in the event the parties fail to agree on all terms and conditions including price by the stated times and the applicants exercise their options, the Coal Supply

¹⁰⁸ Clause 12.4.

¹⁰⁹ CPM’s Written Submissions, [126].

¹¹⁰ CS Energy’s Written Submissions, [115]-[116].

Agreement is extended on the same terms and conditions including price applying at the conclusion of the current term. The respondents submit that the reference in clause 3.2(a)(ii) to the price review procedures set out in clause 12 indicates that the parties are to apply the review procedures in clauses 12.1 and 12.2 and that no term is immune from those procedures.¹¹¹ The applicants submit that by making clause 3.2(a)(ii) subject to the procedure in clause 12, does not mean that the parties in negotiating the terms and conditions and price in relation to an exercise of an option are to have regard to the principles stated in clause 12.1. I note that the exercise of options by the applicants is the subject of separate proceedings between the parties.¹¹² It is unnecessary in answering question 7 for me to express even a preliminary view as to these submissions. It is sufficient to note that the trigger mechanism under clause 3.2 for a negotiation of the terms and conditions and price under the Coal Supply Agreement is the exercise of an option by the applicants.

[105] The second review mechanism is under clause 10 which deals with price. This provides for a review period upon a party nominating a possible EMI.¹¹³ By clause 10.2(a) the method of calculating the Contract Price in clause 10 (including the method of calculating escalation) is subject to the review provisions set out in clause 12. The trigger for this review mechanism is the nomination by a party of a possible EMI. By clause 10.2(n) any dispute between the parties as to any matter set out in clause 10.2 must be referred to determination by an expert in accordance with clauses 13.3 to 13.6 inclusive.

[106] The third review mechanism is that considered by the Court of Appeal in *Callide Coalfields (Sales) P/L*, namely clause 12.2. The trigger for a review under clause 12.2 is the fifth anniversary of the effective date of the Coal Supply Agreement. This review has therefore passed. Pursuant to clause 12.2(b) what is reviewed is the consistency of the operation of the Coal Supply Agreement against the principles set out in clause 12.1(a). The parties by clause 12.2(d) are required to use their best efforts to review the consistency of the operation of the Coal Supply Agreement against those principles within 90 days of that meeting. Fraser JA (with whom Keane JA and Chesterman J agreed) found that clause 12.2 did not form part of the contractual mechanism by which the contemplated contractual adjustments are to be effected. His Honour concluded that clauses 12.3 to 12.8 (and, in the event of a dispute under that “Change Event” process, clause 13) exclusively fulfilled this aspect of the contractual object expressed in clause 12.1.¹¹⁴

[107] The fourth review mechanism is pursuant to clause 12.3. The trigger for such a review is where there occurs or may occur a Change Event.

[108] The Coal Supply Agreement also contains a mutual collaboration provision, clause 21 which reads:

“The Seller and the Buyer recognise that circumstances may arise which could not have been reasonably foreseen at the time this Agreement was entered into. The parties agree that they will use their best endeavours to

¹¹¹ Respondents’ Written Submissions, [33(d)].

¹¹² SC No 12366 of 2015 and SC No 12381 of 2015.

¹¹³ Clause 10.2(f) and (g).

¹¹⁴ [2008] QCA 408, [39] (Fraser JA).

resolve any such problems due to any such unforeseeable circumstances including continuation of any force majeure condition in the spirit of mutual understanding and collaboration.”¹¹⁵

[109] Fraser JA in *Callide Coalfields (Sales) P/L* referred to this clause as obliging the parties to endeavour to agree upon contractual adjustments to cater for reasonably unforeseeable circumstances but the clause “stops short of expressly obliging the parties to reach agreement”.¹¹⁶

[110] In *Superior Overseas Development Corporation and Phillips Petroleum (UK) Co Ltd v British Gas Corporation*¹¹⁷ the English Court of Appeal considered a clause for *ad hoc* price review under a long term agreement for the supply of gas. Clause 7 of Article X in the relevant contract provided:

“(a) If at any time or from time to time during the contract period there has been any substantial change in the economic circumstances relating to this Agreement and (notwithstanding the effect of the other relieving or adjusting provisions of this Agreement) either party feels that such change is causing it to suffer substantial economic hardship then the parties shall (at the request of either of them) meet together to consider what (if any) adjustment in the prices then in force under this Agreement or in the price revision mechanisms contained in clauses 4, 5 and 6 of this Article are justified in the circumstances in fairness to the parties to offset or alleviate the said hardship clause by such change.”

[111] The clause went on to provide for a dispute resolution process. Donaldson LJ noted that both parties were in a position to discuss the price to be paid for the whole content of the gas field, but they could only do so on the basis of the known facts as to capital investment which had already taken place, and estimates, or more accurately “guesstimates” of future capital expenditure and operating and maintenance costs over a 25 year period.¹¹⁸ Donaldson LJ continued:

“There were known to be three jokers in the pack. The first was the effect of future inflation or deflation on the capital and operating costs of producing and delivering the gas over the 25 year period. The second was the relative competitive position of gas and other major alternative fuels over the period. Third, and this was more of a “wild card” than a joker, there was a possibility that the parties had failed to foresee some other factor which would falsify some or one or all of their assumptions.”¹¹⁹

[112] In relation to the “wild card” his Lordship observed:

“The parties then turned their attention to the “wild card” and devised price revision machinery to be used on an *ad hoc* basis. Wide words were used as

¹¹⁵ Clause 22 of the CPM Agreement.

¹¹⁶ [2008] QCA 408, [48] (Fraser JA).

¹¹⁷ [1982] 1 Lloyd’s Rep 262.

¹¹⁸ [1982] 1 Lloyd’s Rep 262, 268 (Donaldson LJ).

¹¹⁹ [1982] 1 Lloyd’s Rep 262, 268 (Donaldson LJ).

was appropriate when trying to provide for the unforeseen and possibly unforeseeable.”¹²⁰

- [113] Whilst clause 7 of Article X considered in *Superior Overseas Development Corporation* is in different terms to clause 12.3, the decision is relevant because it was referred to by Fraser JA in respect of clause 12.3 where his Honour adopted Donaldson LJ’s “nautical analogy”:

“In my judgment, cl 7 is an ultimate safety net. To adopt an analogy which is perhaps appropriate to North Sea gas, the parties contemplated that in most foreseeable economic conditions the course of the joint venture would be dictated by the automatic price revision mechanisms contained in cll. 4, 5 and 6 (the agreed price autopilot). But the parties realized that over a period of 25 years economic storms could arise of such severity that the price or the auto pilot would not be able to keep the venture on course. Clause 7 provides for a manual override if this occurs and the venture goes so far off course as to cause one of the parties to suffer substantial economic hardship. The experts then take over, correct the course and, if appropriate, revise the settings on the price autopilot.”¹²¹

- [114] The applicants submit that a change in circumstances is a change in objectively ascertainable matters. It does not contemplate a situation where the circumstances have not changed, but only a party’s appreciation of them.¹²² The applicants also refer to the examples of a “Change Event” in clause 12.3(a)(i) to (v). The applicants submit that each example relates to “an objective change, not a change in subjective beliefs, intentions or knowledge.”¹²³ The first example, however, refers to the Commercial Load Date of Unit 2 occurring more than 18 months after the Effective Date. As I have already observed, the relevant change in circumstances in relation to this example is a change in the parties’ expectation that the Commercial Load Date of Unit 2 would occur within the 18 months after the Effective Date. The applicants further submit that their interpretation is consistent with the approach taken generally to hardship clauses, which deal with “unforeseen” or “unforeseeable” circumstances which lead to economic hardship.¹²⁴ The only reference to an unforeseen change in circumstances in clause 12.3 is the example given in clause 12.3(a)(iii) which refers “without limitation” to advances in technology which were not foreseen at the date of the Coal Supply Agreement. The other examples in clause 12.3(a)(i) to (v) are of changes in circumstances which the parties contemplated could at least occur in the course of a long term contract. There is no express requirement that a change in circumstances must be unforeseen so as to constitute a Change Event. The test for a Change Event is a change in circumstances which has or will have the relevant effect stated in clause 12.3(a).

- [115] The applicants, however, submit that changes in circumstances relating to geological conditions do not constitute a change in circumstances under clause 12.3(a). The

¹²⁰ [1982] 1 Lloyd’s Rep 262, 268 (Donaldson LJ).

¹²¹ [2008] QCA 408, [62] (Fraser JA) citing *Superior Overseas Development Corporation and Phillips Petroleum (UK) Ltd v British Gas Corporation* [1982] 1 Lloyd’s Rep 262, 269 (Donaldson LJ).

¹²² CPM’s Written Submissions, [126].

¹²³ CPM’s Written Submissions, [128].

¹²⁴ See, for example, *Superior Overseas Development Corporation and Phillips Petroleum (UK) Co Limited v British Gas Corporation* [1982] 1 Lloyd’s Rep 262, 265 (Waller LJ) and 269 (Donaldson LJ).

applicants accept that the respondents carried out standard industry exploration to produce data from which to estimate the geological characteristics of the mine (which is not the subject of any criticism) and although it was appreciated by the parties that the geological features could not be known with certainty until mining of the relevant coal occurred,¹²⁵ the applicants consider that a significant increase in cost as a result of encountering unexpected geological conditions does not constitute a change in circumstances.¹²⁶ Both parties accept that obviously the geology has not changed. According to the applicants, the only thing that has changed is the state of knowledge of the Coal Mine Owners and their expectations of the financial profits to be earned from the coal mine.¹²⁷ In support of this submission, the applicants refer to *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd & Ors*.¹²⁸ The clause considered by Philip McMurdo J in that case was a force majeure clause in the context of a long term contract for the supply of gas. The contract defined the term “force majeure event” to relevantly mean:¹²⁹

“any event or circumstance, or combination of events or circumstances, not within the control of a Party ... including, without limiting the generality of the foregoing:

...

(h) unpredicted, sudden and material deterioration in productivity of more than one well or failure of wells, equipment or plant breakdown or failure that causes full or partial interruption of the delivery of Gas by Moura Sales under this Agreement.”

[116] Clause 14.1.1 required the service of a notice without delay “if a force majeure event occurs”.

[117] In considering that clause his Honour stated:¹³⁰

“According to cl 14.1.1, a Force Majeure Event is something which “occurs”. It may be an event or circumstance, or a combination of them, but there must be an occurrence, and necessarily, one within the life of the Agreement. So the mere geology of Ridgedale or of some location within it could not of itself constitute the Force Majeure Event.”

[118] Relevantly in relation to paragraph (h) of the definition of a force majeure event, his Honour observed:¹³¹

“The “deterioration in productivity” to which it refers involves a comparison of its actual productivity at two points in time. It does not involve a comparison of its *forecast* productivity with its actual productivity. Much of the evidence involved an investigation of Dawson’s exploration and planning, and of the reliability of various forecasts of production from Ridgedale.

¹²⁵ Ninth Further Amended Defence, [4A(1)], Fourth Further Amended Reply and Answer [3(i)] (SC No 12122 of 2013) and Reply and Answer to the Eighth Further Amended Defence, [1I] (SC No 12138 of 2013).

¹²⁶ Respondents’ Written Submissions, [170].

¹²⁷ CPM’s Written Submissions, [127].

¹²⁸ [2009] QSC 8, affd *AGL Sales (Qld) P/L v Dawson Sales P/L & Ors* [2009] QCA 262.

¹²⁹ [2009] QSC 8, [14] (Philip McMurdo J).

¹³⁰ [2009] QSC 8, [34] (Philip McMurdo J).

¹³¹ [2009] QSC 8, [46] (Philip McMurdo J).

Undoubtedly each of these 15 wells was, at the least, less successful than Dawson had expected. But that disparity does not constitute a Force Majeure Event, and in particular it does not constitute an event within para (h) of the definition. It is a change to the actual productivity and thereby to the level of actual production which results in an *interruption* of the delivery of gas.”

[119] Philip McMurdo J was dealing with a force majeure clause in significantly different terms to clause 12.3. One should exercise caution in applying authorities which deal with differently worded clauses.¹³² The term being considered by his Honour was “deterioration in productivity”. This is a very different concept to “change in circumstances”. His Honour’s observation that a “deterioration in productivity” could not be established by the party comparing its forecast productivity with its actual productivity is unsurprising. The case does not however assist in determining whether a change in the respondents’ knowledge of geological conditions may constitute a change of circumstances for the purposes of clause 12.3.

[120] The respondents submit that the language used in clause 12.3 is apt to cover any change in conditions from those prevailing or expected at a previous point in time, which impact on the clause 12.1 principles.¹³³ The respondents further submit that the distinction which the applicants seek to read into the language of clause 12.3 does not assist them. What is described as a change in expectations (or forecast) can readily be described as a change between two actual conditions. A party’s state of knowledge at any given time is a circumstance which can change and has changed. Here the state of geological data has changed as more exploration and excavation takes place. According to the respondents, where there is a change in the actual, physical mining conditions encountered and the mining methods and equipment which may be used to extract coal, then the Coal Mine Owners must change their mining operations to accommodate these different conditions. I accept this submission. In the context of a long term agreement for the supply of coal as between the Station Owners and the Coal Mine Owners, a change of circumstances may occur where the Coal Mine Owners have to change their mining operations to accommodate different conditions. This is not a mere change in one party’s own expectations or forecast. Rather, it is a change in a state of knowledge. It would be surprising in the context of a long term contract for the supply of coal from an adjacent coal mine that the parties would exclude such a change in a state of knowledge from the Change Event review mechanism. Such a construction would defeat the “predominant effect” of the clause 12.1(a) principles. The parties, however, are in agreement that a Change Event permits a comparison of a set of circumstances at two different points in time in order to discern a change in those circumstances. This requires a comparison to be made of two objective facts, that is, facts which may be objectively ascertained. To discern, however, whether a Change Event has occurred, one cannot compare the subjective state of mind of a party with an objective fact. I accept the applicants’ submission that a mere failure to meet one party’s own expectations or forecasts would not be a change in circumstances for the purposes of clause 12.3(a).

[121] Question 7 should therefore be answered as follows:

7(a)(i) : NO

¹³² *Patel v Earlspring Properties Ltd* [1991] 2 EGLR 131 (CA), 132 (Woolf LJ).

