IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT ESTABLISHING THE ASEAN-AUSTRALIA NEW ZEALAND FREE TRADE AREA

B E T W E E N :

ZEPH INVESTMENTS PTE LTD

(Co. No. 201902599N) Claimant

and

THE COMMONWEALTH OF AUSTRALIA Respondent

ANNEXURE 7C

TO THE

NOTICE OF ARBITRATION

DATED 29 MARCH 2023

(Amended 30 September 2023)

Addendum-Sovereign Risk/ Loss of Opportunity (Chance)

Loss of Commercial Opportunity

Commercial Overview loss of chance damages caused by the Amendment Act

Introduction

1. This submission contains a preliminary commercial overview of the claim for damages for loss of commercial opportunity advanced by the Claimant. The legal argument relied on by the Claimant in advancing this claim will be developed further in subsequent written and oral submissions.

2. These submission which includes schedule A annexed hereto should be read with the submissions and witness statement of [redacted] dated 22 March 2023, and the expert report of [redacted] dated 27 March 2023 and the witness statements and annexures or the Notice of Arbitration which inter alia support the damages claimed in the Claimant's relief in respect as what damages would have been awarded to the Claimant in respect of the four additional projects which the Claimant would have proceeded with between 2012 to 2022 As the 2020 Arbitration was being conducted under Australian Law it reflects the legal position under Australian Law.

1. The Claimant's position

3. The Amendment Act by its terms breached Article 6 and Article 9 of AANZFTA and caused the Claimant loss and damage.

4. By the Amendment Act becoming a law on 13 August 2020, the Claimant suffered the loss of two commercial opportunities. Firstly, the Claimant's Subsidiaries lost the opportunity to receive a damages award in the 2020 Arbitration. Secondly, the Claimant also lost the opportunity to develop proposals and projects through its subsidiary companies over the remaining term of the State Agreement, which were valuable contract rights under the State Agreement. An overview of these losses is set out below.

5. The Claimant quantifies its loss in the tables set out at the end of this schedule. The Claimant also claims interest and costs.

The evidence

6. In support of its claim, the Claimant relies on the lay and expert witness statements

contained in its Arbitration Notice.

7. The expert reports provide the Tribunal with four values, which have been rounded for ease of reference. Firstly, there is the expert put forward by the Western Australian Government to the Western Australian Supreme Court in 2014 (i.e. by Mr William Preston) who valued the BSIOP as having an EBITDA of Australian dollars $27,000,000,000.[1] Secondly, there is the revised valuation put forward by independent expert from the United Kingdom, [redacted], who valued the BSIOP as at October 2020 as having a net present value of US$7,800,000,000.[2] [redacted] evaluated the 2014 valuation of William Preston reducing it to US$7,300,000,000.[3] Next, there is the valuation of [redacted] dated 27 March 2023 who valued a clone project of the BSIOP by reference to the actual amount of royalty being paid by CITIC Limited to Mineralogy in 2023, adjusted for the actual price earnings multiple applying in February 2021 on the New York Stock exchange (the date of the proposed Award in the 2020 Arbitration). The Independent expert valuation is set out on pages 16 to 21 of the expert report attached to the Witness statement of [redacted] dated 27 March 2023.

The applicable legal framework

8. The four additional projects would have been dealt with under Australian Law in the 2020 Arbitration (**Initial Sovereign Risk**).[4] The 16 projects which represented a loss of opportunity caused by the Amendment Act becoming law (**Permanent Sovereign Risk**) should be considered under International Law. The principles for loss of opportunity or chance applying under Australian Law or International law are similar and it is open to the Tribunal to consider them as relevant to the Permeant Sovereign Risk. Schedule A contains a brief summary of the Australian common law principles relevant to a claim for damages for loss of commercial opportunity.

9. The following overview is based on the position as it would have applied to the Initial Sovereign Risk under the common law of Australia.

[1] Affidavit of William Preston, 12 July 2013 (**Exh, C-410**).
[2] Statement of [redacted], 25 May 2020 (**Exh. C-188**).
[3] Statement of [redacted], 29 January 2020 (**Exh. C-187**).
[4] See [redacted] Statement, paras 240-242; Additional Submissions in the 2020 Arbitration from para 237 (**Exh. C-169**).

Sovereign Risk

10. In view of the focus of the loss of opportunity claims on sovereign risk, it is appropriate to commence with a discussion of the concept of sovereign risk and how sovereign risk created the losses of opportunity for which damages are now claimed in this arbitration.

11. This topic is covered in detail in the Claimant's Submissions on Damages which is Annexure 8C to the Arbitration Notice and the Witness Statement of [redacted]. However, the main points about sovereign risk, and how it created the relevant losses of opportunity, are summarised below.

