

CITATION: *Halikos Hospitality Pty Ltd & Ors v INPEX Operations Australia Pty Ltd*  
[2019] NTSC 10

PARTIES: HALIKOS HOSPITALITY PTY LTD  
(ACN 143 433 998)

and

HALIKOS PTY LTD  
(ACN 092 987 463)

and

HALIKOS INVESTMENTS PTY LTD  
(ACN 009 639 221)

and

HALIKOS NT PTY LTD  
(ACN 159 722 620)

v

INPEX OPERATIONS AUSTRALIA  
PTY LTD (ACN 150 217 262)

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory  
jurisdiction

FILE NO: 9 of 2016 (21611352)

DELIVERED: 13 February 2019

HEARING DATE: 3 August 2017

JUDGMENT OF: Kelly J

## CATCHWORDS:

CONTRACT – Objective intention to enter into a legally binding relationship - Whether letter of 13 February 2014 amounted to a binding agreement for defendant to take and pay for 225 (reducing to 150) rooms over a 15 year period – Objective intention to be determined by what reasonable people in the position of the parties with their knowledge of surrounding circumstances would have understood by the relevant communications – No objective intention to enter into legally binding relationship - Judgment for the defendant

CONTRACT – No actual authority of officers of defendant to bind defendant – No ostensible authority - Judgment for the defendant

EQUITY – Estoppel – Whether defendant estopped from denying the existence of a binding agreement - Whether on or about 13 February plaintiffs and defendant adopted the mutual assumption that they had entered into a legally binding agreement – No mutual assumption established – Judgment for the defendant

EQUITY – Estoppel by representation – Whether plaintiffs proceeded with development in reliance on promise or assurance by defendant that defendant would take and pay for 225/150 rooms over a 15 year period or that it was committed to taking and paying for rooms in the development – no promise or assurance established – No reliance established – Judgment for the defendant

AUSTRALIAN COMPETITION LAW – Misleading and deceptive conduct – Whether by words and conduct defendant represented that it had made a commitment to take and pay for 225/150 rooms over a 15 year period or that it was committed to taking and paying for rooms in the development – No representation established – Judgment for the defendant

*Australian Competition Law* (Cth) s 18, 236

*Australian Competition Law* (NT) s 18, 236

*Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* 1975] HCA 49; (1975) 133 CLR 72, *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd* (1964) 2 QB 480, *Northside Developments Pty Ltd v Registrar General* (1989) 170 CLR 146, *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; 218 CLR 451, *Alphapharm Pty Ltd* (2004) 219 CLR 165, *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387, applied

**REPRESENTATION:**

*Counsel:*

Plaintiff: RJ Whittington QC with RD Williams  
Defendant: PE Cahill with N Christrup

*Solicitors:*

Plaintiff: Finlaysons  
Defendant: Paul Maher Solicitors

Judgment category classification: B  
Judgment ID Number: Kel1902  
Number of pages: 138

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Halikos Hospitality Pty Ltd & Ors v INPEX Operations Australia Pty Ltd*  
[2019] NTSC 10  
No. 9 of 2016 (21611352)

BETWEEN:

**HALIKOS HOSPITALITY PTY LTD**  
**(ACN 143 433 998)**  
First Plaintiff

**HALIKOS PTY LTD**  
**(ACN 092 987 463)**  
Second Plaintiff

**HALIKOS INVESTMENTS PTY LTD**  
**(ACN 009 639 221)**  
Third Plaintiff

**HALIKOS NT PTY LTD**  
**(ACN 159 722 620)**  
Fourth Plaintiff

AND:

**INPEX OPERATIONS AUSTRALIA  
PTY LTD**  
**(ACN 150 217 262)**  
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 13 February 2019)

**The Parties**

- [1] The plaintiffs are companies that form part of the Halikos Group, a Darwin based group of companies involved in property development, management,

construction and related activities. (The plaintiffs are collectively referred to in the parties' submissions and these reasons as "Halikos" except where it becomes necessary to distinguish among them.)

- [2] John Halikos (the founder of the Halikos Group) and Shane Dignan (Managing Director) are the directors and shareholders of the Halikos companies. Mr Halikos owns 51% of the shares in the second plaintiff, Halikos Pty Ltd (HPL), and Mr Dignan owns 49% of the shares in that company. HPL is the parent company of the first plaintiff Halikos Hospitality Pty Ltd (HH) and the fourth plaintiff, Halikos NT Pty Ltd (HNT). HPL is engaged in property development and financing. Mr Halikos and Mr Dignan are the directors of HH. HH is the hospitality arm of the Halikos Group and provides accommodation and other hospitality services, including operating hotels and serviced apartments in and around Darwin. Geoffrey Weeks is the Executive General Manager of HH. HNT is engaged in owning and leasing property and property development. The third plaintiff, Halikos Investments Pty Ltd (HI), is a company engaged in property development and financing property development. HI is wholly owned by Mr Halikos, and is the trustee of the Halikos Family Trust. All of the dealings between Halikos and INPEX the subject of these proceedings were conducted on behalf of Halikos by Mr Dignan and Mr Weeks.
- [3] The defendant, INPEX Operations Australia Pty Ltd, is the agent and operator appointed by joint venturers to construct and operate the onshore and offshore processing facilities for the Ichthys LNG Project at Bladin

Point, near Darwin (“the Ichthys Project”). (The defendant is referred to in the parties’ submissions and these reasons as “INPEX”.)

- [4] INPEX’s head office is in Perth, Western Australia. Its ultimate parent company is INPEX Corporation, which is based in Tokyo, Japan.

**Background/matters not in dispute**

- [5] Evidence was given about the structure of the Ichthys Project and INPEX’s operations by way of background. INPEX contracted with JKC Australia LNG Pty Ltd (“JKC”) to construct the onshore facilities for the Ichthys Project in the Northern Territory, and JKC has subcontracted this work to various subcontractors.

- [6] INPEX has several business units, each with separate responsibilities.

These include:

- (a) the Onshore Construction division which is responsible for the construction of the onshore facilities;
- (b) the Operations division which is responsible for the operation of the offshore and onshore facilities after the construction phase is finished;  
and
- (c) the Corporate Co-ordination division which manages INPEX’s general business services, human resources and external affairs including dealings with government, media and public relations.

- [7] In the period from 13 February 2014 until 15 October 2014, Hitoshi Okawa san was a director and company secretary of INPEX. Mr Christopher Wheeldon was the General Manager, Construction and Mr Sean Kildare was the General Manager, INPEX Darwin office. Mr Kildare was part of the Corporate Co-ordination division, answering to Atsushi Sakamoto san, also a director of INPEX, who held the position of Onshore Project Director.
- [8] Uncontradicted evidence was given that INPEX has various requirements for the authorisation and approval of proposed contracts. At the times relevant to these proceedings these included the preparation of a decision note for key decisions, followed by a recommendation for award (“RFA”) or recommendation for variation (“RFV”). These then had to be assessed by senior officers who made a recommendation. For contracts over US\$30 million, the recommending officers had to include the President Director of INPEX, Ito san. For contracts over US\$500,000 (or for variations which took the contract value over the contract ceiling specified in the original RFA) the RFA or RVA had to be approved by the Contracts Committee and then embodied in a formal written document executed by a director or directors of INPEX. For contracts or variations over US\$10 million, relevant joint venture partners also had to approve. For contracts over US\$40 million, approval of the parent company, INPEX Corporation was necessary.
- [9] The joint venture agreement required a tender process to be conducted for proposed contracts over US\$10 million, unless joint venture approval had

been obtained. Prior approval from the General Manager Contract & Procurement was required to “sole source” a contract (that is, to award it to a party without a tender).