¹³³ Respondents’ Written Submissions, [14].

- 7(a)(ii)(A) : YES
 7(a)(ii)(B) : NO
 7(b) : YES

Question 8

“8. Can a party rely on a change or changes in circumstances for the purposes of clause 12.3 of the Coal Supply Agreement, in circumstances where the party has previously:

- (a) notified the other party (pursuant to clause 12.3(b)(i)) of; or**
(b) submitted a Change Event Notice (pursuant to clause 12.3(b)(ii)) in relation to,

an alleged Change Event that is comprised in whole or in part of the change or changes in circumstances sought to be subsequently relied upon?”

- [122] All parties accept that a Notifying Party cannot give a Change Event Notice for an identical change in circumstances which has already been the subject of an adjustment or a final determination that no adjustment should be made.¹³⁴
- [123] It may also be accepted that there is no limitation to the number of Change Event Notices which may be given during the term of the Coal Supply Agreement.¹³⁵
- [124] For reasons given in answer to question 7(a)(ii)(A) the answer to question 8 is “no”.¹³⁶ As I understand the question, it raises the issue whether a Notifying Party may rely on a change of circumstances, previously notified as a Change Event, in a subsequent notice as part of the change in circumstances for either a notice under clause 12.3(b)(i) or 12.3(b)(ii). A Notifying Party may only notify pursuant to clause 12(b)(i) of its intention to initiate a review if there has occurred or may occur a Change Event. That means that not only has a change of circumstances occurred, but it is a change of circumstances which has or will have a material effect on the competitiveness of the Notifying Party in that party’s reasonable opinion. Such a notice is required to be given “promptly”. Whilst there is no obligation to give a notice under clause 12.3(b)(i), such a notice does signify that a Change Event has occurred. The giving of a Change Event Notice under clause 12.3(b)(ii) initiates the machinery not only contained in clause 12.3(b), but also in clauses 12.4 to 12.8 and may ultimately lead to a dispute resolution under clause 13. This machinery, as observed by Fraser JA, assists in the definition of any dispute, including as to any adjustment of the contractual terms as sought by the parties.¹³⁷ I accept the applicants’ submissions that it could not have been the intention of the parties that a party could serve multiple notices in relation to the same change in circumstances previously notified as a Change Event. As submitted by the applicants, “such a construction would

¹³⁴ Respondents’ Written Submissions, [307] and CS Energy’s Written Submissions, [122].

¹³⁵ The respondents seek to distinguish the present case from that considered by Moore-Bick J in *Esso Exploration & Production UK Ltd v Electricity Supply Board* [2004] EWHC 723 (Comm) where there was an express limitation on the number of notices which could be given over the term of the relevant agreement.

¹³⁶ See [112]-[115] above.

¹³⁷ [2008] QCA 408, [45] (Fraser JA).

not only defeat the time limitations in clause 12.3(b) ... but would also make the review procedure in clauses 12.3 to 12.8 commercially impractical and unworkable.”¹³⁸ The answer to question 8 is therefore “no”.

Question 9

- “9 Can a party rely on a change or changes in circumstances for the purposes of clause 12.3 of the Coal Supply Agreement in circumstances where the party forms a reasonable opinion that the change or changes in circumstances have, or will have, a material effect on the competitiveness of the Coal Mine Owners or the Buyer in relation to the industry in which it operates and:¹³⁹**
- (a) does not notify the other party in writing promptly on the formation of the opinion that it is the party’s intention to initiate a review of the Coal Supply Agreement under clause 12.3 which may lead to an Adjustment; or**
 - (b) does not, as soon as practicable in all the circumstances, submit a Change Event Notice within the meaning of that term as used in clause 12.3(b)(ii) in relation to an alleged Change Event that is comprised in whole or in part of the change or changes in circumstances”**

[125] It follows from my answer to question 8 that the answer to question 9 is also “no”. This conclusion does not rely on the time requirements in clause 12.3(b)(i) and (ii) being essential. The time requirements must, however, be given some meaning. Whilst there is no requirement for a party to give a notice pursuant to clause 12.3(b)(i) upon the occurrence of a Change Event, the failure to give such a notice simply means that the party did not have the intention to initiate a review of the Coal Supply Agreement which may lead to an adjustment. A notice under clause 12.3(b)(i) at least serves the purpose of informing the Receiving Party of the Notifying Party’s intention to initiate a review because of the Change Event.

Question 10

- “10. Was a Change Event deemed to have occurred upon the delivery of the document entitled ‘Change Event Notice Callide B Coal Supply Agreement (Clause 12)’ (with Annexures) delivered by Callide Sales to CS Energy on 12 November 2013 (the 12 November Notice)?¹⁴⁰”**

[126] Pursuant to clause 12.3(b)(ii) a Change Event will be deemed to have occurred if a Notifying Party submits a formal notice of a change event which includes those matters identified in clause 12.3(b)(ii)(A) and (B). It follows that a Change Event will only be deemed to have occurred if the Notifying Party has submitted a Change Event Notice. If what is submitted is not a Change Event Notice then the deeming provision has no operation. The applicants submit that if a notice is given which complies with the requirements of clause 12.3(b)(ii) then the receiving party must accept the notice as a

¹³⁸ CPM’s Written Submissions, [144].

¹³⁹ Further Amended Statement of Claim, [9](e)] and Sixth Further Amended Defence, [9(e)].

¹⁴⁰ Sixth Further Amended Defence, [11(c)].

notice of a Change Event and engage in the process set out in clauses 12.3 to 12.8. The deeming provision operates so that the underlying facts behind the Change Event Notice and the holding of the reasonable opinion by the Notifying Party as to the material effect on competitiveness cannot be raised as an impediment to the parties participating in the review process.¹⁴¹ The purpose of the deeming provision is, if a valid notice is delivered, the Receiving Party may not deny the Change Event review process has been engaged or otherwise refuse to participate in that process on the basis that a Change Event has not occurred. The debate as to whether or not the matters in the notice are factually correct, the consequences of those matters and what adjustment to the contractual term shall be made, is reserved for the Change Event review process itself.¹⁴² So long as a party forms the opinion that a Change Event has occurred, and gives the notices referred to in clauses 12.3(b)(i) and (ii) the Change Event process is engaged and the parties are obliged to enter into negotiations as to whether an adjustment to accommodate or mitigate the Change Event should be made (and absent agreement to proceed through the dispute resolution process in clause 13). That is so even if, as a matter of fact, no Change Event has occurred.¹⁴³ Irrespective of the deeming provision, the onus is upon the Notifying Party to establish the impact of the Change Event.¹⁴⁴ For reasons which follow I am of the view that the 12 November notice is not a Change Event Notice. As a result clause 12.3(b)(ii) does not operate so as to deem that a Change Event has occurred. The answer to question 10 is therefore “no”.

Increases in Cost (Question 11)

Question 11

“11. Are increases in costs governed exclusively by clause 10 of the Coal Supply Agreement (such that they cannot engage clause 12 of the Coal Supply Agreement) or may increases in costs give rise to, or form part of, a change or changes in circumstances that constitute a Change Event?”

[127] The applicants submit that this question should be answered as follows:

“Mere increases in costs are not in and of themselves a Change Event. Unless they are the consequence or effect of a Change Event, they are governed exclusively by clause 10.”¹⁴⁵

[128] Clause 10 is a sophisticated provision dealing with price escalation. According to the applicants clause 10 provides expressly for increases in the Contract Price over time on account of what may be termed general economic conditions. Mere increases in cost are a reflection of general economic conditions and do not, of themselves, constitute a Change Event.¹⁴⁶ Clause 10 therefore as submitted by the applicants, provides the only remedy under the Coal Supply Agreement for mere increases in cost by providing for a price increase mechanism.

¹⁴¹ T1-13, lines 20-45.

¹⁴² CS Energy’s Written Submissions, [129].

¹⁴³ CPM’s Written Submissions, [148].

¹⁴⁴ Clause 12.3(b)(iv).

¹⁴⁵ CS Energy’s Written Submissions, [130] and CPM’s Written Submissions, [150].

¹⁴⁶ CPM’s Written Submissions, [151]-[152].

- [129] The respondents however, submit that increases in cost are not governed exclusively by clause 10, but rather may give rise to or form part of a change or changes in circumstances that constitute a Change Event.¹⁴⁷ In support of this submission, the respondents rely on two of the examples given in clauses 12.3(a)(ii) and (iv). The respondents submit that the change in circumstances in these two examples reflect mere increases in cost or prices.¹⁴⁸ Upon proper analysis, the change in circumstances identified in clause 12.3(a)(ii) and (iv) are not examples of mere increases in cost. Clause 12.3(a)(ii) refers to a change in coal prices being paid by other power stations. By that clause the parties acknowledge that the Station Owners must reasonably demonstrate, by the elimination of other relevant factors, that there is a material adverse change in the competitive position of the power station which is due to changes in coal prices being paid by other power stations before the parties will be obliged to review the Coal Supply Agreement against the principles set out in clause 12.1(a)(iii). That principle only applies to the initial term of the Coal Supply Agreement which has now passed. The second example contained in clause 12.3(a)(iv) is the Coal Mine Owners demonstrating an increase in the long term (being at least five years) trend in electricity price occurring during the whole or any part of any period when an EMI is not operative. These examples are not of mere increases in operating costs but are references to specifically contemplated matters that may affect the competitiveness of the parties in their respective industries, namely coal prices being paid by other power stations in respect of the Station Owners and the long term trend in electricity prices in respect of the Coal Mine Owners.
- [130] The mechanism in clause 10 is similar to that identified by Donaldson LJ in *Superior Overseas Development Corporation*:
- “The first adjustment mechanism is contained in cl 5 and is designed to take account of the effects of future inflation or deflation upon the capital and operating cost of producing and delivering the oil. The details do not matter. Suffice it to say that there was a formula which was to be applied to the then existing prices and provision for any party who was dissatisfied to remit the resulting figure to a panel of experts for confirmation or revision. The experts were also empowered to revise the formula itself.”¹⁴⁹
- [131] Similarly, clause 10 provides expressly for increases in the Contract Price over time on account of what might be termed general economic conditions. The respondents however, submit that a review under clause 12.3 provides a mechanism whereby the whole of the Coal Supply Agreement (including clause 10) may be reviewed against the principles in clause 12.1. A distinction should however be drawn between the nature of a review under, for example, clauses 10 and 12.2 with a review pursuant to clause 12.3. The review under clause 10.2 is for the escalation of the Contract Price in accordance with an appropriate index. The review under clause 12.2(b) concerns the consistency of the operation of the Coal Supply Agreement against the principles set out in clause 12.1(a). A review under clause 12.3 however, is only triggered by a formal notice of a Change Event. If mere increases in operating costs constitute a Change Event it would in my view, result in a constant price review under the Coal Supply Agreement pursuant to the Change Event mechanism. As submitted by the applicants, the respondents’ construction “robs the first element of the definition ‘change in circumstances’ of any real

¹⁴⁷ Respondents’ Written Submissions, [280].

¹⁴⁸ Respondents’ Written Submissions, [152(e)].

¹⁴⁹ [1982] 1 Lloyd’s Rep 262, 268 (Donaldson LJ).

content, and it does not provide any meaningful objective yard stick against which to measure the trigger”.¹⁵⁰

[132] I would therefore answer question 11 in the terms contended by the applicants.

Time Requirements (Questions 13 to 15)

Question 13

“13. Must a notice given in accordance with clause 12.3(b)(i) of the Coal Supply Agreement be given promptly when the Change Event becomes known to the Notifying Party or may a notice given in accordance with clause 12.3(b)(i) of the Coal Supply Agreement be given promptly after the party giving the notice forms the intention to initiate a review?”

[133] The applicants submit that a notice must be given in accordance with clause 12.3(b)(i) promptly when the Change Event becomes known to the Notifying Party. The respondents’ contention is that on the proper construction of clause 12.3(b)(i), the notice under that clause may be given promptly after the Notifying Party forms the intention to initiate a review. According to the respondents the trigger for giving the notice is the formation of the intention to initiate a review. A notice cannot be given until this intention is formed. It is therefore the natural time from which time would logically run.¹⁵¹

[134] The respondents’ contention does not in my view, accord with the words of clause 12.3(b)(i). The requirement to notify the Receiving Party in writing promptly is “when that Change Event becomes known to the Notifying Party”. The phrase in clause 12.3(b)(i) “that it is the Notifying Party’s intention to initiate a review” is a reference to the content of the notice. The introductory words to clause 12.3(b) state:

“If at any time after the date of execution of this Agreement there occurs, or either party considers there may occur, a Change Event, then:”.

[135] These introductory words contemplate a Change Event that has occurred or may occur. The definition of Change Event itself in clause 12.3(a) is of a change of circumstances which has or will have the relevant material effect. This definition already expressly encompasses a change in circumstances which “will have” the relevant material effect. The reference in the introductory words to clause 12.3(d) “considers there may occur a Change Event” therefore includes a change in circumstances that is yet to occur. That is, a notice under clause 12.3(b)(i) may be given where a Change Event has yet occurred but the Notifying Party considers there may occur a Change Event. The reference in clause 12.3(b)(i) to “when that Change Event becomes known” (emphasis added) should be read as a reference to a Change Event which occurs or which a Notifying Party considers may occur. A Notifying Party is therefore required to promptly notify when a Change Event occurs or it considers there may occur a Change Event.

¹⁵⁰ T3-30, lines 40-42.

¹⁵¹ Respondents’ Written Submissions, [317]-[318].

- [136] I accept the applicants' submission that the notice under clause 12.3(b)(i) is in the nature of a "warning notice" as described by Lord Denning MR in *Tradax Export SA v Andre and Cie SA*.¹⁵² All the notice under clause 12.3(b)(i) does is notify the Receiving Party that there is an intention to initiate a review. There is no obligation on the part of the Notifying Party to proceed with a review. A notice under clause 12.3(b)(ii) is only required to be given if the Notifying Party wishes to proceed with a review of the Coal Supply Agreement.
- [137] Question 13 should therefore be answered:

"A notice must be given in accordance with clause 12.3(b)(i) of the Coal Supply Agreement promptly when the Change Event becomes known to the Notifying Party."