12. The starting-point of the analysis is that, but for the enactment of the Amendment Act, the arbitration provided for in the 2020 Arbitration Agreement would have taken its course and culminated in arbitral award being issued by 12 February 2021. Had that occurred, and the "State Agreement" was seen to be effective (i.e., it could be enforced by the Claimant's subsidiaries), the Claimant's subsidiaries would have resumed developing the Mining Tenements under the State Agreement, as originally planned. Market confidence in Mineralogy and its co-proponents (including International Minerals) would have been restored by the effective demonstrated enforcement of the State Agreement. The enactment of the Amendment Act, however, destroyed all commercial possibility of the Claimant through its subsidiaries undertaking further projects pursuant to the State Agreement, as a result of the extreme sovereign risk created by the Amending Act.

13. This sovereign risk manifested itself in two respects, one of which would have been raised in the 2020 Arbitration (following amendment) and one of which arose out of the enactment of the Amendment Act.

14. The first category of sovereign risk loss of opportunity damages relates to loss created by sovereign risk in the period 2012 to 2022. As explained by [redacted] in his witness statement,[5] the Claimant's Subsidiaries intended to apply to Mr McHugh to amend their claim to include a further claim for projects that could not be developed between 2012 and 2022, as a result of the Minister's refusal to deal with the BSIOP Proposal in accordance with Clause 7 of the State Agreement. The intention was to claim for four projects that would have proceeded in this period, based on the rate of development that

[5] [redacted] Statement, para 419 and 428

had occurred in the previous 10 years and the projects that had been planned for the period. As four projects had been developed or were in the process of being developed between 2022 and 2012, and thus it is reasonable to assume that another four projects would have been commenced between 2012 and 2022. The loss that Mineralogy intended to claim in the 2020 Arbitration was US$31,072,000,000. This is based on a value of the BSIOP as determined by [redacted] (multiplied by four), as each future project would have essentially been a "clone" of the BSIOP and would have had the same potential value. Further details in relation to this claim are set out in the Claimant's Submissions on Damages which is Annexure 8C to the Arbitration Notice.

15. By the Amendment Act becoming law in Australia, the Claimant's Subsidiaries lost forever their right or opportunity to receive an Award in the 2020 Arbitration. The Claimant's Subsidiaries lost the opportunity to amend their pleadings to include the damages caused by the sovereign risk brought about by Barnett's rejection of the BSIOP in 2012. The Claimant's Subsidiaries first became aware of such damages in 2020 by witness statements obtained in the 2020 Arbitration and confirmed in June 2020 by [redacted] (see witness statement 19 June 2020).[6] Moreover, the Claimant's Subsidiaries lost the opportunity to sell or deal with four more projects between 2012 to the date of the proposed Award in the 2020 Arbitration. The Claimant under the terms of AANZFTA is therefore entitled to receive an award of damages equivalent to the amount the Claimant's Subsidiaries would have received in the Award to be made in the 2020 Arbitration in February 2021, as well as interest since that time and costs.

16. The second category of sovereign risk loss of opportunity damages relates to loss created by sovereign risk which rendered other projects, over the remaining life of the State Agreement, impossible. The Amending Act created far reaching, irremediable, permanent sovereign risk, rendering the State Agreement effectively worthless. Mineralogy has been placed into a position where it can no longer exploit the contractual rights it owned under the State Agreement because the market is aware that the State Agreement cannot ever again be relied upon. The level of sovereign risk is unacceptable to those who finance and or participate in such projects and the commercial reality is that the contractual rights set out in the State Agreement can no

[6] Statutory Declaration of [redacted], 19 June 2020 (**Exh. C-146**).

longer be relied on and the Mining Tenements can no longer be developed.[7] The Claimant's Submissions on Damages, which is Annexure 8C to the Arbitration Notice, identifies and values the projects which would have been developed but for the enactment of the Amendment Act. That opportunity has now been lost for all time. Conservatively, the Claimant claims for the loss of opportunity to develop a further 16 projects, which represents a loss of opportunity worth up to US$124,288,000,000. The Claimant has developed tables that allow the Tribunal to consider this loss. These tables are set out in [redacted] Statement from paragraph 453 onwards.

Sovereign Risk Damages – Loss of opportunity to develop future projects Caused by the Amendment Act

17. The Claimant has placed before the tribunal valuation evidence which establishes the value of a project of AUD $27 billion made by the Western Australian Government expert placed before the Western Australian Supreme Court in 2014.

18. In the 2020 Arbitration, [redacted] performed a discounted cashflow (DCF) analysis to value the BSIOP. [redacted] had completed an analysis on 25 May 2020 of the BSIOP as at 8 October 2012 and valued the project for the BSIOP as at that date. In considering the value of money and timing of future projects it is submitted that any discounting would be offset by any likely gains in the economic value. [redacted] report was a revision of his 23 January 2012 report. In his 25 May 2020 report on page 9 he states that he has determined that "The net present value (NPV) of the equity cash flows after tax at a discount rate of 8% is US$ 7.77 billion in Year 1."[8] The amount of US$7.768 billion is rounded up from the figure at table 4, on page 9 of his report, which provides that the NPV after tax at 8% in Year 1 is US$ 7.768 billion.