[10] It is not disputed that on 15 February 2012, Halikos and INPEX entered into an agreement whereby Halikos agreed to provide to INPEX not less than forty apartments in a particular building (not H105, the building at the centre of this dispute) for a five year period from 1 May 2012 until 30 April 2017 (“the Accommodation Agreement”). The term of the Accommodation Agreement was for five years (from 1 May 2012 to 30 April 2017). The rates payable were set out, and it was agreed that they would be increased annually by 6%. The Accommodation Agreement contained the following clause (clause 3):

If, during the term of the Agreement, INPEX requires additional apartments:

- (i) Halikos will use its best endeavours to make the additional apartments available to INPEX;
- (ii) INPEX’s use of any additional apartments will be on the same terms as this Agreement; and
- (iii) the rate payable for additional apartments will be the then current rate payable by INPEX in respect of an equivalent Apartment if INPEX request for additional apartments is made before 1 July 2012. If INPEX request for additional apartments is made after 1 July 2012 then the rate for the additional apartments will be the rate as agreed between the parties.

[11] It is also not in dispute that Mr Weeks and Mr Dignan gained some knowledge of the existence of INPEX's internal procedures during the process of negotiating the Accommodation Agreement in 2011 and 2012.<sup>1</sup>

### **Summary of the plaintiffs' claims**

[12] The first plaintiff, HH claims that it had a binding agreement with INPEX to supply not less than 225 apartments and hotel rooms over a 15 year period (reducing to not less than 150 after five years) which was breached by INPEX. The agreement is alleged to have been entered into on 13 February 2014 and repudiated by INPEX on either 15 October or 20 November 2014. The alleged agreement is referred to in the statement of claim, and these reasons, as "the Additional Accommodation Variation". HH claims damages for breach of the Additional Accommodation Variation.

[13] Halikos also claims that, in reliance on representations and conduct by INPEX, various of the plaintiff companies demolished existing buildings at 105 Mitchell Street, Darwin, terminated leases, and undertook a \$46.75 million development of that site to construct the 180 room H105 apartment/hotel complex ("H105") and that they suffered detriment as a result.

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<sup>1</sup> During the course of negotiating and finalising the Accommodation Agreement, Mr Wheeldon provided Halikos with a copy of the Recommendation for Award for that Contract which contained a lengthy and detailed analysis of the proposal, was signed by eight different INPEX personnel including Okawa san, Sakamoto san and Mr Wheeldon, and had provision for signing by the Contracts Committee and four other senior management people including the President Director Seiya Ito san.

[14] There are alternative, and concurrent, claims in contract, estoppel and for misleading and deceptive conduct but all of Halikos' claims stem from either the contract claim by HH or the claim by Halikos that it went ahead with the development of H105 as a result of promises or representations by INPEX. The four plaintiffs have claimed for different alleged losses arising as a result of the various claims.

[15] INPEX denies the existence of the alleged contract and denies that it made the alleged promises or representations that form the basis of the claims.

### **Examination of the evidence and findings of facts**

[16] There are several key events in this case. The first is a meeting between Mr Dignan, Mr Weeks, Okawa san, Sakamoto san, Mr Wheeldon and Mr Kildare, in Perth on 17 January 2014. Halikos relies on statements alleged to have been made at this meeting in support of its contract claim and its other claims. INPEX denies that those statements were made.

[17] The second key event is a meeting between Mr Dignan and Mr Weeks on behalf of Halikos and Mr Kildare on behalf of INPEX, on 13 February 2014, as a result of which a letter prepared by Halikos was signed by Mr Wheeldon's deputy, Mr Davies, while Mr Wheeldon was absent on leave. Halikos claims that this letter evidences the existence of the pleaded Additional Accommodation Variation.

[18] It is therefore necessary to look at the evidence relating to each of those meetings, and the events leading up to them as well as to some of the

dealings that followed (especially those contained in the documents) to assess whether these support or contradict the evidence of the various participants as to what occurred at those key meetings, and then to make findings of fact before analysing and determining each of the plaintiffs' claims.

### **Dealings in 2012-2013**

[19] There is a great deal of affidavit evidence from Mr Weeks and Mr Dignan from Halikos, and from officers of INPEX including Mr MacDonald (Accommodation Package Manager); Mr Bajars (General Manager, Onshore Operations); Mr Walker (Director Operations); Mr Wheeldon and Mr Davies (Mr Wheeldon's deputy) about communications between Mr Weeks and Mr Dignan and various INPEX personnel in 2012 and 2013 concerning the possibility of Halikos providing further accommodation for INPEX and for contractors and sub-contractors on the Ichthys Project. This included some reference to "the Mitchell Street Project". There is a great deal of dispute about who said what, much of which it is not necessary for me to determine. Much of the dispute revolves around whether Halikos was put on notice that there would be a tender process for any accommodation contract for the operational phase of the Ichthys Project and also whether Halikos told INPEX that it would not be proceeding with the development of H105 unless it had a commitment from INPEX.

[20] Mr Dignan and Mr Weeks depose that Mr Dignan told Mr Wheeldon (and Mr Davies) that Halikos wanted to build a hotel on 105 Mitchell Street, but that it needed a commitment from INPEX before doing so. Mr Wheeldon and Mr Davies deny this.

[21] Mr Wheeldon and Mr Davies both say that in discussions in September or October 2013 they told Mr Dignan and Mr Weeks that any contract for accommodation for the operations phase of the Ichthys Project would be put out to tender, and also that Mr Dignan told them that Halikos was going to build a hotel at 105 Mitchell Street. Messrs Dignan and Weeks deny this.

[22] I accept the evidence of Mr Wheeldon and Mr Davies that Halikos was told that any contract for accommodation for the operations phase would be put out to tender and that Mr Dignan told them that Halikos was going to build a hotel at 105 Mitchell Street and did not say that Halikos would only do so if it got a commitment from INPEX. Their evidence is consistent with the following documentary evidence that preceded and followed these discussions.

[23] On 22 April 2013, Mr Weeks sent an email to Mr Walker from INPEX in which he said:

Our Managing Director and myself are here in Perth and politely request to catch up with you tomorrow to discuss the Inpex Operations project ahead. Unfortunately Glen is away and we have some queries we would like to just touch base with as we are underway with the development of a new building.

We going ahead with our build, however at the same time we want to make sure it meets the requirements in your tender as we are a little

confused with the latest numbers. The build is around \$60 Million and if the numbers of apartments required in the build are less - then this is vital information to planning and development, as well as reducing costs by \$5 million. If the numbers you require are higher than our design then we could miss the opportunity to deliver what is required in the tender. If you could understand we don't want to waste any opportunity to find out later, after we commence, that it does not fit your needs. *[emphasis added]*

[24] Mr Weeks deposed that Mr Dignan told him at this time that Halikos was not going ahead with any build unless he had a contract with INPEX. In his affidavit, Mr Weeks explained away this email by saying: "I wrote that statement in order to put Halikos's best foot forward for the purposes of the discussions, including to try and bring matters to a head." [He did not explain what there was to "bring to a head" when the email refers to a contemplated tender process.]

[25] On 9 May 2013, Mr Weeks sent an email to Mr Bajars from INPEX saying:

I trust your trip to the USA was pleasing, but as well tend to say it's good to be back home.

I just wanted to follow up on the tender for your project when it will possibly available to review.

I would also ask are you intending to visit Darwin soon so that we can catch up regarding numbers and other queries so we can establish we are on the right track with our development that is moving ahead.

[26] On 24 May 2013 Mr Weeks sent a letter to INPEX containing an "expression of interest" in providing accommodation services. He received no reply.

[27] Throughout 2013 and the early part of 2014, there were requests from Mr Weeks to Mr Wheeldon to be advised of "numbers" – referring to the number of people from INPEX, its head contractor JKC and sub-contractors

who would need to be accommodated during particular periods of time.

(The above are some examples.) When he responded, Mr Wheeldon said he was unable to provide numbers as he had not received them.