Questions 14 and 15

- "14. Is compliance with the time specified in clause 12.3(b)(i) of the Coal Supply Agreement a condition precedent to the valid issue of a notice under the clause?"**
- 15. Is compliance with the time specified in clause 12.3(b)(ii) of the Coal Supply Agreement a condition precedent to the valid issue of a Change Event Notice under the clause?"**

- [138] The applicants submit that the time requirements specified in clause 12.3(b)(i), "promptly" and in clause 12.3(b)(ii) "as soon as practicable in all the circumstances" are conditions precedent to the valid issue of the respective notices. The applicants assert that a failure to comply with these time requirements renders the respective notices invalid. Such a conclusion depends on the proper construction of the clauses. The applicants identify four matters in support of their submission that time is essential. First, the notices under clause 12.3 are unilateral. The service of a valid notice under clause 12.3(b)(ii) has the effect that a Change Event is "deemed to have occurred". The unilateral service of a notice under clause 12.3(b)(ii) triggers the review procedure contemplated by clauses 12.3 to 12.8.¹⁵³ Second, the applicants point to the effects of an adjustment under clause 12.3 which are potentially very significant. Such an adjustment can include an adjustment to price.¹⁵⁴ The adjustments must "accommodate or mitigate the Change Event" and be consistent with the principles set out in clause 12.1. Third, the Change Event the subject of the notices may be a matter of which the other party is unaware. As submitted by the applicants this is particularly so given that a Change Event focuses on a change in circumstances which has a material effect on the competitiveness of a party in relation to its industry.¹⁵⁵ Fourth, the applicants refer to the use of the two notice procedures in clause 12.3 as suggesting the importance of time in the process. The first notice must be given "promptly". The purpose of the first notice, according to the applicants, is that it puts the Receiving Party on notice that they should be proceeding or planning on the basis that the terms of the Coal Supply Agreement might be adjusted.¹⁵⁶

¹⁵² [1976] 1 Lloyd's Rep 416, 421 (Denning MR).

¹⁵³ CPM's Written Submissions, [172].

¹⁵⁴ CPM's Written Submissions, [173].

¹⁵⁵ CPM's Written Submissions, [174].

¹⁵⁶ CPM's Written Submissions, [178].

[139] The applicants refer to the decision of the Court of Appeal in *AGL Sales (Qld) P/L v Dawson Sales P/L & Ors.*¹⁵⁷ One of the issues on appeal was whether delay in issuing a notice under the force majeure clause of a long term gas supply agreement rendered the notice ineffectual. Ultimately the Court did not have to determine the issue. Chesterman JA however concluded that the time requirement was essential:

“I would therefore construe clause 14.1.1 as requiring a Curtailment Notice to be given without delay if it is to bring about the consequences described in the succeeding subclauses. Such a construction accord with the ‘Force Majeure’ cases, and the general principal that contractual rights may only be altered unilaterally in the precise manner provided for in the contract. The Notice was not given without delay. It did not therefore have the effect of suspending Dawson’s obligations to supply the amounts of gas nominated by AGL.”¹⁵⁸

[140] Chesterman JA observed that the commercial purposes of the notice could be seriously affected if Dawsons were not obligated to give it promptly after a force majeure event. This was because AGL would not know whether and to what extent the force majeure event (of which it would remain ignorant) had affected Dawson’s capacity to sell gas to it and its need to obtain alternative supplies of gas.¹⁵⁹ Chesterman JA stated:

“More generally, contractual notices which one party may give another unilaterally altering the rights of the parties to the contract must comply strictly with the terms which govern the giving of notice.”¹⁶⁰

[141] Whilst not deciding the point, Muir JA observed that if the obligation to issue a notice without delay was not a requirement of a valid notice and failure to comply merely gave rise to a claim for damages for breach of contract, the purpose of the notice and of the particulars would be substantially defeated.¹⁶¹ Muir JA stated:

“An obvious purpose of the particulars required to be specified in the Notice is to inform the respondent promptly of the likely extent and duration of the interruption to the supply of gas under the Agreement to enable it to take whatever steps might be available to it to minimise the damage, if any, likely to be caused by interruption. Other such purposes are to enable the Notice to provide a timely basis for co-operation between the parties and minimising the adverse consequences of the shortfall and to provide a basis upon which the respondent can act in order to assess whether Dawson is complying with its obligations under clause 14.1.2, or in determining whether there may be cause to consider the application of clause 14.1.3.”¹⁶²

[142] *AGL Sales (Qld) Pty Ltd* was concerned with a force majeure clause. The Coal Supply Agreement also contains a force majeure clause which, coincidentally, is also clause 14. Pursuant to clause 14.2 of the Coal Supply Agreement a notice of a force majeure event must be provided within two business days after the occurrence of the event. By clause

¹⁵⁷ [2009] QCA 262.

¹⁵⁸ [2009] QCA 262, [113] (Chesterman JA).

¹⁵⁹ [2009] QCA 262, [102] (Chesterman JA).

¹⁶⁰ [2009] QCA 262, [111] (Chesterman JA).

¹⁶¹ [2009] QCA 262, [37] (Muir JA).

¹⁶² [2009] QCA 262, [36] (Muir JA).

14.3 following an event of force majeure the affected party's obligations (including any obligation to pay money under the Coal Supply Agreement) is suspended. This is to be contrasted with the nature of the notices given under clauses 12.3(b)(i) and (ii). The notice that is required to be given under clause 12.3(b)(i) is in the nature of a warning notice. It does not alter rights or obligations under the Coal Supply Agreement. The giving of a notice under clause 12.3(b)(i) is not mandatory but permissive. It simply notifies a party's intention to initiate a review of the Coal Supply Agreement which may lead to an adjustment. The first notice does not automatically lead to an actual review of the Coal Supply Agreement. This only occurs if the Notifying Party wishes to proceed with a review of the Coal Supply Agreement and submits a Change Event Notice pursuant to clause 12.3(b)(ii). The procedure thereafter, absent agreement, may ultimately involve lengthy litigation before any adjustment is made to the Coal Supply Agreement. In the meantime the Notifying Party's contractual obligations remain in place and unchanged.

- [143] The applicants also refer to cases concerning building contracts, namely *Wormald Engineering Pty Ltd v Resources Conservations Co International*¹⁶³ and *Opat Decorating Service (Aust) Pty Ltd v Hansen Yuncken (SA) Pty Ltd*.¹⁶⁴ That time may be of the essence in relation to construction contracts is not surprising. For example, in *Wormald Engineering* the arbitrator whose decision was upheld, found that the failure to give notice as required by the relevant clause "was destructive of the appellant's entitlement to recover under it".¹⁶⁵ In *Opat Decorating Service* Bollen J referred with approval to the statement of Smart J in *Jennings Construction Ltd v QH & M Birt Pty Ltd*¹⁶⁶ where his Honour stated:

"The purpose of cl 47 is to ensure that notice is given at an early stage so that the contractor can inspect and investigate promptly the events or circumstances and consider his position. ... Unless notice is given the contractor may not be alerted to the proposed claim and given an opportunity to investigate and check. The requirement of written notice, which is so common in construction contracts, puts the matter on a formal and readily identifiable basis."

- [144] In both *Opat Decorating Service* and *Jennings Construction* the relevant clauses required a notice to be given within 14 days. In the present case the time requirements are expressed in more fluid terms, namely, "promptly" and "as soon as practicable in all the circumstances". The applicants however, submit that it does not matter that the timeframes are not expressed in terms of a precise number of days. In *AGL Sales (Qld) Pty Ltd* for example, the relevant time specification was "without delay". In other cases it has been held that an essential time stipulation was "shall give prompt notice".¹⁶⁷
- [145] Unlike force majeure clauses, any delay in giving a notice under either clause 12.3(b)(i) or (ii) does not suspend or alter the Notifying Party's obligations under the Coal Supply Agreement. Even in the context of force majeure clauses time requirements have been

¹⁶³ (1988) 8 BCL 158, 162 (Roger CJ).

¹⁶⁴ (1994) 11 BCL 360, 364 (Bowen J).

¹⁶⁵ (1988) 8 BCL 158, 162 (Rogers CJ).

¹⁶⁶ (1986) 8 NSWLR 18, 24 (Bollen J).

¹⁶⁷ See *Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery AD* [2003] 1 Lloyd's Rep 1, 25 [135] (Aitkens J).

found not to be essential. In *Great Elephant Corporation v Trafigura Beheer BV*¹⁶⁸ Teare J considered a force majeure clause in the following terms:

“immediately on the occurrence of force majeure ... promptly notify the other party in writing stating the details of the event or act constituting force majeure and stating also the measure being adopted by it to minimise or to remedy the consequences of the force majeure on the performance of this contract.”

[146] Teare J referred with approval to the judgment of Lord Wilberforce in *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA*¹⁶⁹ and went on to say:¹⁷⁰

“Following that guidance the following seem to be important points to bear in mind when construing the notice provision in this case:

- (i) The clause is not framed as a condition precedent.
- (ii) The requirement is not for notice within a clear and specified number of days but notice which is immediate and prompt. What is immediate and prompt will depend upon factual context. Here, the notice requires not only the “details” of the event but also the “measures” being adopted to minimise the consequences of the event. Both of these requirements suggest that some delay in giving notice must be permitted. Thus identifying when a notice is not immediate or prompt may be difficult. This is not the context in which the parties are likely to have intended that failure to provide immediate or prompt notice would debar a party from relying upon a force majeure event;
- (iii) Where a specific sanction is intended the parties tend to say so expressly.”

[147] Teare J concluded that the notice provision was not to be construed as a condition precedent to reliance upon the force majeure clause but rather as an innominate term sounding in damages only.¹⁷¹

[148] It would be surprising if the “predominant effect” of the clause 12.1 principles and a party’s ability to have a Change Event review could so easily be defeated by a failure to comply with such fluid time requirements. This is especially so where those time requirements are not expressly identified as conditions precedent and no express consequences are identified as a result of non-compliance.

[149] As stated by Lord Diplock in *United Scientific v Burnley Council*¹⁷²:

“My Lords, the rules of equity, to the extent that the Court of Chancery had developed them up to 1873 as a system distinct from rules of common law, did not regard stipulations in contracts as to the time by which various steps

¹⁶⁸ [2012] 2 Lloyd’s Rep 503, 524-525 (Teare J).

¹⁶⁹ [1978] 2 Lloyd’s Rep 109, 113 (Wilberforce LJ).

¹⁷⁰ [2012] 2 Lloyd’s Rep 503, 525 [121] (Teare J).

¹⁷¹ [2012] 2 Lloyd’s Rep 503, 525 [122] (Teare J).

¹⁷² [1978] AC 904, 927 (Diplock LJ).

should be taken by the parties as being of the essence of the contract unless the express words of the contract, the nature of its subject matter or the surrounding circumstances made it inequitable not to treat the failure of one party to comply exactly with the stipulation as relieving the other party from the duty to perform his obligations under the contract.”

- [150] Lord Diplock also observed that stipulations as to the time at which a party was to perform a promise on its part were among the contractual stipulations which were not regarded as “conditions precedent” if its failure to perform that promise punctually did not deprive the other party of substantially the whole benefit which it was intended that it should obtain from the contract.¹⁷³
- [151] The applicants submit that the time requirements should be viewed as essential because damages as a remedy for breach of contract would be difficult to establish. The Receiving Party would likely be proceeding and planning on the basis that the Coal Supply Agreement is to be performed in accordance with its current terms and that the principles enshrined in clause 12.1 were continuing to be met by those terms.¹⁷⁴ The respondents do not accept that damages would be difficult to assess. This is because the process started by a late Change Event Notice would culminate in either an agreement between the parties (about which there could be no complaint), or a determination by an external party of an appropriate adjustment by reference to the principles in clause 12.1(a). The Receiving Party’s competitive position in its industry must be taken into account as well as the Notifying Party’s competitive position. If, because of a delay in serving a notice, a Receiving Party has entered into some transaction or altered some aspect of its business, that will fall to be taken into account in considering what, if any, adjustment is appropriate and “fairly and reasonably” reflects the principles in clause 12.1(a).¹⁷⁵ The respondents therefore submit that it is difficult to see that a Receiving Party will ever be significantly prejudiced in a financial sense by the “late” delivery of a Change Event Notice. Even if it was accepted that damages would be difficult to assess, I would still construe clauses 12.3(b)(i) and (ii) as not imposing essential time requirements. Until such time as an adjustment is agreed or determined the Notifying Party remains bound by the terms of the existing Coal Supply Agreement. If time were of the essence then delay in notification would deprive a party of the right to instigate a Change Event review. The Notifying Party would simply be forced to continue in a long term contract in which it could remain uncompetitive in its own industry.¹⁷⁶
- [152] Whilst I do not view the time requirements in clauses 12.3(b)(i) and (ii) as being essential, they must be given meaning. The time requirements cannot simply be ignored so as to permit a party to sit on a Change Event that occurred in, for example, 2010 and then combine it with a more recent Change Event in a Change Event Notice submitted in 2016. This would defeat the detailed machinery for a Change Event review in clauses 12.3 to 12.8.

¹⁷³ [1978] AC 904, 928 (Diplock LJ). See also *Alliance Petroleum Australia NL & Ors v Australian Gas Light Company* (1985) 39 SASR 84, 91-92 (Cox J); *Amann Aviation Pty Ltd v Commonwealth of Australia* (1990) 22 FCR 527, 558 (Burchett J); *British and Commonwealth Holdings PLC v Quadrex Holdings Inc* [1989] 1 QB 842, 856-857 (Browne-Wilkinson VC).

¹⁷⁴ CPM’s Written Submission, [174].

¹⁷⁵ Respondents’ Written Submissions, [209].

¹⁷⁶ Respondents’ Written Submissions, [208(c)].