19. The Claimant has established the value of a project by reference to the 2020 valuation of independent expert [redacted] using a discounted cash flow **(DCF**) analysis of a net present value in the order of US$ 7.768 billion. [redacted] calculated that was able to reduce the State of Western Australia's 2014 valuation to US7.39 billion using a discounted cash flow analysis. Independent expert [redacted] reviewed the [redacted] valuations in 2020 and opined as to their reasonableness in his expert report attached to his witness

[7] [redacted] Expert Report, pp.24, 26-29
[8] Witness Statement of [redacted], p.24 (p.9 of the Revised Report) (**Exh. C-188**).

statement dated 27 March 2020. [redacted] also confirmed the discount rate used by [redacted] was appropriate. (**C-187**)

20. In his report dated 27 March 2023, [redacted] has determined a value range for a project as being between US$9.2 billion and US$16.6 billion, utilising the royalties actually being paid by CITIC Limited to Mineralogy and Price Earnings ratios from the New York Stock Exchange.

21. The above valuations of a project are helpful in considering the damages incurred by the loss of opportunity. It is submitted that [redacted] valuation in 2020 on a DCF basis, which was supported by detailed engineering, is a conservative traditional approach that should be adopted in considering this matter. The other valuations form a good basis for considering the value of a project at different times using different methodologies.

22. Consequently, a valuation of US$7.768 billion should be used when considering the value of each project. In considering the value of money and timing of future projects, it is submitted that any discounting would be offset by any likely gains in the economic value of a project considering the following:

    (a) new projects would have a lower capital cost in not having to establish a port and other infrastructure which has already been established by the Sino Iron Project;

    (b) inflation;

    (c) growth in the iron ore market;

    (d) growth in the global economy;

    (e) increases in the iron ore price;

    (f) increases in global demand; and

    (g) decline in global resources.

Time loss arises

23. It is submitted that, upon the Amendment Act becoming law on 13 August 2020, the loss of opportunity arose and that damages should be assessed on that date. It is submitted that the net present value of a project should be accepted as determined by

[redacted] at US$7.68 billion, and it is submitted that the total damages for loss of opportunity to develop projects under the State Agreement should be determined as being damages amounting to US$155,360,000,000, including an Award for Damages under the 2020 Arbitration Agreement.

Evidentiary foundation

24. It is submitted that the required evidence is set out in the matters incorporated in the Notice of Arbitration. The Claimant has adduced evidence that the relevant opportunity has real value.

25. The Claimant's director Mr Palmer has provided evidence of the opportunity in his Witness Statement dated 22 March 2023. Further objective evidence and circumstances upon which the Claimant relies is set out in the exhibits to the Notice of Arbitration and the evidence of [redacted]. The Claimant relies on this evidence to prove its entitlement to recover substantial damages. This evidence enables the Tribunal to exercise its judgement and to draw inferences about the likelihood that the Claimant would have exploited and achieved the opportunity, but for the Respondent's wrong.

26. Evidence of the terms of a contract under which an opportunity is promised (i.e., the State Agreement) and the rights of the Claimant's Subsidiaries under the 2020 Arbitration Agreement constitute prima facie evidence of the existence of a valuable opportunity.

27. The Sino Iron Project has demonstrated that the State Agreement rights are assets that have very significant value. The opportunity to exploit these rights has now been lost. In principle, the loss of a commercial opportunity should be valued by reference to its market value, being the discounted present value of projected cash flows. This follows from the analysis of [redacted] and William Preston.

28. A future cash flow can include the sale of an asset.

29. It is submitted that in determining the value to ascribe for a project, in my commercial assessment, I have relied on the value ascribed by expert witness [redacted] in the 2020 Arbitration, being US$7.68 billion.

30. It is noted that [redacted] used a discount rate of 8%. The [redacted] Expert Report in 2020 has confirmed the 8% discount rate as being appropriate. It is submitted that it is

not necessary to escalate value for future projects and nor is it necessary to discount values further at all, as one offsets the other.

31. It is submitted the Tribunal should adopt [redacted] valuation, even though other assessments were higher and although the price of iron ore was predicted to grow in future years with the growth in the iron ore requirements of China, and even though future projects would not have the same capital burden to establish ports, roads and infrastructure etc. Lower capex, lower interest charges The Claimant claims the total damages for the Initial Sovereign Risk and Permanent Sovereign Risk of $155,360,000,000.

32. It is further submitted that it fits within what might be regarded as an acceptable range considering the circumstances over the course of the 60-year term of the State Agreement. It is further submitted it must be remembered that any Mining Leases granted in the last year of the State Agreement would have three terms of 21 years from that date. Awards for future damages can be discounted to reflect present value, and accordingly, the total figure of USD 155,360,000,000 set out below could be discounted. if the value needed to be discounted to account for the "time" value of money. The market value of a project needs to be increased inter alia to reflect increased iron ore prices and to credit the use of established infrastructure. It is submitted one can offset the other

33. Based on the value of projects and the market increase for iron ore, combined with the fact that such natural resources are getting scarcer, the Claimant submits that such increases act as a natural hedge and that the 8% discount applied by [redacted], as well as the additional costs of infrastructure that he modelled which won't be required for future projects, are sufficient to offset further discounting.