[28] On 7 October 2013, Mr Weeks sent Mr Wheeldon two draft agreements for Halikos to provide accommodation for INPEX. Neither was the same as the pleaded Additional Accommodation Variation. Each was expressed to be for four years; each stated that Halikos agreed to provide 130 apartments for the rates set out, and that if INPEX required additional apartments Halikos would use its best endeavours to make the additional apartments available. Each was silent as to whether the obligation on INPEX would be to pay for the apartments whether or not they were occupied. The difference between the two was that one was expressed to be a variation of the original Accommodation Agreement and the other was a stand-alone agreement. In his covering email, Mr Weeks said:

One document is as a stand-alone agreement and the 2nd is a variation agreement taken from the C2 Agreement<sup>2</sup> which may make more sense. It is based on a clause in that agreement if INPEX requests additional apartments. They are Word format documents should you need to discuss tracking changes.

[29] Mr Weeks deposed that Mr Wheeldon “raised clause 3” – ie that it was Mr Wheeldon’s suggestion to draft an agreement which was expressed to be a variation of the original Accommodation Agreement utilising clause 3 of that agreement (set out above). Mr Wheeldon denied that this idea came from him. The underlined words in the covering email from Mr Weeks

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<sup>2</sup> This is a reference to the original Accommodation Agreement.

suggest that the idea came from Mr Weeks. (Further, in an email dated 29 January 2014 to Mr Kildare and Mr Wheeldon, Mr Weeks explained why he said the use of a variation to the original contract would benefit INPEX.)

[30] Halikos did not receive a positive response (or indeed an acknowledgement) from INPEX to either of the two draft agreements and on 20 November 2013 Mr Dignan sent an email to Mr Wheeldon containing the following proposition:

I wanted to follow up if your people have come back to you with the updated numbers for INPEX's future apartment requirements at our 105 Mitchell Street project to share with me.

Chris, if current numbers are still not available to you, could I suggest an option that we can both still move forward, whilst waiting for final numbers, that ensures Halikos meeting the completion date for occupancy. If you could send me an email requesting (what you thought were your original numbers) 126 apartments, I would be happy to respond confirming back to you that should those numbers reduce you could release back apartments without any commitment, and alternatively should your numbers increase that we would supply the extra apartments.

In essence, what I am proposing is that based on our good working relationship that we give each other a gentleman's agreement by email that assists both our businesses till the final numbers are known and we move to formal documentation.

Mr Wheeldon responded that he was in Perth packing up his house and would get back to him. This proposal was not followed up.

[31] Both parties are agreed that in early 2014, the then Chief Minister of the Northern Territory, Mr Adam Giles made representations to INPEX about the perceived negative effects the Ichthys Project was having on tourism in

the Territory as a result of upward pressure on accommodation prices.

(There had been publicity about this in the press.)

### **Lead up to the Perth meeting**

[32] Towards the end of 2013, Mr Weeks, Mr Dignan and Mr Wheeldon had discussions about the prospect of Messrs Weeks and Dignan meeting Okawa san and Sakamoto san. Mr Wheeldon says that Messrs Weeks and Dignan asked to meet Okawa san. Messrs Weeks and Dignan both say that it was Mr Wheeldon's suggestion. It is of no real importance but, given that the initiative (indeed pressure) to "get things moving" had been coming from Halikos, I consider it likely that it was Messrs Weeks and Dignan who requested the meeting. This is also consistent with later correspondence referred to below.

[33] On 6 December 2013, Mr Weeks, Mr Dignan and Mr Wheeldon met at Ducks Nuts. Again, the parties have different accounts of that meeting. Mr Wheeldon deposed that Mr Dignan asked him to provide him with an email confirming that INPEX needed additional rooms. Mr Wheeldon replied that he couldn't do that because the onshore construction unit of INPEX (his area of responsibility) did not need the rooms. He said he was still struggling to get numbers from the major contractor JKC. He told Mr Dignan that there was a process to be followed and that without JKC involvement there would be no need for rooms for the construction phase. He said that operations might be interested in the proposed development at

105 Mitchell Street. He also said that the project (ie the Ichthys Project, not necessarily INPEX) would always need rooms.

[34] Mr Dignan gave a very different version of this meeting. He said that Mr Wheeldon asked him to put together a letter – to be sent to Perth that day - setting out Halikos’s proposal regarding developing 105 Mitchell Street, and “to put in that letter a reference to the fact that Halikos was going to start the project” because it would “assist him internally”. He also said that, at some stage during the meeting, when Mr Weeks was out of the room, he asked Mr Wheeldon “if the purpose built building for INPEX at 105 Mitchell Street was something that INPEX still wanted,” and that Mr Wheeldon shook his hand and said, “Yes, we will definitely be taking it.” He said that Mr Wheeldon told him to keep progressing with designing and planning the development at 105 Mitchell Street.

[35] I consider that Mr Dignan’s account of the meeting is highly improbable. It is not consistent with any of the objective evidence of communications between the parties before and after 6 December. No plausible reason has been suggested as to why Mr Dignan would ask Mr Wheeldon if INPEX still wanted the building. (He had not had a response to the draft agreements he had sent and Mr Wheeldon had still not given him information about projected numbers.) There is even less reason to suppose, given the state of play evident from the email correspondence, that Mr Wheeldon would respond to such a question by shaking Mr Dignan’s hand and saying, “We’ll definitely be taking it.” Nor is there any plausible suggested reason why

Mr Wheeldon would have “internal” reasons to want Mr Dignan to say Halikos was going to start the development - particularly if (as Mr Dignan deposed) Mr Dignan had told him that was not going to happen without a commitment from INPEX. It simply doesn’t make sense and I find that it did not occur.

[36] Mr Wheeldon’s account of the conversation is consistent with the state of play revealed by the email correspondence. Halikos was pushing for an agreement with INPEX for the provision of additional accommodation, or failing that a non-binding “gentlemen’s agreement” or, failing that, for a letter stating that INPEX would require 65 apartments (see [39] and [40] below). I find that Mr Dignan and Mr Weeks asked Mr Wheeldon to arrange a meeting with Okawa san.

[37] That same day (6 December 2013), Mr Dignan sent a letter to Mr Wheeldon in the following terms:

Dear Chris

Thank you for the meeting today, we appreciate your time in a very busy environment of the ICTHYSIS project.

In our meeting we discussed the issues impacting on both our companies that being the negative press and at times criticism surrounding availability of accommodation in Darwin, now and into the future. It is in both our companies’ best interests to provide a solution to this problem and turn this negative situation we currently find ourselves in to a positive outcome.

We respectfully request, and would appreciate, the opportunity to present to yourself and the Directors of the project a solution that we believe would be suitable all stakeholders.

To briefly outline our proposal, Halikos Hospitality Pty Ltd is the largest provider of accommodation in Darwin and therefore in the best

position to get the balance correct between available accommodation to satisfy tourism and project or FIFO workers. We are about to commence construction of a dual hotel and apartment complex - 105 Mitchell Street which will consist of approximately 64 Hotel Suites and 68 2 Bedroom Apartments.

The benefits of this complex which would resolve the current negative press of accommodation are: *[These are listed.]*

From a public relations perspective we believe we can get the “buy in” from the crucial stakeholders such as Tourism, Government and the Local Community that the future for accommodation in Darwin CAN be solved to everyone’s satisfaction and best interests.

Chris, we would like the opportunity to formally present to yourself and the Directors, by travelling to Perth for a joint meeting. Given this current situation is escalating we would be happy to present as early as next week.

We look forward to hearing back from your Directors on turning the corner on this current negative situation and delivering a solution for everyone.

Kind regards

Shane Dignan

Managing Director Halikos Pty Ltd *[emphasis added]*

[38] This letter is unambiguous. It communicated to INPEX that Halikos was about to start construction on 105 Mitchell Street and that Mr Dignan wanted a meeting with the Directors to put a proposal to INPEX; not that it would only construct H105 if it had a binding agreement with INPEX to rent 225 (or 150) rooms over 15 years – or indeed any kind of commitment or agreement from INPEX at all.