- [153] The review contemplated by the submitting of a Change Event Notice is not a general review of the consistency of the terms of the Coal Supply Agreement with the clause 12.1(a) principles.¹⁷⁷ It is more focused. It is triggered by notification of a Change Event. By the imposition of time requirements, not only in relation to the giving of notices but in the taking of other steps,¹⁷⁸ the parties contemplated an expedited process for agreeing either an option to accommodate or mitigate the Change Event or an adjustment generally in accordance with the principles set out in clause 12.1(a). In this respect the time requirements in clause 12.3(b)(i) and (ii) of “promptly” and “as soon as practicable in all the circumstances” inform the nature of a Change Event, that is, a Change Event is a change of circumstances which has or will have a relevant material effect, which is capable of being notified in a timely manner.
- [154] Questions 14 and 15 should both be answered “no”.
- [155] It is convenient at this point to consider a question posed by CPM but not CS Energy. Question 15 of CPM’s separate questions states:
- “Must a Change Event Notice given in accordance with clause 12.3(b)(ii) of the Coal Supply Agreement be given as soon as practicable:
- (a) after the Notice of Intention is given; or
 - (b) after the Change Event the subject of the Change Event Notice becomes known to the party giving the Change Event Notice; or
 - (c) after the party giving the Change Event Notice forms the opinion that it wishes to proceed with a review under clause 12 of the Coal Supply Agreement?”
- [156] The question is somewhat hypothetical in the present case because the respondents gave the purported formal notice of a Change Event under clause 12.3(b)(ii) within six days of the First Notice. The relevant applicants submit that the correct answer is (a), a Change Event Notice must be given in accordance with clause 12.3(b)(ii) as soon as practicable after the first notice is given. The respondents however, submit that the time requirement only runs from when the Notifying Party has determined that it wishes to proceed with a review. As a matter of construction of clause 12.3(b)(ii) I accept the applicants’ submission. For present purposes however, either construction demonstrates the fluidity of a time requirement “as soon as practicable in all the circumstances”. This is because as previously observed, a notice under clause 12.3(b)(i) may be given of a Change Event that is yet to occur. A Notifying Party may, for example, wait until such time as the Change Event actually occurs before proceeding with a review. I accept the respondents’ submission that what constitutes “as soon as practicable in all the circumstances” is likely to be influenced by a large and complex array of matters.¹⁷⁹

¹⁷⁷ Clause 12.2 of the Coal Supply Agreement provides for this type of review.

¹⁷⁸ See time requirements in clauses 12.3(b)(iii), 12.4(b), 12.5, 12.6 and 12.7(b).

¹⁷⁹ Respondents’ Written Submissions, [64].

The 12 November notice

[157] Questions 16 to 23 and 25 to 36 concern the proper construction of the Change Event Notice submitted on 12 November 2013. The approach to the construction of such a document is set out in *Mannai Investment Co Limited v Eagle Star Life Assurance Co Limited*.¹⁸⁰ Relevantly, the House of Lords (per Lord Steyn) at 767 to 769 held that:

“The construction of the notices must be approached objectively; the issue is how a reasonable recipient would have understood the notices. The notices must be construed taking into account the relevant objective contextual scene. The inquiry is objective: the question is what reasonable persons, circumstanced as the actual parties were, would have had in mind ... Even if notices under contractual rights contain errors they may be valid if they are “sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate”: *The Delta case* [1990] 2 All ER 176 at 183, [1990] 1 WLR 445 at 454 per Slade LJ and adopted by Stocker and Bingham LJJ and *Carradine Properties Ltd v Aslam* [1976] 1 All ER 573 at 576, [1976] 1 WLR 442 at 444 ... The reasonable recipient should be left in no doubt what right is being exercised .”¹⁸¹

[158] Where a notice is intended to be sent between business people, it should be construed in that light, not treated as if a statute or a pleading intended to be dissected by lawyers. As a result, a lawyer’s conception of technical precision and absolute clarity is a mistake.¹⁸²

Does the 12 November notice describe a Change Event? (Questions 16 to 30)

Question 16

“16. Does the 12 November Notice, on the face of the notice, assert that there was:

- (a) an occurrence comprised of a single change in circumstances”**
- (b) one or more changes in circumstances which both (i) do not constitute more than one Change Event and (ii) are of the same nature?**
- (c) one or more changes in circumstances which do not constitute more than one Change Event?**
- (d) one or more changes in circumstances which are of the same nature?¹⁸³”**

¹⁸⁰ [1997] AC 749.

¹⁸¹ [1997] AC 749, 767-769 (Steyn LJ) cited in CPM’s Written Submissions, [182].

¹⁸² Respondents’ Written Submissions, [150] citing *Mannai Investment Co Limited v Eagle Star Life Assurance Co Limited* [1997] AC 749, 782 (Clyde LJ) and *Finishing Services Pty Ltd v Lactos Fresh* (2007) ANZ Conv R 93, 100 (Kiefel, Sundberg and Edmonds JJ).

¹⁸³ Further Amended Statement of Claim, [13(b)] and Sixth Further Amended Defence, [13(a)].

Question 16(a)

[159] Clause 4.2 of the 12 November notice states:

“Since the time of entry into the CSA, there have been a number of changes in circumstances (identified below in this Notice) which, in the Seller’s reasonable opinion, have had, and continue to have, a material effect on the Coal Mine Owners’ competitiveness in the coal mining industry.”

[160] Paragraph 4.3 of the 12 November notice further states:

“The effect of these changes in circumstances is a substantial increase in the cost of producing coal from the southern areas of Callide Coalfields (referred to as the **Callide Mine**), in circumstances where a significant proportion of the coal from the Callide Mine is sold to the Buyer under a contract which fixes the coal price paid by the Buyer at a rate far lower than market value. These changes in circumstances together and cumulatively constitute a Change Event, being a Change Event within the meaning of clause 12.3(a).”

[161] The notice therefore identifies more than a single change in circumstances. Question 16(a) should be answered “no”.

Questions 16(b), (c) and (d)

[162] The answer to question 16(b) is also “no”. The changes in circumstances notified constitute more than one Change Event and are not of the same nature. The 12 November notice identifies 12 different alleged changes in circumstances which are listed at paragraph 4.4 and individually addressed in sections 5 to 16.

[163] The 12 November notice also identifies at least seven separate Change Events. The changes in circumstances notified in section 5, being the changes in the market and economic conditions, are stated to have had a significant direct and indirect impact on the cost of production for coal and therefore a significant impact on the Coal Mine Owners’ competitiveness in the coal industry.¹⁸⁴ The 12 November notice also identifies the 2010/2011 Queensland floods, the 2013 wet weather, the resultant force majeure notices under the Coal Supply Agreement and steps taken to mitigate the effects of the force majeure events as all resulting in the Coal Mine Owners incurring significant increased cost and having to change its planned coal production and mine plan. These matters are said to constitute a change in circumstances giving rise to a Change Event.¹⁸⁵ To similar effect are the changes in circumstances identified in paragraphs 4.4(e), (g), (h), (i) and (j) which are all said to constitute Change Events.¹⁸⁶

[164] The respondents submit that the changes in circumstances identified in the 12 November notice are all of the same nature because the effect of these changes in circumstances is a substantial increase in the cost of producing coal from the Callide Mine.¹⁸⁷ The

¹⁸⁴ See para 5.18 of the 12 November notice.

¹⁸⁵ See paras 4.4(c) and 7.2.6 of the 12 November notice.

¹⁸⁶ See paras 9.1, 11.12, 12.4, 13.7 and 14.7 of the 12 November notice.

¹⁸⁷ Respondents’ Written Submissions, [219].

respondents further submit that the circumstances described in the notice could equally be characterised as compromising a single change in circumstances (for instance, as an increase in the mine’s cost of production).¹⁸⁸ The respondents accept that some of the changes in circumstances contained in the 12 November notice can be said to be of a different nature. However, the changes in circumstances described in the 12 November notice may equally be characterised as being of the same nature because they are all changes in financial circumstances or changes of a kind which impact the respondents financially.¹⁸⁹ These submissions should be rejected. In my view, the proper construction of the 12 November notice is that it notifies numerous changes in circumstances, some of which constitute a Change Event in their own right and are of a different nature. There is a difference between the nature of a change of circumstances and the effect of that change. As submitted by the applicants, the nature of something refers to its inherent or essential quality or constitution, as distinct from its effects or consequences. The term “nature” is defined in the Macquarie Concise Dictionary (5th ed) to mean:

“The particular combination of qualities belonging to a ... thing by ... constitution; native or inherent character ...”¹⁹⁰

As identified in [20] above the changes in circumstances in the notice include changes of a different “inherent character” ranging from rain events to changes to an environmental authority. It follows that questions 16(c) and (d) should also be answered “no”.

Question 17

“17 Does the answer to 16 mean that, on the face of the notice, the matters set out in the 12 November notice do not fall within the definition of ‘Change Event’?”¹⁹¹”

[165] In light of my answer to question 7(a)(ii)(A) the answer to question 17 is as follows:

“The matters set out in the 12 November notice do not fall within the definition of ‘Change Event’ because they are changes in circumstances which comprise more than one Change Event.”

[166] As submitted by the applicants, it is apparent from sections 5, 7, 9, 11, 12, 13 and 14 of the 12 November notice, that seven different Change Events are described. These seven separate Change Events, along with the other five changes in circumstances, are said by the respondents to give rise to one Change Event.¹⁹² This is not permissible because, as I observed in [100] answering question 7(a)(ii)(A) above, whilst it may be accepted that a notice may notify more than one Change Event, the nature, extent, impacts and options should be able to be ascertained in relation to each of those Change Events.

[167] By the 12 November notice, the Change Event for which the respondents seek to initiate a review is the combination of 12 changes in circumstances, seven of which are said to constitute separate Change Events.

¹⁸⁸ Respondents’ Written Submissions, [334(a)].

¹⁸⁹ Respondents’ Written Submissions, [334(b)].

¹⁹⁰ CS Energy’s Written Submissions, [153(a)].

¹⁹¹ Further Amended Statement of Claim, [13(b)] and Sixth Further Amended Defence, [13(a)].

¹⁹² CPM’s Written Submissions, [190].

Questions 18 and 19

“18. Are the matters in section 6 of the 12 November notice, on the face of the notice:

- (a) based on an alleged initial failure to appreciate features of the geology, not based on any alleged change in actual geology, not entailing an occurrence or a matter of a supervening or external nature, entailing a mere failure to meet expectations; and/or**
- (b) based on increased costs arising from adverse physical conditions encountered at the Callide Mine?**

19. Does the answer to 18 mean that, on the face of the notice, the matters set out in the 12 November notice do not fall within the definition of ‘Change Event’?”

[168] Section 6 of the 12 November notice deals with coal deposit and mine planning. The Coal Mine Owners have encountered geological features of the coal seams which were not known at the time of entering into the Coal Supply Agreement. I have already determined in answering question 7(b) that such a change in knowledge in the context of the Coal Supply Agreement may constitute a change of circumstances.¹⁹³

[169] The parties accept that the changes described in section 6 are not based on physical changes in the actual geology. I accept the respondents’ submission that it is wrong to describe the change in section 6 as either an “initial failure” to appreciate features of the geology or as a “mere failure” to meet expectations. What has changed is the information and data which the respondents now have. This change is therefore a change in an external fact.¹⁹⁴

[170] Question 18(a) should therefore be answered:

“No, except they are not based on any alleged change in actual geology.”

[171] The answer to question 18(b) is “yes”. It follows that the answer to question 19 is “no”.

[172] The equivalent question posed by CPM (question 20) is in slightly different terms to CS Energy’s question 18:

“20. Does section 6 of the 12 November notice, on the face of the notice:

- (a) describe the change in circumstances as Callide Sales becoming aware of geological features of the Coal deposit at the Callide Mine which were not known by Callide Sales at the time of execution of the Coal Supply Agreement, which increased the costs of mining and reduced profitability under the Coal Supply Agreement (or is this an inaccurate summary)?**

¹⁹³ [101]-[121] above.

¹⁹⁴ Respondents’ Written Submissions, [343]-[345].

- (b) **describe a change to the conditions or state of affairs existing at the time of entry into the Coal Supply Agreement for the purposes of clause 12.3(a) of the Coal Supply Agreement?**
- (c) **describe merely a change from the conditions or state of affairs which the Coal Mine Owners believed, at the time of entry into the Coal Supply Agreement, that they would encounter in the future?**
- (d) **describe matters based on increased costs arising from adverse physical conditions encountered at the Callide Mine?"**

[173] Question 20(d) is answered the same as CS Energy's question 18(b), namely "yes". For the reasons given in paragraphs [101] to [121] above, question 20(b) should be answered "yes". Similarly, question 20(c) should be answered "no". As to question 20(a), this question concerns whether the applicants' contentions as to the effect of section 6 of the 12 November notice are correct. The question is whether the summary of the change in circumstances described by section 6 of the 12 November notice, as identified in question 20(a), is an accurate or inaccurate summary. To the extent that question 20(a) suggests that the only aspect of the change in circumstances outlined in section 6 of the 12 November notice was the respondents "becoming aware of geological feature of the coal deposit", it is not an accurate summary. Whilst paragraph 6.1 of the 12 November notice refers to "the Seller has become aware of several features of the coal deposit", section 6 not only refers to an increase in the cost of mining but a need to modify the sequence of mining and moving into mining another field much earlier than planned.¹⁹⁵ This also led to a change in data including the forecast increase in Callide Mine's strip ratio.¹⁹⁶ The impacts of the change are not just to cost but also impacts on the energy content of the coal mined.¹⁹⁷ The summary therefore in CPM's question 20(a) is inaccurate in that it does not capture these aspects of section 6 of the 12 November notice. Question 20(a) should therefore be answered "no".

Questions 20 and 21

“20 Are matters in paragraphs 9 to 14 of the 12 November notice, on the face of the notice, matters which do not entail an occurrence but entail a mere consequence or effect without identification of an underlying occurrence?”

21 Does the answer to 20 mean that, on the face of the notice, the matters set out in the 12 November notice do not fall within the definition of ‘Change Event’?”

[174] Sections 9 to 14 of the 12 November notice identify cost increases encountered by the respondents. These include significant increases to the overall cost of coal at the mine (section 9), increases in labour and contractor costs (section 10), increases in the cost of diesel (section 11), increases in the cost of explosives (section 12), increases in maintenance costs (section 13) and increases in the cost of electricity (section 14). I have

¹⁹⁵ See para. 6.5 of the 12 November notice.

¹⁹⁶ See para. 6.7 of the 12 November notice.

¹⁹⁷ See para. 6.8 of the 12 November notice.

already determined in [127] to [132] above, that mere increases in costs are not in and of themselves a Change Event.