34. The Claimant submits the following Assessment tables of damages for lost opportunity:

(h) one for the period 2012 to 2020 for 4 projects (Table A); and
(i) one for the remaining 42 years of the State agreement for 16 projects (Table B).

Table A and Table B are reproduced below.

Table A - Development of Projects through 2012-2020 that would have been claimed at the Domestic Arbitration

1 Project = US$ 7,768,000,000

4 Projects = US$ 31,072,000,000

Probability	**Value**
100%	US$ 31,072,000,000
90%	US$ 27,964,800,000
80%	US$ 24,857,600,000
70%	US$ 21,750,400,000
60%	US$ 18,643,200,000
50%	US$ 15,536,000,000
40%	US$ 12,428,800,000
30%	US$ 9,321,600,000
20%	US$ 6,214,400,000

Table B - Development of Projects through 2020-2062

1 Project = US$ 7,768,000,000

16 Projects = US$ 124,288,000,000

Probability	**Value**
100%	US$ 124,288,000,000
90%	US$ 111,859,200,000
80%	US$ 99,430,400,000
70%	US$ 87,001,600,000
60%	US$ 74,572,800,000

50% US$ 62,144,000,000

40% US$ 49,715,200,000

30% US$ 37,286,400,000

20% US$ 24,857,600,000

Table A: Damages US$ 31,072,000,000

Table B: Damages US$ 124,288,000,000

Total Sovereign Risk lost Opportunity Damages: US$ 155,360,000,000

Schedule A– Damages for Loss of Commercial Opportunity - Legal Overview

Introduction

1. Loss of commercial opportunity is a well-recognized head of damage under the common law of Australia. The same principals apply to International Law in respect of a loss of chance. The Claimant submits the Australian law principals which would have applied to the assessment of loss of opportunity damages are at the 2020 Arbitration follow. Damages for this type of loss may be awarded in contract: *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 118–19 (Deane J) (**Exh. CLA-101**); *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 355 (Mason CJ, Dawson, Toohey and Gaudron JJ) (**Exh. CLA-134**); and in the tort of negligence: *Johnson v Perez* (1988) 166 CLR 351 (**Exh. CLA-115**); *Nikolaou v Papasavas Phillips & Co* (1989) 166 CLR 394 (**Exh. CLA-123**); *Sellars*, 355 (Mason CJ, Dawson, Toohey and Gaudron JJ) (**Exh. CLA-134**); *Naxakis v Western General Hospital* (1999) 197 CLR 269, 278 [29] (Gaudron J) (**Exh. CLA-122**).

2. A claim for damages for loss of a commercial opportunity is a type of claim for loss of a chance. A commercial opportunity is a chance to obtain a pecuniary benefit, or to avoid a pecuniary loss or liability, in a commercial context: *Amann* (**Exh. CLA-101**), 92–4 (Mason CJ and Dawson J), 104 (Brennan J), 118–19 (Deane J); *Sellars* (**Exh. CLA-134**), 348 (Mason CJ, Dawson, Toohey and Gaudron JJ), 363 (Brennan J). The loss of a commercial opportunity is a form of economic loss: *Sellars* (**Exh. CLA-134**), 348 (Mason CJ, Dawson, Toohey and Gaudron JJ).

3. In general terms, a claim for loss of a commercial opportunity involves a claim for compensation for the loss of a chance or opportunity to take an alternative available course of action. The object of this course of action is to obtain a pecuniary benefit or to avoid a pecuniary loss or liability. This course of action may include entering into a profitable contract, making an alternative investment, or avoiding some type of financial loss.

4. This type of claim represents a claim for the value of the *chance* or *opportunity* of receiving an expected benefit or avoiding an expected loss or liability; not a claim for

the value of the expected benefit or loss or liability itself: *Howe v Teefy* (1927) 27 SR (NSW) 301, 307 (Street CJ; Gordon and Campbell JJ agreeing) (**Exh. CLA-112**). The opportunity of receiving the expected benefit or avoiding the expected loss or liability is the probability that the benefit would accrue in the manner expected or the probability that the loss or liability could have been avoided.

Object of damages

5. At common law, the primary object of an award of damages is to give the claimant compensation for loss. This object is achieved by awarding the claimant a sum of money designed to put the claimant 'in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation': *Haines v Bendall* (1991) 172 CLR 60, 63 (Mason CJ, Dawson, Toohey and Gaudron JJ) (**Exh. CLA-111**).