[39] In his covering email, enclosing the letter to Mr Wheeldon, Mr Weeks wrote:

Thank you for this morning’s meeting – we appreciate your time.

As discussed, could we receive your correspondence on accommodation requirements of around 65 apartments at our proposed 105 Mitchell Street complex.

[40] Mr Wheeldon responded on the same date:

Geoff,

The letter has already gone to the relevant persons in Perth top (sic) review and revert. If we get a positive response from that it may alleviate any other commitments so I would like to see what sort of response I get first to gauge the interest before I commit to 65 rooms.

Cheers

This response too, is inconsistent with Mr Dignan's account of the 6 December meeting.

[41] On 10 January 2014, Mr Weeks and Mr Dignan met with Mr Wheeldon and Mr Kildare in Halikos' H Hotel Board room to do a "test run" of Halikos' presentation re the 105 Mitchell Street project. All parties present agreed that Mr Weeks and Mr Dignan presented a power point presentation and Mr Kildare and Mr Wheeldon made comments and suggestions. However, there is disagreement between the deponents as to what else was said.

[42] Mr Dignan deposed that they emphasised that H105 would be "a dedicated purpose built building for INPEX for the project". Mr Kildare agreed that Mr Weeks said the building would be "purpose built" – which he understood to mean for accommodating the construction, FIFO, business and corporate travelling market as opposed to tourists – but did not recall anything being said about "purpose built for INPEX".

- The second sentence on page 1 of the presentation reads: "We believe this purpose built complex will provide INPEX with a plausible

solution to an issue arising of late surrounding suitable accommodation in Darwin now and into the future.”

- Under the heading “Benefits” it states: “The complex would be accommodation dedicated to the project.”

[43] Mr Dignan also deposed, “Whilst the first slide (headed “Introduction”) suggested that Halikos was about to commence constructing 105 Mitchell, I clearly stated that Halikos would not start construction without a written commitment from INPEX.” Mr Weeks gave evidence to the same effect: he used the words “written contract”. I do not accept that evidence. It is at odds with the written material.

- The first page of the presentation begins with the sentence: “The Halikos Group is about to commence construction of a dual hotel and residential complex at 105 Mitchell Street which will consist of mix of one and two bedroom suites.”
- The following dot point appears under the heading “Summary”:  
“105 Mitchell has a Development Approval to commence immediately and finance approval has been granted allowing us to meet your pending accommodation requirement in 2015 and beyond.”

[44] Mr Dignan also deposed, “Chris Wheeldon said that we should, in the presentation, refer to using clause 3 of the Accommodation Agreement as a variation mechanism for the additional accommodation when we presented

to INPEX's directors". I do not accept that evidence either. It is fairly clear from the email from Mr Weeks to Mr Wheeldon of 7 October 2013 enclosing the two draft agreements (referred to at [28] above) that the idea of a variation to the Accommodation Agreement purportedly pursuant to clause 3 of that agreement originated with Halikos.

[45] Mr Kildare deposed that he asked about the state of readiness of the project and that Mr Dignan told them Halikos had all the approvals, the financing was all sorted, a construction schedule was ready, pre-commitments were being completed, that Halikos would commence demolition in early April 2014 after the wet season and that they would then start construction, which would take about 15 to 18 months. He deposed that neither Mr Dignan nor Mr Weeks said that construction was conditional upon INPEX making a commitment to take accommodation in H105. I accept that evidence: it is consistent with the general tenor of the written presentation.

#### **The meeting in Perth on 17 January 2014**

[46] The requested meeting took place in Perth on 17 January 2014. Present were Mr Dignan, Mr Weeks, Okawa san, Sakamoto san, Mr Wheeldon and Mr Kildare. This is the meeting that both parties rely upon on the issue of whether Mr Kildare and Mr Wheeldon had ostensible authority to bind INPEX to the alleged Additional Accommodation Variation. This meeting is also crucial to the estoppel and misleading or deceptive conduct claims.

- [47] It is common ground that the Halikos parties took a bound presentation booklet to the meeting in lieu of the power point presentation shown to Mr Wheeldon and Mr Kildare at the “test run” presentation in Darwin on 10 January. It is also common ground that Mr Weeks and Mr Dignan gave the presentation.
- [48] Mr Kildare deposed that Shane Dignan said that Halikos would commence construction by April as soon as possible after the wet and that it would take approximately 15 to 18 months to build; he did not make any qualification to that. Mr Kildare deposed that there was some discussion about INPEX’s accommodation requirements: that Okawa san said that the Project needed to better manage its accommodation requirements in Darwin so as to overcome the negative publicity from tourism and local industry; that Sakamoto san said he did not believe INPEX needed further accommodation of this type; and that Mr Wheeldon interjected that further accommodation was needed because the workforce was going to increase.
- [49] Mr Kildare deposed further that first Sakamoto san and then he (Mr Kildare) said that INPEX would not underwrite or commit to one building and Okawa san and Mr Wheeldon expressed agreement. He deposed that he said words to the effect that if Halikos wanted to build a building like H105 it was up to them – their decision and their risk. He then suggested that Halikos and INPEX could consider moving to a more flexible concept and that a broad accommodation services arrangement would be more suitable than a dedicated building.

[50] Mr Kildare agreed that Mr Dignan raised the possibility of a variation to the existing Accommodation Agreement as an alternative to a completely new agreement.

[51] Mr Kildare deposed that Okawa san:

- (a) asked Mr Weeks and Mr Dignan to provide an alternative proposal for a broader accommodation service agreement rather than for one specific building;
- (b) said that INPEX needed to have a better understanding of its accommodation requirements before it could review, assess and agree to a proposal from Halikos (and that Sakamoto san agreed);
- (c) asked Chris Wheeldon to determine whether there would be an increase in accommodation numbers for Onshore Construction outside the Howard Springs Accommodation Village;
- (d) told Chris Wheeldon that if he justified an increase in the accommodation numbers this would have to be detailed in a decision note and the appropriate processes (which he outlined) completed before INPEX could commit to any proposal;
- (e) said that Chris Wheeldon would take on the role of lead negotiator with Halikos for a broader accommodation service agreement;

- (f) said that any proposal received from Halikos would have to go through INPEX's internal contracts review process, leading up to a formal decision by the Ichthys Executive Committee; and
- (g) told Mr Weeks and Mr Dignan that he (Mr Kildare) could assist from a relationship management perspective, and specifically with relevant stakeholders, such as politicians and business groups.

[52] Mr Kildare deposed that he re-iterated/summarised all of this at the end of the meeting and that Mr Weeks and Mr Dignan indicated that they understood.

[53] Mr Wheeldon deposed that he could not recall in detail who said what at the meeting but he did recall that:

- (a) someone (he can't recall who) said something to the effect that if the proposal led to an agreement the easiest method should be used to document it and that the Accommodation Agreement should be looked at to see if it could be used for any agreement if the proposal proceeded;
- (b) someone from INPEX said that INPEX did not see the need for a building;
- (c) at no stage during the meeting did either Mr Weeks or Mr Dignan say what Halikos wanted from INPEX;

(d) after the presentation there was a general discussion among those present to the effect that:

- INPEX did not need a building;
- INPEX could not get accurate information from JKC about its manpower and accommodation requirements and what INPEX needed was a third party to assess and report on the accommodation being used by all personnel on the project in Darwin not just INPEX personnel and for that third party to control and co-ordinate accommodation for all personnel on the Project across all accommodation developers in Darwin;
- that Halikos may be the preferred party to undertake that third party position; and
- that if they went this route it would need to include an agreement by all parties, INPEX, JKC and subcontractors or it would not be effective and would not proceed.