- [175] The applicants submit that the 12 November notice does not identify an underlying occurrence of the kind contemplated by the definition of Change Event in the Coal Supply Agreement. None of the cost increases identified in sections 9 to 14 rely upon any underlying cause of the cost increase as the relevant change in circumstances. The applicants therefore submit that the sections do not adequately identify and rely upon, as change in circumstances, the event of occurrence that caused the cost increases.¹⁹⁸ Construing sections 9 to 14 of the 12 November notice objectively, it may be accepted that what is asserted to be the change or changes in circumstances are the increases in costs themselves. Section 9, for example, deals with overall cost of production. Paragraph 9.2 identifies the overall escalation in production costs as follows:

“The costs of production of coal at the Callide Mine have increased significantly since 1998. The rate of increase is well above the CPI Index. This increase in the costs of production has not been accompanied by a corresponding increase in the price received for the coal because of the 90% of CPI Index escalator incorporated in the Contract Price under the CSA.”

A review of any price escalation and the adoption of an appropriate index are matters that are dealt with in clause 10 of the Coal Supply Agreement.

- [176] Paragraph 9.11 of the 12 November notice then compares the forecast costs of the Callide Mine for 1998 to 2012 with the actual cost. What is thereafter asserted is that the respondents have not been able to pass on the cost increase under the Coal Supply Agreement.¹⁹⁹
- [177] The increase in the cost of labour identified in section 10 is for the period 1998 to 2013. Similarly, paragraph 11.6 of the 12 November notice refers to the price of diesel fuel increasing dramatically between 1998 and 2012.
- [178] Cost increases arising from the mining boom are referred to in section 5 of the 12 November notice. Paragraph 5.10 states that the mining boom constitutes a set of circumstances which has had a significant impact on the costs of mining of coal at the Callide Mine and for the industry as a whole. Paragraph 5.16 states that the specific impact of the mining boom can be observed by reference to the increased costs of production identified in the Change Event notice. The difficulty with the mining boom being the underlying cause of cost increases is that these increases are identified from 1998 onwards. The mining boom, on the information supplied in the Change Event notice, appears to have commenced in or about 2003.²⁰⁰
- [179] The respondents’ primary submission, with which I have already dealt, is that an increase in costs which has the relevant material effect on competitiveness constitutes a Change

¹⁹⁸ CPM’s Written Submissions, [221].

¹⁹⁹ Paras 9.15 to 9.17 of the 12 November notice.

²⁰⁰ Annexure M to 12 November notice, 60-61, report from the program on Energy and Sustainable Development working paper 101, March 11, Australia’s Black Coal Industry Past Achievements and Future Challenges.

Event. As submitted by the applicants, however, such a construction results in an unacceptable shifting of risk from the respondents to the applicants.²⁰¹ The answers to questions 20 and 21 should therefore be “yes”.

[180] There is a separate question raised by CPM (question 24) which states:

“Are sections 9 to 14 of the 12 November notice accurately stated in paragraph [25] to [30] of the statement of claim?”

[181] I have compared the relevant paragraphs of the statement of claim with the detail in sections 9 to 14 of the 12 November notice. In my view, CPM’s question 24 should be answered “yes”.

[182] CPM’s equivalent questions to CS Energy’s questions 20 and 21 are also in slightly different terms and require separate consideration. CPM’s questions 25 and 26 are as follows:

“25. Do sections 9 to 14 of the 12 November notice, on the face of the notice, describe:

- (a) a change or changes in circumstances comprising a mere increase in costs?**
- (b) the occurrence of a single change in circumstances or multiple changes in circumstances where each of the changes in circumstances is of the same nature?**
- (c) merely the effect on competitiveness contemplated by clause 12.3(a)?**

26. Do the answers to questions 11 and 24-25 above mean that:

- (a) the matters described on the face of sections 9 to 14 of the 12 November notice are not a change in circumstances capable of comprising a Change Event within the meaning of clause 12.3(a) of the Coal Supply Agreement?**
- (b) the 12 November notice does not, on its face, identify a Change Event under clause 12.3(a)?”**

[183] Question 25(a) should be answered “yes”. As to question 25(b), each of the changes in circumstances relied on by the respondents in sections 9 to 14 of the 12 November notice may all be broadly described as increases in operational costs. This does not, however, make the changes in circumstances of the same nature. As submitted by the relevant applicants, it is not enough to be of the same nature that all of the changes have a financial impact on the costs of production of coal. That would be true of every conceivable change in circumstances that has a material effect on competitiveness.²⁰² The applicants’ submission, however, proceeds on the premise that in order to constitute a Change Event for the purposes of clause 12.3(a) the changes in circumstances must be of the same nature. I have previously rejected that limitation. I accept however that the changes in

²⁰¹ T3-32, lines 5-12.

²⁰² CPM’s Written Submissions, [224].

circumstances referred to in sections 9 to 14 of the 12 November notice are multiple changes in circumstances that are not of the same nature. I would therefore answer CPM's question 25(b) "no".

- [184] The answer to question 25(c) is "yes". It follows that the answers to questions 26(a) and (b) are "yes".

Questions 22 and 23

"22. Are matters in paragraph 15 of the 12 November notice, on the face of the notice, matters which do not entail an occurrence or a matter of a supervening or external nature but entail a mere failure to meet expectations?"

23. Does the answer to 22 mean that, on the face of the notice, the matters set out in the 12 November notice do not fall within the definition of "Change Event"?"

- [185] Section 15 of the Change Event Notice is entitled "Benefit under the CSA". Paragraphs 15.1 and 15.2 state as follows:

"15.1 Pursuant to clause 12.1 of the CSA, the parties agreed that the Coal Mine Owners and the Station Owners expected to benefit under the CSA and that a change in circumstances requires the parties to review the CSA to ensure that it remained consistent with that expectation.

15.2 "*Benefit*" under the CSA refers to profitability. At the time of entry into the CSA, the Coal Mine Owners and Station Owners had an expectation of profiting under the CSA. The Seller, and through it the Coal Mine Owners, no longer benefit under the CSA. When the contract was entered into, the Seller's Cash Margin on the expansion to enter the CSA was expected to exceed the agreed 13% investment hurdle rate. The hurdle rate was an internal benchmark to allow the joint venture parties to filter investment proposals. When entering the CSA, the cash margin forecast to be generated between 1998 and 2013 was a surplus of \$264m. The sustained cash surpluses forecast for Callide are demonstrated in contemporaneous financial papers from the time of entry into the CSA, a copy of which appears at annexure BBB to this Notice. The actual cash margin received between 1998 and 2012 was a deficit of \$67m. It is estimated that the cash margin for 2013 would be a deficit of \$109m. This is a change in circumstances within the meaning of clause 12.3(a) requiring review of the CSA in accordance with clause 12.1(b)."

- [186] Section 15 concludes with paragraph 15.5:

"15.5 Whilst it was a principle of the CSA that the parties would benefit under its terms, the Seller/Coal Mine Owners are no longer benefitting in that manner. To the contrary, the Seller/Coal Mine Owners are now incurring very significant losses."

I have already determined that the word “benefitting” at least includes a financial benefit.²⁰³ It may be accepted that financially benefitting under the Coal Supply Agreement would also include profitability. The issue, however, is whether what is described in section 15 constitutes a change of circumstances as contemplated by clause 12.3(a). The equivalent questions posed by CPM’s questions 13 and 27 perhaps better capture this issue than CS Energy’s question 22. CPM’s question 13 reads:

“Can the mere fact of the Coal Mine Owners ceasing to benefit under the Coal Supply Agreement of itself be a change in circumstances capable of comprising a Change Event within the meaning of clause 12.3 of the Coal Supply Agreement?”²⁰⁴.

Question 27 reads:

“Does section 15 of the 12 November notice, on the face of the notice, describe a change or changes in circumstances comprising the mere fact of the Coal Mine Owners having ceased to benefit under the Coal Supply Agreement?”

[187] The principle identified in clause 12.1(a)(i) is that the Coal Mine Owners and the Station Owners have an expectation of benefitting under the Coal Supply Agreement. As I have already observed, this is not a unlimited expectation because clause 12.1(a)(i) is made subject to the principle in clause 12.1(a)(ii) that each party supports the process of review under clause 12 to ensure the Coal Mine Owners and the Station Owners remain competitive in relation to their respective industries. That process of review in clause 12.3(a) refers to a “Change Event” as being a change in circumstances which has, or will have, a material effect on the competitiveness of the relevant party in their own industry. The material effect is therefore a reference to competitiveness and not to an expectation of benefitting under the Coal Supply Agreement. That is, a Change Event, by definition, does not occur because a change in circumstances has or will have a material effect on a party’s expectation of benefitting under the Coal Supply Agreement. To construe it otherwise is to confuse what constitutes a Change Event with the process of review which seeks to ensure that the terms of the Coal Supply Agreement remain consistent with the principles, including the principle of an expectation of benefitting.

[188] The respondents submit, however, that the text of clause 12.3 does not support the conclusion that the definition of Change Event excludes a change in circumstances which comprises the respondents no longer benefitting under the Coal Supply Agreement. There is nothing, for example, in the text of the clause itself which suggests that the meaning of “change in circumstances” should be read down, other than that the change have a “material effect” on the competitiveness of either party.²⁰⁵ The respondents further submit that the fact that the parties have expressly agreed that the extent to which they expect to benefit from entering the Coal Supply Agreement is subject to the review process set out in clause 12 provides support for this conclusion. According to the respondents, the review process set out in clause 12 would be rendered nugatory if the fact of a party failing to benefit under the Coal Supply Agreement (and *a fortiori* experiencing a “material effect” on competitiveness) was not sufficient to engage a

²⁰³ See above [46].

²⁰⁴ Further Amended Statement of Claim, [34] and Sixth Further Amended Defence, [30].

²⁰⁵ Respondents’ Written Submissions, [177].

review of the Coal Supply Agreement.²⁰⁶ Mr Doyle QC submitted that the change in circumstances identified in section 15 constituted more than a mere change in an expectation of benefitting under the Coal Supply Agreement. The respondents are not relying on any forecast of expected benefits under the Coal Supply Agreement, rather the proved fact that, in spite of the original expectation, the respondents are no longer benefitting under the Coal Supply Agreement.²⁰⁷ These submissions should be rejected. The respondents accept that a Change Event permits a comparison of a set of circumstances at two different times in order to discern a change in those circumstances.²⁰⁸ What is relied on by the respondents, however, is a comparison not between a set of circumstances at two different times, but rather between an original expectation and a matter of fact. As submitted by Mr Pomeranke QC for CS Energy, the respondents seek to compare a subjective state of mind with an objective fact²⁰⁹ to ascertain a change rather than a comparison of a set of circumstances at two different times.

[189] I therefore answer CS Energy’s question 22 and CPM’s question 27 “yes”.

[190] It also follows that CS Energy’s question 23 and CPM’s question 28(a) and (b) should be answered “yes”.

Question 25

“25 Having regard to the answer to question 11 above do the matters referred to in the 12 November notice at paragraphs 9 to 14 engage clause 12 of the Coal Supply Agreement?”²¹⁰

[191] In light of my answers to questions 11 and 20 above which deal with increases in cost outlined in sections 9 to 14 of the 12 November notice, the answer to question 25 is “no”.

Question 26

“26 Do the matters set out in the 12 November notice fall, in substance, within the definition of a ‘Change Event’?”²¹¹

[192] This question arises out of the respondents’ pleaded case that if the change or changes in circumstances identified in a notice of Change Event given under clause 12.3(b)(ii) satisfy, in substance, the requirements of the definition of “Change Event”, then that notice will be a “Change Event Notice” within the terms of, and given in accordance with, clause 12.3(b)(ii) notwithstanding any deficiency in the form of the notice.²¹² As I have observed above,²¹³ the construction of a notice such as the 12 November notice must be approached objectively. As correctly submitted by the applicants, the respondents’ plea

²⁰⁶ Respondents’ Written Submissions, [178]-[179].

²⁰⁷ T2-61, lines 6-17 and lines 40-47.

²⁰⁸ See [84] above and T2-48, lines 5-10.

²⁰⁹ T3-36, lines 40-45.

²¹⁰ Further Amended Statement of Claim, [13(c)(ii)] and Sixth Further Amended Defence [13(b)(i)(B), 13(b)(i)(C)].

²¹¹ Sixth Further Amended Defence, [9(c)(ii)(A), 13(a)(iia)].

²¹² Sixth Further Amended Defence, [13(a)(iia)] (SC No 12138 of 2013) and Ninth Further Amended Defence [10(b)(i) and 14(c)] (SC No 12122 of 2013).

²¹³ See [156].

that the matters set out in the 12 November notice fall, “in substance”, within the definition of a “Change Event” proceeds on the assumption that this is a relevant enquiry. It is not.²¹⁴ Even if I did not accept this submission, the “in substance” criterion is not apt to address the defects in the 12 November notice.²¹⁵ This is because the 12 November notice conveys to a reasonable recipient seven separate Change Events, along with five other changes in circumstances, which are said to constitute one Change Event. Further, the increases in cost identified in sections 9 to 14 and the change in the respondents’ expectancy to benefit under the Coal Supply Agreement are not changes in circumstances for the purposes of clause 12.3(a). The answer to question 26 is therefore “no”.

Question 27

“27 Are the matters referred to in question 16 above discernible by a reasonable reader of the 12 November notice in the position of the applicant?”

[193] In light of my answers to questions 16(a), (b), (c) and (d) the answer to question 27 is also “no”.

Question 28

“28. If some of the matters set out in the 12 November notice do not, on the face of the notice, fall within the definition of Change Event, is the 12 November notice nevertheless valid?”

[194] In answering questions 20 and 22 I have determined that those increases in cost identified in sections 9 to 14 of the 12 November notice and the matters identified in section 15 are not changes in circumstances as contemplated by clause 12.3(a). Question 28 raises for consideration whether in those circumstances the 12 November notice is nevertheless valid.

[195] Paragraph 4.6 of the 12 November notice states:

“If any part of this Change Event Notice is determined to be ineffective or invalid for any reason whatsoever, such ineffectiveness or invalidity will not affect the validity or operation of the remainder of this Change Event Notice and such ineffective or invalid part will be deemed to be deleted from this Change Event Notice.”

The reference to the “validity” of the notice should be understood as an inquiry as to whether the notice was a notice within the terms of, or given in accordance with, clause 12.3(b)(ii).