6. The compensatory principle applies both to the assessment of damages in tort and in contract, however the hypothetical reference point differs between the two claims. In contract, the hypothetical reference point is the position the claimant would have been in if the contract (promise) had been performed: *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 11–12 (Mason, Wilson and Dawson JJ) (**Exh. CLA-108**); *Amann*, 80 (Mason CJ and Dawson J), 98 (Brennan J), 117 (Deane J), 134 (Toohey J), 148 (Gaudron J), 161 (McHugh J) (**Exh. CLA-101**). In tort, the hypothetical reference point is the position the claimant would have been in if the tort had not been committed: *Gates*, 11–12 (Mason, Wilson and Dawson JJ) (**Exh. CLA-108**); *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657, 664 (Full Court) (**Exh. CLA-120**). In many cases, however, the application of the compensatory principle will yield similar results irrespective of whether the claim is brought in tort or in contract. This is because the exercise of putting the claimant in the same position as if the relevant wrong had not occurred involves putting the claimant in a position to pursue the relevant opportunity.

Temporal issues

7. In general, damages for loss of a commercial opportunity, like other types of compensatory damage, are awarded 'once and forever, and (in the absence of any statutory exception) must be awarded as a lump sum.' This requires a court to discount

(or accumulate) the claimant's damages to present value at the time the claimant's loss is assessed: *Todorovic v Waller* (1981) 150 CLR 402, 412, 414 (Gibbs CJ and Wilson J; Aickin J agreeing) (**Exh. CLA-138**). The general rule is that 'damages for torts or breach of contract are assessed as at the date of breach or when the cause of action arises': *Perez*, 355 (Mason CJ); 367 (Wilson, Toohey and Gaudron JJ), 380 (Deane J), 386 (Dawson J) (**Exh. CLA-115**). In applying the general rule, a court may take into account in assessing damages matters known by the date of assessment: *Perez*, 368–9 (Wilson, Toohey and Gaudron JJ), 392 (Dawson J) (**Exh. CLA-115**); *Nikolaou*, 403–4 (Wilson, Dawson, Toohey and Gaudron JJ) (**Exh. CLA-123**).

8. In general, damages for loss of a commercial opportunity are assessed as at the time of loss, although post-loss evidence relevant to the question of damages is admissible in certain circumstances: *Perez*, 366–9 (Wilson, Toohey and Gaudron JJ), 389, 391–2 (Dawson J) (**Exh. CLA-115**); *Nikolaou*, 403–4 (Wilson, Dawson, Toohey and Gaudron JJ) (**Exh. CLA-123**). A loss of a commercial opportunity will arise at the time the claimant is deprived, by the defendant's wrong, of an opportunity with a non-negligible monetary value: *Commonwealth v Cornwell* (2007) 229 CLR 519 (**Exh. CLA-102**).

9. If the opportunity is not perpetual, a determination must be made as to the time at which the opportunity, had it been pursued, would have ceased in any event. If the opportunity turns on the actions of the claimant, the determination of the time at which the loss would have ceased may depend on the court's findings on whether the claimant has mitigated its loss: see, eg, *Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd (No 2)* (2009) 261 ALR 179 (**Exh. CLA-129**).

Fact of loss

10. A claim for loss of opportunity requires the claimant to prove both the fact and value of its loss. A claimant must prove the fact of loss on the balance of probabilities: *Sellars*, 355 (Mason CJ, Dawson, Toohey and Gaudron JJ), 367-8 (Brennan J) (**Exh. CLA-134**); *Tabet v Gett* (2010) 240 CLR 537, 585 [136]-[137] (Kiefel J; Hayne, Crennan and Bell JJ agreeing) (**Exh. CLA-137**).

11. Proof of the fact of loss requires the claimant to prove both the existence of a valuable commercial opportunity, and that the defendant's wrong caused the loss of this opportunity: *Gates*, 13 (Mason, Wilson and Dawson JJ) (**Exh. CLA-108**); *Amann*, 88

(Mason CJ and Dawson J) (**Exh. CLA-101**); *Sellars*, 355 (Mason CJ, Dawson, Toohey and Gaudron JJ), 359, 362, 364– 5 (Brennan J) (**Exh. CLA-134**); *Tabet*, 585 [137] (Kiefel J; Hayne, Crennan and Bell JJ agreeing) (**Exh. CLA-137**).

Existence of opportunity

12. In order to prove the existence of a commercial opportunity, the claimant must prove, on the balance of probabilities, that the opportunity itself 'had *some* value (not being a negligible value)': *Sellars*, 355 (Mason CJ, Dawson, Toohey and Gaudron JJ) (emphasis in original) (**Exh. CLA-134**). The existence of a commercial opportunity 'must be proven by evidence': *Price Higgins & Fidge v Drysdale* [1996] 1 VR 346, 355 (Winneke P; Ormiston J and Charles JA agreeing) (**Exh. CLA-128**). This evidence will include evidence of the claimant's 'objectives and the contingencies in the way of their achievement': *Sellars*, 365 (Brennan J) (**Exh. CLA-134**). Importantly, the claimant must adduce evidence on which a rational assessment could be made that the relevant opportunity had some value: *Prosperity Advisers Pty Ltd v Secure Enterprises Pty Ltd t/a Strathearn Insurance Brokers* [2012] NSWCA 192, [88] (Tobias AJA; Macfarlan and Barrett JJA agreeing) (**Exh. CLA-130**).