[54] Okawa san deposed that his recollection of the meeting was of listening to and looking through the presentation and of hearing Mr Weeks saying that Halikos could provide accommodation dedicated to INPEX personnel. He also said that he recalled Mr Weeks talking about the idea of a broader accommodation service agreement. He deposed that he (Okawa san) told Messrs Dignan and Weeks that there would be internal processes to go

through, that they would need to check what the accommodation requirements were for the Project, and that it was not clear yet if the Project had a need for additional accommodation. He also told them that if Halikos' proposal was the solution to the issue of the NT Government's concerns about accommodation, and if the Project required additional accommodation, their proposal was a good idea. He (Okawa san) also said that INPEX needed to do the proper market research to review their manning plans, what accommodation they already had, what accommodation was available and then compare them so they could see if there was a gap. He asked what would be the simplest way to put a solution into effect if the analysis showed there was not enough accommodation for the number of workers and Mr Dignan said that one option would be to enter into a variation of the existing Accommodation Agreement. (There was no detailed discussion of this.) Okawa san responded to the effect that if that was the simplest, "Let's do that". At the end of the meeting he said he preferred to pursue the broader accommodation services agreement rather than construction of the new building. He also said that Chris Wheeldon should take the lead in the discussion with Halikos and commence internal research to check the Project accommodation requirements (referring to INPEX, JKC and the subcontractors). He told Mr Kildare to support Mr Wheeldon.

[55] Sakamoto san also gave a general overview of the meeting without recalling too many specifics of what was said. In his first affidavit, Sakamoto san

deposed that when they went to page 33 of the presentation which said that the development application had been approved and the demolition of the existing building was to commence on 31 January 2014, either Mr Weeks or Mr Dignan said words to the effect that they wanted endorsement from INPEX for the proposal by then. In his second affidavit he deposed that that was a mistake. They said words to the effect that they wanted something from INPEX by then.<sup>3</sup> At the time of the meeting, he did not understand what they wanted. He said something about two weeks being too short for INPEX to make a decision. He also recalled that he said that Onshore had secured all the accommodation it needed and did not need any additional accommodation. He recalled that Okawa san asked Mr Wheeldon to research the bed requirements for INPEX but could not recall whether he asked him to research the requirements for JKC and subcontractors. He commented that Mr Wheeldon was the contract holder of the Accommodation Agreement with Halikos and the one managing that contract and so was the appropriate person to continue discussions with Halikos.

[56] Several of the INPEX witnesses deposed that Mr Kildare's position in the company, as part of the Corporate Co-ordination division, not the Construction division, was made known to Mr Dignan and Mr Weeks at the meeting.

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<sup>3</sup> An email to Okawa san from someone else in INPEX referring to an article in the NT News on 26 February 2014 announcing the construction of H105, said: "After all, this has got permission! I recall that they told us to respond by the end of January? Now we can get rid of the disrespectful Hilton Darwin."

[57] Mr Dignan and Mr Weeks give a different version of events at the meeting.

Mr Dignan denied a number of things which the INPEX witnesses (or some of them) said occurred at the meeting. He denied:

- (a) that Sakamoto san said INPEX did not need further accommodation;
- (b) that anyone at the meeting said that INPEX would not commit to one building;
- (c) that anyone said that if Halikos wanted to build a building like 105 Mitchell it was up to them – their decision and their risk;
- (d) that either Mr Wheeldon or Okawa san had mentioned the possibility of a broader accommodation agreement at the meeting;
- (e) that Okawa san said he wanted an alternative proposal for a broader accommodation agreement rather than one for a specific building, or that he wanted to pursue such an agreement rather than the construction of a new building;
- (f) that anyone at the meeting mentioned that a broad accommodation agreement would be more suitable than a dedicated building;
- (g) that Okawa san asked Mr Wheeldon to justify an increase in accommodation numbers;

- (h) that Okawa san asked Mr Wheeldon to determine whether there would be an increase in the accommodation numbers outside the INPEX village;
- (i) that Okawa san said it was not clear whether the Project required additional accommodation;
- (j) that there was any mention of onshore manning and accommodation requirements;
- (k) that either he or Mr Weeks said they wanted an endorsement for the proposal;
- (l) that there was any mention of the need to review, assess and agree a proposal from Halikos or for INPEX to undertake further internal analysis, or of any decision note, internal contract review process or formal decision by the executive committee; and
- (m) that there was any mention of the respective roles of Okawa san and Mr Kildare.<sup>4</sup>

[58] Mr Dignan also deposed that certain things did happen at the meeting. He said that:

- (a) during the presentation he explained that Halikos had development approval and finance pre-approvals in place, so that work on H105

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<sup>4</sup> However, Mr Dignan conceded in cross-examination that he understood Mr Kildare to be essentially an external affairs or public relations person, as did Mr Weeks.

could start as soon as INPEX committed to the building and the additional accommodation;

- (b) later in the presentation he stated that Halikos would not go ahead with the redevelopment of 105 Mitchell without a binding written agreement and commitment from INPEX;
- (c) everyone from INPEX was nodding and smiling and commenting that they were “impressed with the building and the location” and other similar comments;
- (d) he and Mr Weeks said that Halikos wanted a four year agreement for 148 rooms at H105;
- (e) Okawa san asked Mr Wheeldon whether the agreement could be done straight away by a variation, and that Mr Wheeldon and Mr Kildare both said that using clause 3 of the Accommodation Agreement and a variation would mean a more streamlined approach which would avoid the need for a tender process;
- (f) following that Okawa san nodded, smiled and said, “I am happy,” and, “I agree with what is proposed,” and, “This is what INPEX wants,” and, “Halikos and INPEX should move forward on this basis;”
- (g) Mr Kildare said, “This is definitely what INPEX needs,” and “This could fix INPEX’s issues.” He also said, “INPEX needs to get this deal

done so we can tell everyone that we are fixing the accommodation problem.”

- (h) Mr Wheeldon said he had already run the numbers and that INPEX needed the accommodation that Halikos was proposing: he said, “INPEX needs every bit of accommodation it can get for the project,” and, “This is going to be great for INPEX,” and, “INPEX is so lucky to have Halikos in Darwin”;
- (i) Okawa san asked Mr Wheeldon to find out and finalise how much more accommodation was needed over the 148 rooms at H105 and then to negotiate what was required under clause 3 of the Accommodation Agreement;
- (j) after Mr Kildare said what a great job Halikos was doing, Okawa san said, “I want a broader, longer term accommodation solution covering the Construction, Commissioning and Operations phases of the Project;”
- (k) Okawa san also said, “I want the 148 rooms in 105 Mitchell but also need more,” and accordingly that the accommodation would not necessarily be in just that one building;

(l) Okawa san then said, “Chris and Sean,<sup>5</sup> you are to finalise the additional accommodation needed as soon as possible and then come back to Halikos”;

(m) towards the end of the presentation, he again stated that a written agreement and commitment from INPEX would be required before building work commenced.

[59] In his affidavits, Mr Weeks gave very similar evidence. He added an additional detail. He deposed that Okawa san said, “The agreement should be for longer than 4 years so it covers Construction, Commissioning and Operations. It should be for 15 years.”

[60] Mr Weeks did disagree with Mr Dignan in relation to one aspect of the meeting. He said that Okawa san did talk about a broader general accommodation provider agreement. He attributed these statements to Mr Okawa:

(a) “I also want a broader general accommodation provider agreement.”

(b) “I want Halikos to take the accommodation burden off INPEX, so that we can concentrate on the Project rather than being a landlord.”

(c) “It will be Halikos’ role to source the accommodation, deal with maintenance issues and to provide INPEX with statistics or other information as required.”

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5 Chris Wheeldon and Sean Kildare

[61] Mr Weeks emphasised that while Okawa san did say that Mr Kildare was to assist Mr Wheeldon, he did not say that assistance was limited to relationship management or say that Mr Kildare had only a limited role because this was an onshore construction issue. Mr Weeks also deposed that towards the end of the meeting Okawa san said to Mr Wheeldon, “Chris, you are responsible for finalising the amount of accommodation we need. I then want you to finalise the agreement and get things moving.”