[196] The respondents submit that paragraph 4.6 reflects a conventional approach to preserving the efficacy of a notice if one part of it offends some requirement.²¹⁶ The respondents refer to the decision of the New South Wales Court of Appeal in *State of New South Wales*

²¹⁴ CPM’s Written Submissions, [235].

²¹⁵ CS Energy’s Written Submissions, [190].

²¹⁶ Respondents’ Written Submissions, [228].

*v Austeel Pty Ltd.*²¹⁷ Mason P identified the relevant dispute resolution clause as follows:²¹⁸

- “3. The Agreement contains a dispute resolution clause (cl 14) that contemplates a tiered approach to dispute resolution: first there is to be a meeting of representatives; second a meeting of very senior officers; third expert determination or mediation; and finally if all else fails, there is to be arbitration.
4. Very tight frames are stipulated.
5. Clause 14 purports to stipulate the procedure that must be followed to resolve “*any difference or dispute*”. The first stage is giving “*written notice of the dispute to the other party*”. Representatives nominated by each party must meet within five business days and attempt in good faith to resolve the dispute. Various options then cascade down, within exiguous time spans, culminating (if all else fails) in arbitration conducted in accordance with the existing laws of this State including the **Commercial Arbitration Act 1984**.”

[197] On 7 November 2001 the respondent in that case issued what purported to be a notice pursuant to clause 14.1. The appellant disputed the validity of this notice. At first instance Palmer J held that the notice was valid. This decision was upheld on appeal. Mason P made reference to the general nature of the notice in identifying the relevant dispute:²¹⁹

- “17. I get little assistance from these dicta because the present context is different. Here the notice sets the scene for dispute resolution, but it does so in a fairly preliminary manner. Discussion and mediation will follow if necessary. Inevitably some issues will drop away and others will be reformulated. Ultimately if necessary there will be an arbitration in which attention will have to be given to proper points of claim. If those points of claim go beyond the scope of the notice then certain rights may arise.
18. All this may not come to pass of course if the dispute is resolved earlier. But in determining what this contract requires in order to satisfy the obligation of the initiating party to give “*written notice of the dispute that has already arisen out of or in connection with the agreement*” we should focus on the context. As I have indicated, it is a context of laying the ground work for various tiers of informal and ultimately formal dispute resolution.
19. A notice must, like a pleading, attempt to capture or describe the essence of the existing dispute or difference, at least from the perspective of the initiating party, but like any business document it is to be construed fairly in its context. It is not submitted that it had to be drawn with all the formalities of a pleading.”

²¹⁷ [2003] NSWCA 392.

²¹⁸ [2003] NSWCA 392, [3]-[5] (Mason P).

²¹⁹ [2003] NSWCA 392, [17]-[19] (Mason P).

[198] The respondents rely on the above passages to refute the applicants' submission that the Change Event Notice sets the parameters of the dispute which might ultimately be justiciable. The respondents submit that the dispute is the failure to agree an adjustment.²²⁰ The difficulty with this submission is that unlike the clause that was considered in *Austeel*, nothing subsequent to the Change Event Notice alters the identification of the relevant Change Event of which it gives notice.²²¹ It is the notification of a Change Event which triggers the review under clauses 12.3 to 12.8 and ultimately the dispute resolution procedure under clause 13. Fraser JA in *Callide Coalfields (Sales) P/L* stated that the notification clauses 12.3(b)(i) and 12.3(b)(ii) together with clause 12.4 "are aptly designed to assist in the definition of any dispute, including as to any adjustment of the contractual terms sought by the parties". His Honour further observed:

"Under these contractual provisions, the dispute is not at large."²²²

[199] My answers to questions 20 and 22 mean that the 12 November notice identifies seven out of 12 changes in circumstances which are not contemplated by clause 12.3(a) as constituting "a change in circumstances". Further, of these seven changes in circumstances, the five referred to in sections 9, 11, 12, 13 and 14 of the notice are notified as constituting a Change Event in their own right.²²³ The 12 November notice therefore notifies five Change Events which are not capable of being a Change Event and a further two changes in circumstances which are not changes in circumstances for the purposes of clause 12.3(a).²²⁴

[200] No attempt at severance will cure the notice where each of the twelve changes in circumstances "together and cumulatively" are said to constitute the one Change Event.²²⁵ Additionally, as discussed below, for each of the five individual Change Events the 12 November notice does not provide data relevant to calculating the cost and revenue impacts as they relate to all of the options and alternatives identified by the Notifying Party available to accommodate or mitigate the relevant Change Event.²²⁶ The data provided in section 17 of the notice simply refers to "the overall cost and revenue impact of the changes in circumstances".²²⁷

[201] Nor do the respondents as Notifying Party set out in the notice the options and alternatives for each of the notified Change Events. All that section 18 identifies is five possible options or alternatives to take account of the changed circumstances described in the notice;²²⁸ that is all twelve changes in circumstances, including the seven which I have determined are not changes in circumstances for the purposes of clause 12.3(a).

[202] The answer to question 28 is therefore "no".

²²⁰ T3-12, lines 7-20.

²²¹ T3-39, lines 39-45.

²²² [2008] QCA 408, [45] and [57] (Fraser JA).

²²³ See paras. 9.1, 11.2, 12.4, 13.7 and 14.7 of the 12 November notice.

²²⁴ Sections 10 and 15 of the 12 November notice.

²²⁵ Para. 4.3 of the 12 November notice.

²²⁶ Clause 12.3(b)(ii)(A).

²²⁷ Para. 17.1 of the 12 November Notice. See also [17(c)] above.

²²⁸ Para. 18.1 of the 12 November Notice.

Questions 29 and 30

“29. As a result of the answers to questions 16 to 23 and 26 to 28 above, is the 12 November notice a notice ‘of a Change Event’?”

30. As a result of the answers to questions 16 to 29 above, is the 12 December notice invalid?”

[203] In light of my answer to question 28 above, the answer to question 29 is “no” and the answer to question 30 is “yes”.

Does the 12 November notice describe the impacts, options and alternatives for a “Change Event” and if it does not is it invalid? (Questions 31 to 36)

Question 31

“31. Does the 12 November notice identify or include detailed information regarding the quantum of the cost and revenue impacts of the alleged Change Event?²²⁹”

[204] Section 17 of the 12 November notice deals with the quantum of the cost and revenue impacts of the changes in circumstances described in the notice. The relevant details of section 17 are outlined in [17(c)] of these Reasons. The overall cost and revenue impacts of the 12 changes in circumstances are set out in Annexures B and E to the notice. These annexures do not address the specific impacts of the identified changes. The deficit of \$3.253 billion is stated in paragraph 17.2 of the notice to be “largely the result of the increase in the overall costs of production caused by the cumulative effect of the changes in circumstances described in this Notice”.

[205] By reference to the word “largely” the applicants submit that the 12 November notice does not address the quantum of the cost and revenue impacts of the Change Event it purports to describe. Instead, it presents a general analysis of financial performance without excluding factors outside the scope of the described Change Event.²³⁰ A more fundamental problem with the notice, however, is that it makes no attempt to identify the quantum of the cost and revenue impacts of each change of circumstance and in particular those changes in circumstances which are themselves notified as Change Events. An examination of Annexure E does not reveal the cost and revenue impacts of the change of circumstances identified in the 12 November notice. Annexure E is headed “Callide Mine Historical Performance”. The respondents describe Annexure E as “a financial model detailing the mine’s physical and financial performance for the period between 1998 and 2013”.²³¹ The other relevant annexures, namely Annexures B, C, C1, D and D1 are each a financial model detailing the Callide Mine’s forecast physical and financial performance for the period from 2014 to 2031 based on differing assumptions. Annexure B, for example, assumes no adjustments are made to the terms of the Coal Supply Agreement. Annexure C is based on the assumption that adjustments are made to the Coal Supply Agreement as proposed in “Alternative 1”. Annexure C1 assumes the

²²⁹ Further Amended Statement of Claim, [13(d)(ii)] and Sixth Further Amended Defence, [13(c)].

²³⁰ CPM’s Written Submissions, [250] and CS Energy’s Written Submissions, [212]-[213].

²³¹ Respondents’ Written Submissions, [362(a)] and paragraph 17.1 of the 12 November notice.

adjustments to the Coal Supply Agreement are made in accordance with “Alternative 1”. Annexure D assumes “Alternative 2” and Annexure D1 assumes “Alternative 2A”.

[206] Annexure E contains approximately 150 rows of information in relation to the financial and physical performance of the Callide Mine for each year from 1998 to 2013 under the following categories:

- Evaluation Summary
- Original Plan
- Production and Sales
- Profit and Loss Statement
- Cost Allocation
- Cost Category

[207] The respondents submit that the formulae underlying each “cell” in the electronic versions of the relevant annexures allow the applicants to understand not only the changes to the mine’s input cost and measures of physical production over time, but also to track how these factors have contributed (and are forecast to continue contributing) to the mine’s financial performance.²³² The respondents provide the following example in respect of Annexure E:

“Looking at Annexure E, one can use the formulae underlying the following rows to track the contribution of “*Labour*” (at row 79) to “*Mine Cash Costs*” (at row 86), the contribution of “*Mine Cash Costs*” to “*Mine Site Cash Costs per tonne*” (at row 12), the contribution of “*Mine Site Cash Costs per tonne*” to “*Cash Operating Cost per tonne*” (at row 15) and the contribution of “*Cash Operating Cost per tonne*” to “*Cash Operating Margin (deficit) per tonne*” (at row 16).”²³³

[208] Whilst Annexure E does contain line items showing increases in costs identified as changes in circumstances in the 12 November notice²³⁴ the annexure does not reveal the quantum of the cost and revenue impacts of the changes in circumstances concerning changes to the mine planning conditions (section 6), the rainfall events (section 7), changes in government regulation (section 8) or the changes in the coal prices paid by other power stations (section 16).

²³² Respondents’ Written Submissions, [364].

²³³ Respondents’ Written Submissions, [365(a)].

²³⁴ For example, increases in labour and contractor cost (section 10), increases in diesel (section 11), increases in the cost of explosives (section 12), increases in maintenance cost (section 13) and increases in electricity (section 14).

- [209] Annexure E also contains references to other costs which are not changes in circumstances. These include, for example, “other cost” (row 85), “equipment hire and lease” (row 118), “insurance” (row 119), “licences and taxes” (row 141), “travel and entertainment” (row 144), “bank fees” (row 145) and “cost recovery” (row 146). There are also entries for depreciation and taxation (rows 150 and 25). Section 17 of the 12 November notice therefore, in dealing with the quantum of the cost and revenue impacts of the Change Event, presents the overall change in the cost and revenue position of the mine since the Coal Supply Agreement was entered into without disentangling the changes due to the Change Event from other potential changes.
- [210] The respondents however submit that all that is required by clause 12.3(b)(ii)(A) is the provision of “all data which the Notifying Party holds”. There is no allegation that the respondents have held back data. Clause 12.3 does not require the Notifying Party to bring information or data into existence for the purposes of giving the notice or to provide information it does not hold.²³⁵ As I observed in [99] above, a Change Event permits an identification of the quantum of the cost and revenue impacts of the Change Event. If the Notifying Party does not hold data which contains detailed information regarding the quantum of the cost and revenue impacts of the Change Event which it can include in the notice, then in all probability the Notifying Party will be unable to notify a Change Event. Whilst clause 12.3(b)(ii)(A) does not expressly limit the information that may be provided in a Change Event Notice it at least contemplates that the Notifying Party will include data identifying the quantum of the cost and revenue impacts of each Change Event. Section 17 of the 12 November notice and in particular Annexure E does not address the quantum of the cost and revenue impacts of the Change Event it purports to describe nor of each Change Event notified. Question 31 should therefore be answered “no”.
- [211] It is convenient here to deal with an oral submission made by the respondents. The respondents submit that the applicants, by certain amendments to their pleadings, have abandoned any allegation that the cost and revenue impacts of each Change Event must be notified.²³⁶
- [212] Paragraph 9(d)(ii) of CS Energy’s further amended statement of claim originally alleged that the “change in circumstances” comprising a “Change Event” within the meaning of the Coal Supply Agreement must be such as to permit identification of when it occurred and analysis of its distinct effect. Paragraph 13(b)(iv) also originally alleged that the 12 November notice was not a notice within the terms of, or given in accordance with, clause 12.3(b)(ii) of the Coal Supply Agreement because the notice does not permit analysis of the distinct effect of the alleged Change Event or of any of the individual changes in circumstances to which it refers. These paragraphs have been subsequently amended to omit these allegations.
- [213] The applicants however continue to allege by paragraph 9(c)(iii) of the further amended statement of claim that the notice must include detailed information regarding the nature, extent and quantum of the cost and revenue impacts of the Change Event. The reference to “Change Event” when read in the context of paragraph 9(d) of the pleading is a reference to each change in circumstances constituting a Change Event. Paragraph

²³⁵ Respondents’ Written Submissions, [367].

²³⁶ T2-32, lines 35 to 40; T2-34 to T2-35 and T3-7.

13(d)(ii) pleads that the notice does not identify or include detailed information regarding the quantum of the cost and revenue impacts of the alleged Change Event in that Annexures B and E to the 12 November notice do not address the specific impacts of the identified changes. Rather, Annexure B and E present a general analysis of financial performance without excluding factors outside the scope of the Change Event the notice purports to describe.

- [214] Paragraph 13(da)(i) further pleads in the alternative that to the extent that the notice is, in accordance with paragraph 4.6 of the notice, to be read as encompassing some only of the changes in circumstances it describes (the Subset Change Event) the 12 November notice does not set out or include detailed information regarding the quantum of the cost and revenue impacts of the Subset Change Event. The allegation has not therefore been abandoned as submitted by the respondents.