13. In this context, value means monetary value: *Sellars*, 364 (Brennan J); *Howe*, 307 (Street CJ; Gordon and Campbell JJ agreeing) (**Exh. CLA-134**). For an opportunity to have a non- negligible monetary value, two inter-related things are required: first, the object of the opportunity (the relevant benefit, or loss or liability) must have a non-negligible monetary value; secondly, the probability of successfully obtaining or realising that object must be non-negligible: *Glenmont Investments Pty Ltd v O'Loughlin (No 2)* (2000) 79 SASR 185, 281 [430] (Full Court) (**Exh. CLA-109**).

Causation

14. As for causation, the hypothetical acts of the claimant, and *semble*, those closely related to the claimant, are treated as part of the fact of loss and must therefore be proved on the balance of probabilities: *Sellars*, 353 (Mason CJ, Dawson, Toohey and Gaudron JJ), 362, 368 (Brennan J) (**Exh. CLA-134**); *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd* [2014] NSWCA 158, [262]–[265] (Gleeson JA; Ward and Emmett JJA agreeing) (**Exh. CLA-104**). The hypothetical acts of third parties, to the extent that they are relevant to the *fact* of loss, must be proved on the balance of

probabilities; however, to the extent that they are relevant to the *value* of loss, they are ascertained by reference to the degree of probabilities or possibilities: *Sellars*, 355–6 (Mason CJ, Dawson, Toohey and Gaudron JJ), 368–9 (Brennan J) (**Exh. CLA-134**). Accordingly, the claimant is required to prove, on the balance of probabilities, that but for the relevant wrong, the claimant would have acted (or refrained from acting) so as to obtain the relevant benefit or avoid the relevant loss or liability. Once that is established, the claimant must prove, 'by evidence or inference', that, on the balance of probabilities, there was a 'substantial, and not merely a speculative' chance that the third party would have acted (or refrained from acting) in this way: *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602, 1623 (Millett LJ) (**Exh. CLA-96**); *Prosperity Advisers*, [73] (Tobias AJA; Macfarlan and Barrett JJA agreeing) (**Exh. CLA-130**). Once those two matters are established, the court will assess the value of the chance 'by reference to the degree of probabilities or possibilities': *Sellars*, 355 (Mason CJ, Dawson, Toohey and Gaudron JJ) (**Exh. CLA-134**).

15. The appropriate standard of proof to apply to the hypothetical acts of the defendant, or a person closely related to the defendant, will also depend on whether those acts go to the *fact* or *value* of the claimant's loss. In principle, if the hypothetical acts go to the fact of the claimant's loss, the claimant must prove those acts on the balance of probabilities, despite the fact that they are hypothetical: *QCoal Pty Ltd v Cliffs Australia Coal Pty Ltd* [2009] QCA 358, [42], [44] (Fraser JA; Holmes JA and White J agreeing) (*obiter*)- (**Exh. CLA-131**); *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1999] 1 Lloyd's Rep 483, 493–6 (Waller LJ; Ward and Roch LJJ agreeing) (**Exh. CLA-124**). On the other hand, if the hypothetical acts of the defendant, or a person closely related to the defendant, go to the value of the claimant's loss, those acts are assessed by reference to the degree of probabilities or possibilities: see, eg, *Chaplin v Hicks* [1911] 2 KB 786 (**Exh. CLA-100**); *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357 (**Exh. CLA-135**).

Remoteness

16. Like other types of loss, damages for the loss of a commercial opportunity will be awarded where the loss is caused by the defendant's breach, and that loss falls within the rules of remoteness of damage applicable to the claim: see, eg, *IOOF Building Society Pty Ltd v Foxeden Pty Ltd* [2009] VSCA 138, [175]-[178] (Full Court) (claim

in contract) (**Exh. CLA-114**); *Cadoks Pty Ltd v Wallace Westley & Vigar Pty Ltd* (2000) 2 VR 569, [199] (Ashley J) (claim in contract and in tort) (**Exh. CLA-99**).

Value of loss

17. Once liability for loss of a commercial opportunity is established, the value of that loss must be determined.

18. A claimant bears the legal burden of proving the value of the lost commercial opportunity: *Waribay Pty Ltd v Minter Ellison* [1991] 2 VR 391, 397 (Young CJ and Kaye J) (**Exh. CLA-139**); *Longden v Kenalda Nominees Pty Ltd* [2003] VSCA 128, [32]–[33] (Chernov JA; Buchanan JA agreeing) (**Exh. CLA-117**); *Origin Energy LPG Ltd (formerly Boral Gas (NSW) Pty Ltd) v BestCare Foods Ltd* [2013] NSWCA 90, [86] (Ward JA; Hoeben JA agreeing) (**Exh. CLA-125**).