[62] I accept that the meeting happened generally as outlined in the evidence of the INPEX witnesses. Although the recollections of the witnesses differed in matters of detail; some remembered more detail than others; and some recalled details which others did not, those accounts are broadly similar.

[63] I reject the following parts of the evidence of Mr Dignan and Mr Weeks.

- (a) I do not accept that Mr Dignan said that Halikos would not go ahead with the redevelopment of 105 Mitchell Street without a binding written agreement from INPEX (or anything to that effect).
- (b) I do not accept that either Mr Dignan or Mr Weeks proposed that INPEX enter into a four year lease of the 148 rooms in 105 Mitchell.
- (c) I do not accept that Mr Wheeldon said that he had already run the numbers and that INPEX needed the accommodation that Halikos was proposing, or that he said that INPEX needed every bit of accommodation it could get for the project.

- (d) I do not accept that either Mr Kildare or Okawa san said anything to the effect of, “I am happy,” “I agree with what is proposed,” “This is what INPEX wants,” or, “Halikos and INPEX should move forward on this basis.”
- (e) I do not accept that Okawa san said, “I want the 148 rooms in 105 Mitchell but also need more.”
- (f) I do not accept that Okawa san said anything to the effect that Mr Wheeldon or Mr Kildare should finalise how many more rooms were needed over and above the 148 in H105 and get back to Halikos.
- (g) I do not accept that Okawa san said, “The agreement should be for longer than 4 years so it covers construction, Commissioning and Operations. It should be for 15 years,” or anything to that effect.
- (h) I do not accept that Okawa san said, “Chris, you are responsible for finalising the amount of accommodation we need. I then want you to finalise the agreement and get things moving,” or anything to that effect.

[64] The statements attributed to Okawa san and Mr Wheeldon are inherently improbable particularly in light of other evidence to the effect that any agreement for accommodation for the operations phase would be put out to tender, and in light of the evidence about the quite complicated internal procedures for entry into contracts required by INPEX of which both

Okawa san and Mr Wheeldon were well aware. The evidence I do not accept is also inconsistent with the written presentation and other objective documentary evidence both before and after the meeting.

[65] In the email correspondence before the meeting, Halikos was pressing Mr Wheeldon to provide numbers and Mr Wheeldon did not have them, and in an email on 6 December 2013 to Mr Weeks, Mr Wheeldon declined to commit to taking 65 rooms – or even to provide a letter stating that INPEX required that many.

[66] The written presentation is also not consistent with the evidence of Mr Dignan and Mr Weeks about what occurred at the 17 January meeting.

(a) The presentation booklet contained a copy of the letter of 6 December 2013 from Halikos to Chris Wheeldon (referred to above) which contained this representation: “We are about to commence construction of a dual hotel and apartment complex – 105 Mitchell Street which will consist of approximately 64 Hotel Suites and 68 2 Bedroom Apartments.”

(b) The following appears on page 14 of the booklet:

The Halikos Group is due to commence construction of a dual hotel and residential complex at 105 Mitchell Street which will be a mix of Hotel rooms, along with one and two bedroom residents. This purpose built complex will provide the Ichthys Project with a local accommodation solution plus a positive news story.

(c) The following appears on page 16 of the booklet:

105 Mitchell will be a purpose built development dedicated to the Ichthys Project and located centrally on Mitchell Street one of the main business and tourist hubs of Darwin.

- (d) The following appears on page 18 of the booklet:

The complex is accommodation dedicated to the Ichthys project and INPEX other interest in the Territory. (sic)

- (e) Page 33 of the booklet is headed “105 MITCHELL CONSTRUCTION PROGRAM”. Under that is a list of dates and stages with boxes.

18/11/2013	Development Application Approved
31/01/2014	Demolition of existing building
07/02/2014	Site setup
14/03/2014	Base level
10/06/2014	Level 4 Podium
07/11/2014	Roof & platform
27/11/2014	Fit-out
01/02/2015	Furniture
23/02/2015	Permit to Occupy

The first box “Development Application Approved” is ticked.

- (f) The following appears on page 34 of the booklet:

As a long-term Northern Territory businessman I am very excited to have the opportunity to evolve our Hospitality business alongside the Ichthys project, we hope to grow and work in unison with INPEX during the construction phase and into the future with the operational component.

- (g) On the other hand the following Summary appears on page 38:

#### SUMMARY

105 Mitchell has Development Approval to commence immediately and finance approval has been granted allowing us to meet your pending accommodation requirement in 2015 and beyond.

□ Halikos Hospitality is pleased to offer a “Variation” to the current INPEX Operations Australia Contract Number 800575, thus streamlining the contract process. A prompt commitment would allow construction to commence and accommodation deadlines to be met.

□ As a local owner and operator we are in a position to offer INPEX management and staff purchasing opportunities at 105 Mitchell with a significant discount applied to each sale contract, allowing them to invest in the Territory.

□ In summary the Halikos Group has a long term commitment in the Territory and we are very proud of our existing relationship with INPEX and wish to extend accommodation services now and into the future.

(h) Interestingly, the booklet says nothing about what Halikos wants

INPEX to commit to. It does not propose that INPEX enter into a four year lease of the 148 rooms in 105 Mitchell.

[67] I consider it highly likely that the discussion at the 17 January meeting centred around the accommodation needs of the Ichthys Project (which included workers for the head contractor JKC and sub-contractors); and that Okawa san asked Mr Wheeldon to check the Project accommodation requirements (referring to INPEX, JKC and the subcontractors) and to begin negotiating a broader accommodation services agreement with Halikos, not limited to the provision of accommodation in a single building. Such a conclusion is supported by events that occurred after the meeting.

#### **Follow up to the meeting of 17 January 2014**

[68] The Halikos witness’s account of what did (and did not) happen at the meeting is inconsistent with documents created after the meeting. On 18 January 2014 Mr Weeks sent an email to Okawa san, Sakamoto san and

Mr Wheeldon enclosing a draft agreement expressed to be a variation of the Accommodation Agreement. The email contained the following:

As advised in our meeting, INPEX, in giving considering (sic) to our proposal, would undertake a further review of the forward manning levels and future accommodation requirements across the whole project.

[69] This contradicts the assertion by Mr Dignan that Okawa san did not request Mr Wheeldon to obtain such numbers and that Mr Wheeldon said he had already run the numbers. It also supports the evidence of the INPEX witnesses that what was being discussed at the meeting was the accommodation requirements for the Ichthys Project as a whole. Further, it demonstrates an understanding by Mr Weeks that INPEX was to complete its review of the Project's accommodation requirements in Darwin before it would commit to any binding agreement with Halikos. This review was not complete by 13 January 2014.

[70] The draft variation agreement enclosed with that email was a proposal for Halikos to provide to INPEX 148 rooms in 105 Mitchell for four years (with provision for a number of two year extensions at INPEX's option). Halikos received no response from INPEX to this proposal.

[71] Mr Weeks also deposed that when he met with Mr Kildare on 28 January 2014, the majority of the time was spent discussing services that Mr Kildare wanted included in the agreement (for example catering services and airport transfers) which supports the evidence of the INPEX witnesses that the brief

given to Mr Wheeldon, with Mr Kildare's assistance, was to negotiate the terms of a broader accommodation services agreement.

[72] On 29 January 2014 Mr Dignan sent an email to Mr Wheeldon and Mr Kildare saying:

A very productive meeting this morning to address project accommodation requirements long term. The basis of our discussions was to seek a mutually agreed variation that benefits both INPEX and Halikos moving forward:

1. INPEX and Halikos agree in principle to move to an Accommodation Services Provider Agreement which can be as an extension/variation of existing contract 800575.
2. Halikos confirmed they would immediately commence construction of 105 Mitchell Street Apartments & Hotel, of which all rooms will be dedicated solely to project accommodation requirements.
3. The term for this agreement be a minimum of 5 years but preferred to a period of 15 years plus options.