Question 32

“32. Does the answer to question 31 mean that the 12 November notice is invalid?²³⁷”

- [215] In determining whether the 12 November notice is one contemplated by clause 12.3(b)(ii)(A) it is important to appreciate the centrality of the notification of a Change Event in the review process under clauses 12.3 to 12.8. By clause 12.3(b)(v) the parties must use their best endeavours to review and to attempt to agree an adjustment generally in accordance with the principles set out in clause 12.1. By clause 12.3(b)(ii)(A) the Notifying Party must include in the Change Event Notice all data held which is relevant, *inter alia*, to the quantum of the cost and revenue impacts of the Change Event. It is by reference to these cost and revenue impacts that the options and alternatives are identified by the Notifying Party. All data held by the Notifying Party relevant to calculating the cost and revenue impacts as they relate to the options and alternatives identified by the Notifying Party must be included in the notice. These options and alternatives are identified “to accommodate or mitigate” the Change Event.²³⁸ The cost and revenue impacts are important because by clause 12.3(b)(iii) if the Notifying Party becomes aware that an estimate of the financial effect (of the Change Event) is likely to be incorrect then it must amend the estimate and notify “as soon as possible”. Thereafter by clause 12.4(a) if the Receiving Party does not accept any of the options proposed or financial effects estimated in the Change Event Notice then it may propose alternative options. What is reviewed by the senior officers under clause 12.7(a) are the options set out in the Change Event Notice and the detailed information included in the notice which would include the cost and revenue impact of the Change Event. Pursuant to clause 12.7(b)(ii) the senior officers must attempt to agree on *inter alia* the quantum of the financial effect of the Change Event.
- [216] The content and structure of these clauses in my view, demonstrates not only the centrality of notifying a Change Event but also the importance of notifying the cost and revenue impacts of the Change Event. A Change Event Notice is not a mere notification of “*a difference or dispute*” as considered by the New South Wales Court of Appeal in *Austeel*. A Change Event Notice is more focussed. It notifies a change in circumstances which

²³⁷ Further Amended Statement of Claim, [9(c)(iii), 13(d)] and Sixth Further Amended Defence [9(c), 13(d)].

²³⁸ Clause 12.3(b)(ii)(A).

has identifiable cost and revenue impacts which may require an adjustment to the Coal Supply Agreement. If the notice does not permit the identification of the cost and revenue impacts of the Change Event then it is not a Change Event Notice as contemplated by clause 12.3(b)(ii)(A). For the reasons given in my answer to question 31, the 12 November notice does not permit such identification.

[217] The answer to question 32 is therefore “yes”.

Question 33

“33. If the 12 November notice is to be read as encompassing some only of the changes in circumstances it describes, does the 12 November notice set out, or include, detailed information regarding the quantum of the cost and revenue impacts of those changes in circumstances”²³⁹

[218] In light of my answer to question 31 above the answer to question 33 is “no”.

Question 34

“34. If the 12 November notice is to be read as encompassing some only of the changes in circumstances it describes and does not set out or include detailed information regarding the quantum of the cost and revenue impacts of those changes in circumstances, is the 12 November notice invalid?”²⁴⁰

[219] In light of my answers to questions 31, 32 and 33 above the answer to question 34 is “yes”.

Question 35

“35. If the 12 November notice is to be read as encompassing some only of the changes in circumstances it describes, does it state any options and alternatives as being available to accommodate or mitigate those changes in circumstances”²⁴¹

[220] The options and alternatives identified by the respondents are set out in section 18 of the 12 November notice. The five possible options or alternatives identified in paragraph 18.1 are “to take account of the changed circumstances described in this Notice”. None of the options and alternatives are directed to any subset of the changes described in the notice. The answer to question 35 is therefore “no”.

Question 36

“36. If the 12 November notice is to be read as encompassing some only of the changes in circumstances it describes and it does not state any options and alternatives as being available to accommodate or

²³⁹ Further Amended Statement of Claim, [13(da)(i)] and Sixth Further Amended Defence, [13(da)(i)].

²⁴⁰ Further Amended Statement of Claim, [13(da)(i)], Sixth Further Amended Defence, [13(da)(ii)] and Fourth Further Amended Reply and Answer, [10(b)].

²⁴¹ Further Amended Statement of Claim, [13(da)(ii)] and Sixth Further Amended Defence, [13(a)(i)].

mitigate those changes in circumstances, is the 12 November notice invalid?²⁴²

- [221] As I have already observed, the options and alternatives identified by the Notifying Party in the notice are those “available to accommodate or mitigate the Change Event”.²⁴³ A Change Event Notice must include options and alternatives identified by the Notifying Party and the Notifying Party’s recommended option.²⁴⁴ I have determined that seven of the changes in circumstances identified in the notice are not “changes in circumstances” for the purposes of clause 12.3. As the options and alternatives identified in the notice are in relation to all 12 changes in circumstances the 12 November notice is invalid. The answer to question 36 is therefore “yes”.

²⁴² Further Amended Statement of Claim [13(da)(ii)], Sixth Further Amended Defence [13(da)(ii)] and Fourth Further Amended Reply and Answer [10(b)].

²⁴³ Clause 12.3(b)(ii)(A).

²⁴⁴ Clause 12.3(b)(ii)(A).

ANNEXURE “A” – SC No 12138 of 2013

Separate Questions and Answers

Question 1: At the time Callide Coalfields (Sales) Pty Ltd (Callide Sales) (acting on behalf of Anglo Coal (Callide Pty Ltd (Anglo Coal Callide) and AMP Life Limited (AMP Life)) and CS Energy Limited (CS Energy) entered into an agreement pursuant to which Callide Sales agreed to supply coal to CS Energy on 11 May 1998 (Coal Supply Agreement),

(a) were the alleged facts set out in subparagraphs (d) to (h) true?

Answer: YES

(b) were the alleged facts in subparagraphs (d) to (h) known by each of CS Energy, Callide Sales, Anglo Coal Callide (then Shell Coal (Callide) Pty Ltd) and AMP Life?

Answer: YES

(c) alternatively to (b), would the alleged facts in subparagraphs (d) to (h) have been known by reasonable persons in the position of each of those parties?

Answer: UNNECESSARY TO ANSWER

The alleged facts are:

(d) clauses 9.1.3 and 17.6 of CS93 contain a limited review mechanism in the event of any major change to prescribed working conditions within the coal mining industry (as alleged in paragraph 4A(e)(iii) of the defence);

(f) CS Energy, Callide Energy Pty Ltd and IG Power (Callide) Ltd (then Shell Coal Power (Callide) Ltd) estimated that the Contract Price agreed under the Coal Supply Agreement and the Callide Power Project Coal Supply Agreement for the supply of coal would result in them being competitive and profitable in their operations (as alleged in paragraphs 4A(k) of the defence);

(g) Anglo Coal Callide and AMP Life (the Original Coal Mine Owners) estimated that the Contract Price agreed under the Coal Supply Agreement and the Callide Power Project Coal Supply Agreement for the supply of coal would result in them being competitive and profitable in their operations (as alleged in paragraph 4A(k) of the defence);

(h) a change to the estimates referred to in subparagraphs 4A(k) and (l) of the defence would amount to a change to conditions affecting the competitiveness and profitability of the Callide Mine and the Callide B Power Station and the Callide C Power Station (as alleged in paragraph 4A(n) of the defence).

Question 3: May the facts alleged in paragraph 4A of the defence be taken into account in interpreting the Coal Supply Agreement?

Answer: UNNECESSARY TO ANSWER

Question 4: Do the facts alleged in paragraph 4A of the defence give rise to the inference of the objective commercial purpose of the Coal Supply Agreement alleged in paragraph 4B of the defence:

Answer: NO

Question 5: In order for a notice to be a notice within the terms of, and given in accordance with, clause 12.3(b)(ii) of the Coal Supply Agreement is it the case that:

- (a) the matters set out in the notice must, on the face of the notice, fall within the definition of “Change Event”?

Answer: NO

- (b) the notice must, inter alia, include detailed information regarding the nature, extent and quantum of the cost and revenue impacts of the “Change Event”?

Answer: NO

- (c) the notice must, inter alia, state options and alternatives identified by the Notifying Party as being available to accommodate or mitigate the Change Event?

Answer: YES

Question 6: **Is strict compliance with the requirements referred to in 5(a) to (c) (if those requirements are found to exist) necessary for a notice under clause 12.3(b)(ii) to be valid or may a notice be valid if it substantially complies with the requirements of clause 12.3(b)(ii)?**

Answer: UNNECESSARY TO ANSWER

Question 7: Must the “change in circumstances” comprising a “Change Event” within the meaning of the Coal Supply Agreement:

- (a) be an occurrence, comprised of either:

- (i) a single change in circumstances? or

Answer: NO

- (ii) alternatively, one or more changes in circumstances which:

- (A) do not constitute more than one Change Event;

Answer: YES

- (B) further or alternatively, are the same nature?

Answer: NO

- (b) subject to any express exception, be supervening or external in nature, such that a mere failure to meet one party's own expectations or forecasts would not fall within the definition?

Answer: YES

Question 8: Can a party rely on a change or changes in circumstances for the purposes of clause 12.3 of the Coal Supply Agreement, in circumstances where the party has previously:

- (a) notified the other party (pursuant to clause 12.3(b)(i)) of; or
 (b) submitted a Change Event Notice (pursuant to clause 12.3(b)(ii)) in relation to,

an alleged Change Event that is comprised in whole or in part of the change or changes in circumstances sought to be subsequently relied upon?

Answer: NO

Question 9: Can a party rely on a change or changes in circumstances for the purposes of clause 12.3 of the Coal Supply Agreement in circumstances where the party forms a reasonable opinion that the change or changes in circumstances have, or will have, a material effect on the competitiveness of the Coal Mine Owners or the Buyer in relation to the industry in which it operates and:²⁴⁵

- (a) does not notify the other party in writing promptly on the formation of the opinion that it is the party's intention to initiate a review of the Coal Supply Agreement under clause 12.3 which may lead to an Adjustment; or
 (b) does not, as soon as practicable in all the circumstances, submit a Change Event Notice within the meaning of that term as used in clause 12.3(b)(ii) in relation to an alleged Change Event that is comprised in whole or in part of the change or changes in circumstances?

Answer: NO

Question 10: Was a Change Event deemed to have occurred upon the delivery of the document entitled '*Change Event Notice Callide B Coal Supply Agreement (Clause 12)*' (with Annexures) delivered by Callide Sales to CS Energy on 12 November 2013 (the 12 November Notice)?

Answer: NO

Question 11: Are increases in costs governed exclusively by clause 10 of the Coal Supply Agreement (such that they cannot engage clause 12 of the Coal

²⁴⁵ [9)(e)] SOC, [9(e)] D.

Supply Agreement) or may increases in costs give rise to, or form part of, a change or changes in circumstances that constitute a Change Event?

Answer: **Mere increases in costs are not in and of themselves a Change Event. Unless they are the consequence or effect of a Change Event, they are governed exclusively by clause 10 of the Coal Supply Agreement.**

Question 13: Must a notice given in accordance with clause 12.3(b)(i) of the Coal Supply Agreement be given promptly when the Change Event becomes known to the Notifying Party or may a notice given in accordance with clause 12.3(b)(i) of the Coal Supply Agreement be given promptly after the party giving the notice forms the intention to initiate a review?

Answer: **A notice given in accordance with clause 12.3(b)(i) of the Coal Supply Agreement must be given promptly when the Change Event becomes known to the Notifying Party.**

Question 14: Is compliance with the time specified in clause 12.3(b)(i) of the Coal Supply Agreement a condition precedent to the valid issue of a notice under the clause?

Answer: **NO**

Question 15: Is compliance with the time specified in clause 12.3(b)(ii) of the Coal Supply Agreement a condition precedent to the valid issue of a Change Event Notice under the clause?

Answer: **NO**

Question 16: Does the 12 November Notice, on the face of the notice, assert that there was:

(a) an occurrence comprised of a single change in circumstances”

Answer: **NO**

(b) one or more changes in circumstances which both (i) do not constitute more than one Change Event and (ii) are of the same nature?

Answer: **NO**

(c) one or more changes in circumstances which do not constitute more than one Change Event?

Answer: **NO**

(d) one or more changes in circumstances which are of the same nature?

Answer: **NO**

Question 17: Does the answer to 16 mean that, on the face of the notice, the matters set out in the 12 November notice do not fall within the definition of “Change Event”?

Answer: **The matters set out in the 12 November notice do not fall within the definition of “Change Event” because they are changes in circumstances which comprise more than one Change Event.**

Question 18: Are the matters in section 6 of the 12 November notice, on the face of the notice:

(a) based on an alleged initial failure to appreciate features of the geology, not based on any alleged change in actual geology, not entailing an occurrence or a matter of a supervening or external nature, entailing a mere failure to meet expectations; and/or

Answer: No, except they are not based on any alleged change in actual geology.

(b) based on increased costs arising from adverse physical conditions encountered at the Callide Mine?

Answer: YES

Question 19: Does the answer to 18 mean that, on the face of the notice, the matters set out in the 12 November notice do not fall within the definition of ‘Change Event’?

Answer: NO

Question 20: Are matters in paragraphs 9 to 14 of the 12 November notice, on the face of the notice, matters which do not entail an occurrence but entail a mere consequence or effect without identification of an underlying occurrence?

Answer: YES

Question 21: Does the answer to 20 mean that, on the face of the notice, the matters set out in the 12 November notice do not fall within the definition of “Change Event”?

Answer: YES

Question 22: Are matters in paragraph 15 of the 12 November notice, on the face of the notice, matters which do not entail an occurrence or a matter of a supervening or external nature but entail a mere failure to meet expectations?

Answer: YES

Question 23: Does the answer to 22 mean that, on the face of the notice, the matters set out in the 12 November notice do not fall within the definition of “Change Event”?

Answer: YES

Question 25: Having regard to the answer to question 11 above do the matters referred to in the 12 November notice at paragraphs 9 to 14 engage clause 12 of the Coal Supply Agreement?

Answer: NO

Question 26: Do the matters set out in the 12 November notice fall, in substance, within the definition of a “Change Event”?

Answer: NO

Question 27: Are the matters referred to in question 16 above discernible by a reasonable reader of the 12 November notice in the position of the applicant?

Answer: NO

Question 28: If some of the matters set out in the 12 November notice do not, on the face of the notice, fall within the definition of Change Event, is the 12 December notice nevertheless valid?

Answer: NO

Question 29: As a result of the answers to questions 16 to 23 and 26 to 28 above, is the 12 November notice a notice “of a Change Event”?

Answer: NO

Question 30: As a result of the answers to questions 16 to 29 above, is the 12 December notice invalid?

Answer: YES

Question 31: Does the 12 November notice identify or include detailed information regarding the quantum of the cost and revenue impacts of the alleged Change Event?

Answer: NO

Question 32: Does the answer to question 31 mean that the 12 November notice is invalid?