19. However, the claimant is not required to prove the value or extent of that loss on the balance of probabilities: *Waribay*, 397 (Young CJ and Kaye J) (**Exh. CLA-139**); *Price Higgins & Fidge*, 354 (Winneke P; Ormiston J and Charles JA agreeing) (**Exh. CLA-128**). The value of the loss involves the evaluation of hypothetical (past and future) events, and is therefore assessed by reference to the court's assessment of the degrees of probabilities and possibilities that the relevant benefit would have been realised, or the relevant loss or liability would have been avoided: *Sellars*, 355 (Mason CJ, Dawson, Toohey and Gaudron JJ), 368 (Brennan J) (**Exh. CLA-134**); *Tabet*, 585 [136] (Kiefel J; Hayne, Crennan and Bell JJ agreeing) (**Exh. CLA-137**). On this basis, a claimant may be entitled to damages for the loss of a commercial opportunity even though it is improbable that the opportunity will be realised: *Amann*, 92–4 (Mason CJ and Dawson J), 104 (Brennan J), 118–19 (Deane J) (**Exh. CLA-101**); *Sellars*, 349–50, 355 (Mason CJ, Dawson, Toohey and Gaudron JJ), 364–5, 368 (Brennan J) (**Exh. CLA-134**). Instructively, damages have been awarded for the loss of an opportunityy assessed at only 10%: *Global Network Services Pty Ltd v Legion Telecall Pty Ltd* [2001] NSWCA 279, [120] (Meagher JA; Beazley JA agreeing) (**Exh. CLA-110**).

20. The claimant is required to prove the value of a lost commercial opportunity 'with as much certainty and particularity as is reasonable in the circumstances': *Longden*, [33] (Chernov JA; Buchanan JA agreeing) (**Exh. CLA-117**). In order to recover substantial damages, a claimant must therefore adduce 'evidence from which the value of that lost

opportunity can be assessed': *Origin Energy*, [86] (Ward JA; Hoeben JA agreeing) (**Exh. CLA-125**). If proof of the value of a lost commercial opportunity has been made difficult or impossible by the conduct of the defendant, the court may apply the presumption in *Armory v Delamirie*, and resolve any uncertainty against the defendant: *Radosavljevic v Radin* [2003] NSWCA 217, [54] (Mason P; Handley and McColl JJA agreeing) (**Exh. CLA-132**).

Valuation approach

21. Australian law has adopted what can be described as the 'simple probability' approach to the valuation of the loss of a commercial opportunity: see, *Sellars*, 350, 355 (Mason CJ, Dawson, Toohey and Gaudron JJ) (**Exh. CLA-134**); *Tabet*, 585 [137] (Kiefel J; Hayne, Crennan and Bell JJ agreeing) (**Exh. CLA-137**). Under this approach, the value of the loss of a commercial opportunity is determined by assessing the degree of probability of the opportunity, and then by assigning a monetary value to that probability.

22. While the simple probability approach has been widely accepted by Australian courts, it does not require the application of a particular percentage discount to the claimant's damages: *Glenmont Investments*, 283 [442] (Full Court) (**Exh. CLA-109**). In *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 (**Exh. CLA-118**), Brennan and Dawson JJ observed (at 640) that damages based on hypothetical events 'need not be assessed by first determining an award on the footing that the hypothetical situation would have occurred and then discounting the award by a selected percentage. Damages founded on hypothetical evaluations defy precise calculation.'

23. In general, the simple probability approach can be applied in one of two ways: the 'single outcome' method; or the 'expected value' or 'weighted average' method. The singe outcome approach requires the court to determine, from the competing figures before the court, the 'likely' (*Perez*, 366 (Wilson, Toohey and Gaudron JJ) (**Exh. CLA-115**)), 'most probable' (*Browning v Brachers* [2005] EWCA Civ 753, [212] (Jonathan Parker LJ; Mance LJ and the Vice Chancellor agreeing (**Exh. CLA-98**)), or 'most likely' (*Commonwealth v Ryan* [2002] NSWCA 372, [73] (Hodgson JA)) (**Exh. CLA-103**) outcome of the opportunity, and then assessing the probability of that outcome. On the other hand, the weighted average method involves the court identifying each potential outcome of the opportunity, assigning a weight (probability) to each outcome,

and then averaging the results to arrive at a probability weighted average. While each method is legitimate, Australian courts appear to favour the single outcome method: see, eg, *Fightvision Pty Ltd v Onisforou* (1999) 47 NSWLR 473, 505–6, 507 (Full Court) (**Exh. CLA-106**). Determining the value of the loss of a commercial opportunity using the simple probability approach involves two steps: see, eg, *Glenmont*, 281 [429] (Full Court) (**Exh. CLA-109**). First, the value of the object of the opportunity is determined. Secondly, the probability of the opportunity is assessed and the value of the object is then adjusted to reflect that probability.