[73] This is not consistent with Mr Dignan's evidence that he told Okawa san and the others at the 17 January meeting that Halikos would not begin construction of 105 Mitchell without a binding written agreement from INPEX. It is consistent with the evidence of the INPEX witnesses that what was discussed at the meeting was accommodation requirements for the Ichthys Project as distinct from a lease of rooms in a specific building to INPEX.

[74] In an email dated 29 January 2014 to Mr Kildare and Mr Wheeldon, Mr Weeks wrote:

Please find below a snapshot of the existing agreement outlining the key elements supporting a variation that benefits INPEX and its sub-

contractors by appointing Halikos Hospitality as its Accommodation Services Provider.

[75] Again, this supports the evidence of the INPEX witnesses that what was discussed at the meeting of 17 January was the negotiation of an accommodation services agreement, as does the reply from Mr Kildare dated 31 January 2014, in which he wrote:

I note your summary of the key points of the discussion, set out below and agree that they capture the principle objectives and shared view of the way forward.

The principle of re-negotiating and agreeing a more robust, longer-term and broader accommodation services contract, that meets the long term needs of our construction phase and the on-coming operations phase, is much more suitable to both party's needs.

This should allay the need for INPEX and Halikos to discuss specific accommodation allocation on a 'per-building' basis, which does not represent the bigger picture for both parties.

I have discussed this new approach with my Director and he is now aware of the next steps to be taken and agrees it is far more suitable for our needs. Though, he did state, and I do agree, that our future needs (while expected), are not clearly defined at this time. That is a work currently in progress and Chris Wheeldon will bring that details to the table. (sic)

Further into the future, INPEX's Operations accommodation needs will also clarify as we move closer to operational start-up in late 2016.

The next tasks to be undertaken are:

1. Chris Wheeldon to determine numbers and timing of ex-village accommodation requirements in the Darwin area. This will include INPEX, EPCs and their sub-contractors (as best as can be determined).
2. The current accommodation services contract (noted below) is held with Chris Wheeldon. Chris will take the lead to negotiate a broader, longer term contract and propose that for execution.
3. We welcome the assurances from Halikos that the pricing and priority terms and conditions agreed win the current contract will form the basis of the new one.

[76] This email supports the evidence of the INPEX witnesses that at the meeting of 17 January 2014:

- (a) the idea of a broader accommodation services agreement was favoured over an arrangement relating to a single building;
- (b) the discussions concerned the accommodation needs of the Ichthys Project as a whole;
- (c) the future accommodation needs were not yet known and would have to be assessed;
- (d) Chris Wheeldon was asked to assess those needs and also to negotiate a broader accommodation services agreement with Halikos.

It conflicts with the evidence of Mr Dignan that these things were not discussed; that Mr Wheeldon said he had already run the numbers; that Okawa san had approved INPEX taking all of the rooms in H105 and wanted more; and that Mr Wheeldon had been instructed to find out how many more rooms were needed and finalise an agreement with Halikos to provide them.

[77] Given the general consistency of the evidence of Mr Wheeldon and Mr Kildare with the objective documentary evidence, and the relative inconsistency of the evidence of Mr Dignan and Mr Weeks with that objective evidence, where there is no such objective evidence of what occurred and there is a conflict between the evidence of Mr Kildare and/or

Mr Wheeldon and that of Mr Dignan and/or Mr Weeks, I have preferred the evidence of Mr Kildare and Mr Wheeldon.

[78] Mr Wheeldon, Mr Kildare, Mr Dignan and Mr Weeks gave evidence of a number of meetings and discussions that were held between 28 January and 13 February 2014. It is not necessary to set out that evidence in detail. In summary, I accept the evidence of Mr Wheeldon and Mr Kildare that:

- (a) either Mr Wheeldon or Mr Kildare told Mr Weeks and Mr Dignan that INPEX did not need the apartments in H105 but said that other personnel working on the Project might;
- (b) Mr Wheeldon advised Mr Weeks and Mr Dignan that he was working on obtaining revised future workforce numbers but did not yet have them and that INPEX would analyse the accommodation numbers for the Project but that this would take some time;
- (c) Mr Wheeldon told Mr Weeks and Mr Dignan that if the analysis of the accommodation requirements justified the appointment of an accommodation services provider, a decision note on the additional accommodation requirements and the appointment of a service provider would have to be generated and circulated to all relevant departments within INPEX and that that process would take time.

[79] I do not accept the evidence of Mr Dignan that on 6 February 2014, Mr Wheeldon told him, “INPEX Legal are happy for this agreement to be

completed under the existing contract and clause 3 to allow for ease of signing,” or that Mr Wheeldon said that because Legal were happy, and because the parties could just use clause 3 of the existing agreement to make the new agreement a ‘variation’, as they had done in the past,<sup>6</sup> INPEX did not need to go out to tender, or that Mr Wheeldon told him that INPEX wished to avoid going to tender due to the delays that a tender may cause.

[80] I do not accept the evidence of Mr Dignan that around this time (ie 6 February 2014) Mr Wheeldon asked Halikos to send him, as soon as possible, a draft of the variation to the Accommodation Agreement that contained a minimum of 250 apartments. I accept the evidence of Mr Wheeldon that as at 6 February 2014, he did not have numbers for the accommodation requirements for the Project and was not in a position to tell Mr Weeks the accommodation numbers required by the Project.

[81] On 7 February 2014, Mr Weeks sent an email to Mr Wheeldon which stated he was sending through a draft variation agreement. (I do not accept, however, that this was in response to a request from Mr Wheeldon.) The email stated:

As discussed here is the draft document that I have put tentative numbers (minimum) and tenure in for us to confirm. The basis of the

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<sup>6</sup> There is evidence that, at an earlier time, a minor variation was made to the Accommodation Agreement without going through the decision note, RFA etc process. (It was a matter of substituting rooms in one building for rooms in another without additional cost to INPEX.) It may be that this initially gave Mr Dignan and Mr Weeks the idea that a proposal for INPEX to take additional accommodation could be documented in a variation to the Accommodation Agreement without going through the usual process. If so, the evidence shows that they were informed otherwise, at the meeting on 17 January and in later discussions and correspondence, for example in the email from Mr Kildare on 16 April 2014, referred to in para [170] below.

document is to ensure only the variations are noted and all other terms remain as per 800575<sup>7</sup> which I believe is covered.

If the number I have put 250 is very easy achieved then we can move this document to Perth & Japan very quickly as it will also satisfy INPEX and Shane's/Halikos needs as well. Additional requirements can be called on as required or as per forecast scheduling. The major commitment is to the 250 which we believe is achievable.

I have attached the original 800575 again as well

[82] The wording of this email strongly suggests that the figure of 250 inserted into the draft Variation Document came from Mr Weeks (as deposed to by Mr Wheeldon), and from not Mr Wheeldon (as deposed to by Mr Dignan), and that it was inserted as a basis for future discussion. I accept the evidence of Mr Wheeldon that he told Mr Weeks, "Drop it down to 225 and we will leave that as the base for us to prepare a decision note".<sup>8</sup>

[83] The draft variation agreement attached to the email of 7 February 2014 is headed "Variation of Contract Number 800575" and entitled "Accommodation Services Provider Agreement". The recitals state:

By agreement dated 15 February 2012 Contract 800575 ("Contract 800575") Halikos agreed to provide serviced apartments for the use of INPEX to accommodate its employees and contractors.