Answer: YES

Question 33: If the 12 November notice is to be read as encompassing some only of the changes in circumstances it describes, does the 12 November notice set out, or include, detailed information regarding the quantum of the cost and revenue impacts of those changes in circumstances?

Answer: NO

Question 34: If the 12 November notice is to be read as encompassing some only of the changes in circumstances it describes and does not set out or include detailed information regarding the quantum of the cost and revenue impacts of those changes in circumstances, is the 12 November notice invalid?

Answer: YES

Question 35: If the 12 November notice is to be read as encompassing some only of the changes in circumstances it describes, does it state any options and alternatives as being available to accommodate or mitigate those changes in circumstances?

Answer: NO

Question 36: If the 12 November notice is to be read as encompassing some only of the changes in circumstances it describes and it does not state any options and alternatives as being available to accommodate or mitigate those changes in circumstances, is the 12 November notice invalid?

Answer: YES

ANNEXURE “B” – SC No 12122 of 2013

Separate Questions and Answers

Question 1: At the time Callide Coalfields (Sales) Pty Ltd (Callide Sales) (acting on behalf of Anglo Coal (Callide Pty Ltd (Anglo Coal Callide) and AMP Life Limited (AMP Life)) and Callide Power Management Pty Ltd (CPM) (acting on behalf of IG Power (Callide) Ltd (IG Power) and Callide Energy Pty Limited (Callide Energy)) entered into an agreement dated 11 May 1998 pursuant to which Callide Sales agreed to supply coal to CPM (Coal Supply Agreement),

(a) were the alleged facts set out in subparagraphs (d) to (h) true?

Answer: YES

(b) were the alleged facts in subparagraphs (d) to (h) known by each of Callide Sales, Anglo Coal Callide (then Shell Coal (Callide) Pty Ltd), AMP Life Callide Energy and IG Power (then Shell Coal Power (Callide) Ltd (Shell Coal Power)?

Answer: YES

(c) alternatively to (b), would the alleged facts in subparagraphs (d) to (h) have been known by reasonable persons in the position of each of those parties?

Answer: UNNECESSARY TO ANSWER

The alleged facts are:

(d) clauses 9.1.3 and 17.6 of CS93 contained a limited review mechanism in the event of any major change to prescribed working conditions within the coal mining industry (as alleged in paragraph 4A(e)(iii) of the defence);

(f) CS Energy Limited (CS Energy), Callide Energy Pty Ltd and IG Power (then Shell Coal Power (Callide) Ltd) estimated that the Contract Price agreed under the Callide B Coal Supply Agreement and the Coal Supply Agreement for the supply of coal would result in them being competitive and profitable in their operations (as alleged in paragraphs 4A(k) of the defence);

(g) Anglo Coal Callide and AMP Life (the Original Coal Mine Owners) estimated that the Contract Price agreed under the Callide B Coal Supply Agreement and the Coal Supply Agreement for the supply of coal would result in them being competitive and profitable in their operations (as alleged in paragraph 4A(k) of the defence);

(h) a change to the estimates referred to in subparagraphs 4A(k) and (l) of the defence would amount to a changes to conditions affecting the competitiveness and profitability of the Callide

Mine and the Callide B Power Station and the Callide C Power Station (as alleged in paragraph 4A(n) of the defence).

Question 3: May the facts alleged in paragraph 4A of the defence be taken into account in interpreting the Coal Supply Agreement?

Answer: **UNNECESSARY TO ANSWER**

Question 4: Do the facts alleged in paragraph 4A of the defence give rise to the inference of the objective commercial purpose of the Coal Supply Agreement alleged in paragraph 4B of the defence?

Answer: **NO**

Question 5: In order for a notice to be a notice within the terms of, and given in accordance with clause 12.3(b)(ii) of the Coal Supply Agreement is it the case that:

(a) the matters set out in the notice must, on the face of the notice, fall within the definition of “Change Event”?

Answer: NO

(b) the notice must include detailed information regarding:

(i) the nature, extent of the “Change Event”?

(ii) the quantum of the cost and revenue impacts of the “Change Event”?

(iii) the quantum of the cost and revenue impacts of each option and alternative identified?

Answer: NO

(c) the notice must specify options and alternatives identified by the Notifying Party as being available to accommodate or mitigate the Change Event?

Answer: YES

Question 6: Must the “change in circumstances” comprising a “Change Event” within the meaning of the Coal Supply Agreement:

(a) be an occurrence, comprised of either:

(i) a single change in circumstances? Or

Answer: NO

(ii) in the alternative to (i):

(A) a single change in circumstances; or

(B) multiple changes in circumstances where:

- (1) each of the changes in circumstances is of the same nature;

Answer: NO

- (2) further, and in the alternative, they do not constitute more than one Change Event?

Answer: YES

- (b) subject to any express exception, be supervening or external in nature and not comprise merely a change from the conditions or state of affairs which a party expected, at the time of the Coal Supply Agreement, to encounter in the future?

Answer: NO. This question is worded differently to question 7(b) in the Separate Questions in SC No 12138 of 2013 because it refers to “a change from the conditions or state of affairs which a party expected” as opposed to “a mere failure to meet one party’s own expectations or forecasts”. To the extent the question is framed so as to exclude the change in circumstances identified in section 6 of the 12 November notice it should be answered “no”.

Question 7: As to the requirements referred to in question 5(a) to 5(c) and 6 above:

- (a) must each requirement be met on the face of the Change Event Notice?

Answer: NO

- (b) must each requirement be strictly complied with, or may a notice be valid if it substantially complies with the requirements of clause 12.3(b)(ii)?

Answer: UNNECESSARY TO ANSWER

Question 8: Can a party rely on a change or changes in circumstances for the purposes of clause 12.3(b)(i) or a Change Event Notice under clause 12.3(b)(ii) of the Coal Supply Agreement, if party has previously:

- (a) notified the other party (pursuant to clause 12.3(b)(i)) of; or
 (b) submitted a Change Event Notice (pursuant to clause 12.3(b)(ii)) in relation to,

that change or those changes in circumstances?

Answer: NO

Question 9: Can a party rely on a change or changes in circumstances for the purposes of a notice under clause 12.3(b)(i) or a Change Event Notice under clause 12.3(b)(ii) of the Coal Supply Agreement if the party forms a reasonable opinion that the change or changes in circumstances has, or will have, a material effect on the competitiveness of the Coal

Mine Owners or the Station Owners in relation to the industry in which it operates and:

- (a) does not notify the other party in writing promptly on the formation of the opinion that it is the party's intention to initiate a review of the Coal Supply Agreement under clause 12.3 which may lead to an Adjustment; or
- (b) does not, as soon as practicable in all the circumstances, submit a Change Event Notice within the meaning of that term as used in clause 12.3(b)(ii)?

Answer: NO

Question 10: Was a Change Event deemed to have occurred consequent upon the delivery of the document entitled "*Change Event Notice Callide C Coal Supply Agreement (Clause 12)*" (with Annexures) by Callide Sales to CPM on 12 November 2013 (the 12 November Notice)?

Answer: NO

Question 11: Are increases in costs governed exclusively by clause 10 of the Coal Supply Agreement (such that they cannot engage clause 12 of the Coal Supply Agreement) or may increases in costs give rise to, or form part of, a change or changes in circumstances that constitute a Change Event?

Answer: **Mere increases in costs are not in and of themselves a Change Event. Unless they are the consequence or effect of a Change Event they are governed exclusively by clause 10 of the Coal Supply Agreement.**

Question 13: Can the mere fact of the Coal Mine Owners ceasing to benefit under the Coal Supply Agreement of itself be a change in circumstances capable of comprising a Change Event within the meaning of clause 12.3 of the Coal Supply Agreement?

Answer: NO

Question 14: Must a notice given in accordance with clause 12.3(b)(i) of the Coal Supply Agreement be given promptly when the Change Event becomes known to the Notifying Party or may a notice given in accordance with clause 12.3(b)(i) of the Coal Supply Agreement be given promptly after the party giving the notice had formed the intention to initiate a review?

Answer: **A notice given in accordance with clause 12.3(b)(i) of the Coal Supply Agreement must be given promptly when the Change Event becomes known to the Notifying Party.**

Question 15: Must a Change Event Notice given in accordance with clause 12.3(b)(ii) of the Coal Supply Agreement be given as soon as practicable:

(a) after the Notice of Intention is given; or

Answer: YES

(b) after the Change Event the subject of the Change Event Notice becomes known to the party giving the Change Event Notice; or

Answer: NO

(c) after the party giving the Change Event Notice forms the opinion that it wishes to proceed with a review under clause 12 of the Coal Supply Agreement?

Answer: NO

Question 16: Is compliance with the time specified in clause 12.3(b)(i) of the Coal Supply Agreement a condition precedent to the valid issue of a notice under the clause?

Answer: NO

Question 17: Is compliance with the time specified in clause 12.3(b)(ii) of the Coal Supply Agreement a condition precedent to the valid issue of a notice under the clause?

Answer: NO

Question 18: Does the 12 November notice describe, on its face:

(a) a single change in circumstances?

Answer: NO

(b) multiple changes in circumstances which both (i) are the same nature and (ii) do not constitute more than one Change Event?

Answer: NO

(c) multiple changes in circumstances which are of the same nature?

Answer: NO

(d) changes in circumstance which comprise more than one Change Event?

Answer: YES

Question 19: Do the answers to question 18 mean that, on the face of the 12 November notice, it does not identify a Change Event under clause 12.3(a) of the Coal Supply Agreement?

Answer: YES

- Question 20:** Does section 6 of the 12 November notice, on the face of the notice:
- (a) describe the change in circumstances as Callide Sales becoming aware of geological features of the Coal deposit at the Callide Mine which were not known by Callide Sales at the time of execution of the Coal Supply Agreement, which increased the costs of mining and reduced profitability under the Coal Supply Agreement (or is this an inaccurate summary)?
Answer: NO
 - (b) describe a change to the conditions or state of affairs existing at the time of entry into the Coal Supply Agreement for the purposes of clause 12.3(a) of the Coal Supply Agreement?
Answer: YES
 - (c) describe merely a change from the conditions or state of affairs which the Coal Mine Owners believed, at the time of entry into the Coal Supply Agreement, that they would encounter in the future?
Answer: NO
 - (d) describe matters based on increased costs arising from adverse physical conditions encountered at the Callide Mine?
Answer: YES

- Question 21:** Do the answers to question 20 mean that:
- (a) the matters described on the face of section 6 of the 12 November notice are not a change in circumstances capable of comprising a Change Event within the meaning of clause 12.3(a) of the Coal Supply Agreement?
Answer: NO
 - (b) the 12 November notice does not, on its face, identify a Change Event under clause 12.3(a)?
Answer: NO

Question 24: Are sections 9 to 14 of the 12 November notice accurately stated in paragraphs [25] to [30] of the Statement of Claim?

Answer: YES

Question 25: Do sections 9 to 14 of the 12 November notice, on the face of the notice, describe:

- (a) a change or changes in circumstances comprising a mere increase in costs?

Answer: YES

- (b) the occurrence of a single change in circumstances or multiple changes in circumstances where each of the changes in circumstances is of the same nature?

Answer: NO

- (c) merely the effect on competitiveness contemplated by clause 12.3(a)?

Answer: YES

Question 26: Do the answers to questions 11 and 24 – 25 above meant that:

- (a) the matters described on the face of sections 9 to 14 of the 12 November notice are not a change in circumstances capable of comprising a Change Event within the meaning of clause 12.3(a) of the Coal Supply Agreement?

Answer: YES

- (b) the 12 November notice does not on its face, identify a Change Event under clause 12.3(a)?

Answer: YES

Question 27: Does section 15 of the 12 November notice, on the face of the notice, describe a change or changes in circumstances comprising the mere fact of the Coal Mine Owners having ceased to benefit under the Coal Supply Agreement?

Answer: YES

Question 28: Do the answers to questions 13 and 27 above meant that:

- (a) the matters described on the face of section 15 of the 12 November notice are not a change in circumstances capable of comprising a Change Event within the meaning of clause 12.3(a) of the Coal Supply Agreement?

Answer: YES

- (b) the 12 November notice does not, on its face, identify a Change Event under clause 12.3(a)?

Answer: YES

Question 29: Do the matters set out in the 12 November notice fall, in substance, within the definition of a “Change Event”?

Answer: NO

Question 30: Are the matters referred to in question 18 above discernible by a reasonable reader of the 12 November notice in the position of the Applicants?

Answer: NO

Question 31: If some of the matters set out in the 12 November notice do not on the face of the notice, fall within the definition of Change Event, does the 12 November notice nevertheless identify a Change Event as defined in clause 12.3(a)?

Answer: NO

Question 32: As a result of the answers to questions 18 to 31 above, is the 12 November notice a Change Event Notice under clause 12.3(b)(ii)?

Answer: NO

Question 33: Does the 12 November notice describe the cost and revenue impacts of the changes in circumstances cumulatively only?

Answer: YES

Question 34: Does the 12 November notice:

(a) contain detailed information regarding the quantum of the cost and revenue impacts of a Change Event?

Answer: NO

(b) specify options and alternatives to accommodate or mitigate a Change Event?

Answer: NO

(c) contain detailed information regarding the quantum of the costs and revenue impacts of such options and alternative?

Answer: NO

(d) state Callide Sales' recommended option to accommodate or mitigate a Change Event?

Answer: NO

Question 35: As a result of the answers to question 34 above, is the 12 November notice a notice under clause 12.3(b) of the Coal Supply Agreement?

Answer: NO

Question 36: If the 12 November notice is to be read as encompassing some only of the changes in circumstances it describes, does it:

- (a) contain detailed information regarding the quantum of the cost and revenue impacts of the changes in circumstances identified in the 12 November notice?

Answer: NO

- (b) state options and alternatives to accommodate or mitigate those changes in circumstances?

Answer: NO

- (c) state detailed information regarding the quantum of the cost and revenue impacts of options and alternatives to accommodate or mitigate those changes in circumstances?

Answer: NO

- (d) state Callide Sales' recommended option to accommodate or mitigate those changes in circumstances?

Answer: NO

Question 37: As a result of the answers to question 36 above, is the 12 November notice a notice under clause 12.3(b) of the Coal Supply Agreement?

Answer: NO