24. However, if the claimant receives a benefit as a result of the defendant's wrong, an intermediate step is involved: the claimant must first account to the defendant for the value of that benefit before the value of the object is adjusted. This requires the court to subtract the value of the benefit from the value of the object of the opportunity, and then to adjust the resulting sum to reflect the probability of the opportunity: *Ministry of Defence v Wheeler* [1998] 1 WLR 637(**Exh. CLA-121**); see, eg, the approach taken by French J in *Adelaide Petroleum NL v Poseidon Ltd* (1990) 98 ALR 431, 528–32 (not challenged on appeal) (**Exh. CLA-95**).

Valuing the object of the opportunity

25. The object of a commercial opportunity is an asset. In general terms, in the absence of an applicable statutory or contractual provision, the value (or loss in value) of an asset is determined by reference to its 'market' value: *Spencer v Commonwealth* (1907) 5 CLR 418, 432 (Griffith CJ), 441 (Isaacs J) (**Exh. CLA-136**); *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 514 [49] (McHugh, Hayne and Callinan JJ) (**Exh. CLA-119**); *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413, 436 [49]-[51] (McHugh J) (**Exh. CLA-116**). The market value of an asset is the hypothetical price at which a hypothetical seller and a hypothetical buyer, who are both informed and willing but not anxious to trade, would agree as the exchange price of the asset.

26. If the object of the opportunity is a marketable asset, the value of that object can be determined by reference to the (comparable) market price of that asset: see, eg, *G W Sinclair & Co Pty Ltd v Cocks* [2001] VSCA 47 (**Exh. CLA-107**). This approach will be most useful where the object of the opportunity involves an identifiable item of property for which an established and liquid market exists at the time for assessment of damages.

27. If the object is not a marketable asset, an alternative methodology must be used, such as a discounted cash flow analysis. Using this approach, the value of the object is measured by reference to the present value of the anticipated future cash flow of the asset. This approach is often used when the object of the opportunity is an income-producing asset: see, eg, *Hungry Jack's Pty Ltd v Burger King Corporation* [1999] NSWSC 1029 (**Exh. CLA-113**); *P M Sulcs v Daihatsu Australia* [2001] NSWSC 636, [813], [913] (Kirby J) (**Exh. CLA-126**); *BestCare Foods Ltd v Origin Energy LPG Ltd (formerly Boral Gas (NSW) Pty Ltd)* [2013] NSWSC 1287, [167]–[171] (Stevenson J) (**Exh. CLA-97**).

28. Alternatively, if precise evidence of the value of the object is unavailable, or where the assessment of that value involves considerations that are highly subjective or policy driven, an intuitive or 'broad-brush' approach may be adopted. This approach involves the court assigning a value to the object of a commercial opportunity based on the evidence, and the court's judgment, knowledge, and experience. The intuitive approach is most used to value a cause of action: see, eg, *Perez*, 367 (Wilson, Toohey and Gaudron JJ) (**Exh. CLA-115**); *Nikolaou*, 404 (Wilson, Dawson, Toohey and Gaudron JJ) (**Exh. CLA-123**).

Assessing the probabilities

29. The second step in valuing the loss of a commercial opportunity is to assess the probability of the successful realisation of the opportunity. The most common way to assess this probability is to select a percentage figure that reflects the 'contingencies' or 'vicissitudes' affecting the successful realisation of the object of the opportunity. This percentage figure is then used to adjust the value of the object of the opportunity. However, in valuing the loss of a commercial opportunity a court will not inevitably apply a contingency discount: *Rosa v Galbally & O'Bryan (No 2)* [2013] VSCA 154, [30], (Tate JA; Harper JA and Kyrou AJA agreeing) (**Exh. CLA-133**).

30. The assessment of contingencies is 'necessarily subjective': *Glenmont*, 283 [442] (Full Court) (**Exh. CLA-109**). In *BestCare Foods*, Stevenson J summed up the task of assessing contingencies as follows (at [175]) (**Exh. CLA-97**):

> 'The task involves an exercise of judgment… and which, necessarily, cannot be scientific or mathematical in nature, nor susceptible to a detailed process of reasoning. To a large

> extent, I find the process to be one of impression. It is… 'an evaluative determination of a discretionary nature, not susceptible of complete exposition' which is 'inexact, non-scientific, not narrow or purely mathematical, and fact and circumstance specific.'

31. If the object of an opportunity is subject to multiple contingencies, a court may assess those contingencies on a global basis, or alternatively, by assessing each contingency separately: *Falkingham v Hoffmans (a firm)* (2014) 46 WAR 510, 570 [288] (Buss JA) (**Exh. CLA-105**). In a loss of commercial opportunity context, the weight of authority favours a global approach to the assessment of contingencies: see, eg, *Poseidon Ltd v Adelaide Petroleum NL* (1991) 105 ALR 25, 41 (Burchett J; Sheppard J agreeing) (**Exh. CLA-127**). In some circumstances, such as where a court assesses contingencies separately, or the claimant suffers the loss of additional commercial opportunities, it may be necessary to apply the mathematical rules of probability.