INPEX has appointed Halikos as INPEX's sole and exclusive accommodation service provider to provide accommodation in various properties in Darwin including C2 Esplanade – 102 Esplanade, 105 Mitchell - 105 Mitchell Street, One130 Esplanade - 130 Esplanade, H Hotel – 81 Smith Street, H20 Apartments – 6 Briggs Street, Novotel Atrium – 100 Esplanade, Eden Gardens - 69 Boulter Road, Frontier Hotel – 3 Buffalo Court and H Apartments Parap - 2 Mitaros Place.

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<sup>7</sup> This refers to the original Accommodation Agreement.

<sup>8</sup> Mr Weeks also gave evidence that Chris Wheeldon told him in a telephone call to reduce the amount of accommodation from 250 rooms and apartments to 225.

The parties have agreed to vary Contract 800575 to record the terms of appointment of Halikos as INPEX' sole and exclusive accommodation service provider.

[84] Clause 1 of the draft states (inter alia):

1. Halikos agrees to provide not less than 250 additional Apartments and Hotel suites comprising:

i apartments with the use of one car park each; and

ii Hotel suites with the use of one car park each;

furnished and equipped with the furniture and items detailed in Schedule 1<sup>9</sup> which will be under the management of Halikos Hospitality as per contract 800575 for the employees and contractors of INPEX for the following Rate ("the Rate"):

i. \$1341.00 per week – for each one bedroom apartment fully furnished/serviced;

ii. \$1816.00 per week – for each two bedroom apartment fully furnished/serviced; and

iii \$175.00 per day – for each Hotel suite per occupied room.

[85] Clause 1 goes on to provide for servicing of the Apartments and hotel rooms, use of gymnasium and pool and provision of Foxtel.

[86] Clause 4 provides that the term of the agreement will commence on the date of the agreement and expire on 1 September 2029. Clause 5 provides for two four year options exercisable by INPEX.

[87] Clauses 3.3 and 3.4 provide that from the date of the agreement to 28 February 2014, INPEX will pay for such of the additional rooms and apartments that are occupied by its employees and contractors; and that from

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9 The draft does not contain a Schedule 1.

1 March 2014 INPEX is to pay for not less than 250 additional rooms and apartments. (The draft does not specify the proportion of apartments and hotel rooms.)

[88] The rates are to increase by 6% per year: clause 2.

[89] Halikos did not receive any written response to the email of 7 February 2014, or to the attached draft variation agreement.

[90] On 12 February 2014, Mr Weeks sent an email to Chris Wheeldon and Sean Kildare annexing a revised draft variation agreement:

Good afternoon Chris

As per Sean's email dated 31st January 2014, we have now negotiated a broader, longer term contract for the purpose of execution. The document we completed (attached) has your advised combination of 225 apartment and hotels, the Term, and meeting the priority terms and conditions agreed within the current contract 800575.

If you or Sean could now confirm the above and your instruction for Halikos Hospitality Pty Ltd to secure the accommodation whilst the document is being executed.

Thank you for your time and assistance with preparation of the document it is appreciated.

[91] Mr Weeks deposed that he had discussions with Mr Wheeldon in which Mr Wheeldon asked him to reduce the number of accommodation units to 225; said that after the construction phase was finished only the Operations division's 150 hotel rooms and apartments would be needed; and told him that he was otherwise happy with the agreement.

[92] I accept the evidence of Mr Wheeldon that, other than agreeing that he told Mr Weeks to drop the numbers to 225 as the base to prepare a decision note,

he did not have any such discussions with Mr Weeks. Mr Wheeldon deposed that he had not, at that stage, received preliminary numbers from JKC and did not discuss numbers with Mr Weeks. He deposed that he did not receive those numbers until late in February, and this is supported by the evidence that on 24 February, Mr Wheeldon sent two emails to Mr Weeks attaching the figures supplied by JKC. (See [117] below.)

[93] The revised draft variation agreement is similar to the version emailed on 7 February except that the number of apartments and hotel rooms was reduced from 250 to 225; a split of 150 apartments and 75 hotel rooms was specified; the 225 apartments and hotel rooms were to be provided until 28 February 2019; from 1 March 2019 until 20 February 2029, Halikos was to provide not less than 150 apartments and hotel rooms; and INPEX was to pay only for the rooms occupied by its employees and contractors until 28 February 2015 (rather than 28 February 2014 as specified in the version emailed on 7 February). The recitals are the same in both.<sup>10</sup>

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**10** The email of 7 February 2014 was referred to an affidavit by Mr Weeks and also to an affidavit by Mr Wheeldon. The substance of both documents is the same. However the draft variation agreement in the plaintiff's documents, referred to by Mr Weeks contains the following endorsement on the front cover:

Issue date:        {TIME \@ "d MMMM yyyy"}  
                      {TIME \h:mm am/pm}  
                      FINAL

The draft variation agreement in the defendant's documents, referred to in the affidavit of Mr Wheeldon contains the following endorsement on the front cover:

Issue date:        12 February 2014  
6:29 PM  
FINAL

Also the setting out is slightly different between the two – with the same clauses appearing on different pages. Both documents recite on the second page: THIS VARIATION AGREEMENT is made on the 13<sup>th</sup> day of February 2014. (This date is one day after the "issue date" and the date the document was sent to Mr Wheeldon by Mr Weeks.) No explanation has been offered as to why the two documents differ or why the purported date of making of the agreement was inserted into a draft sent on an earlier date, however nothing turns on this.

### **The meeting on 13 February and the letter of 13 February**

- [94] The various participants gave totally different evidence about what happened next and the context in which the letter of 13 February was prepared and signed.
- [95] Mr Weeks deposed that Mr Kildare phoned him on 12 February 2014 after he had sent the email enclosing the revised draft variation agreement and asked for a meeting with Mr Weeks and Mr Dignan the next day to go through the draft, so that INPEX could secure the accommodation it required.
- [96] Mr Kildare deposed that it was Mr Weeks who phoned him and told him that he had been talking to other accommodation providers around Darwin about INPEX's accommodation needs and INPEX's suggestion that Halikos prepare a proposal to manage all of INPEX's accommodation needs in the Darwin CBD. Mr Weeks said that he was having difficulty pulling the Halikos proposal together because other accommodation providers would not speak to Halikos as they did not believe INPEX was asking Halikos for such a proposal. He said that he needed some form of note, or letter or "something from INPEX" that Halikos could show the other providers so

that Halikos could put a proposal together.<sup>11</sup> Mr Kildare said he would speak to Mr Wheeldon and get back to Mr Weeks. I prefer the evidence of Mr Kildare for the reason set out at [77] above, and also because, on the evidence of the documents, it was Halikos that was pressing for the matter to press towards a concluded agreement, not INPEX. INPEX did not respond in writing to any of the draft variation agreements sent to it by Halikos.

[97] Mr Dignan and Mr Weeks met with Mr Kildare on 13 February 2014.

Mr Weeks deposed that at that meeting he gave Mr Kildare a hard copy of the revised draft variation agreement and had a copy of the draft open on his computer. He deposed that Mr Kildare reviewed that document and asked that Mr Weeks make a number of changes to it, which he did on the spot. Mr Kildare then said words to the following effect: “I agree with Chris [Wheeldon] that using a variation is the right way for us to finalise this deal. I am happy with the variation document. It is correct and is all that is required. The RFA for the first agreement [the Accommodation Agreement] was fully signed off and that is all that’s needed for the variation.”.

Mr Weeks said that, from those statements, he understood that a final

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**11** Counsel for INPEX submitted that, whatever Mr Weeks may have said, the real reason Halikos wanted someone from INPEX to sign the letter they had drafted was to show to the banks for the purposes of their finance applications. There is evidence that Halikos had one or more offers of finance that were conditional on there being in existence a four year lease of H105 to INPEX and that Halikos had represented that such a lease had been agreed to or was about to be entered into. Counsel submitted that Halikos needed to get its finance in place to start building; Mr Weeks and Mr Dignan knew that INPEX was not interested in a lease over a specific building and in any event would not sign any formal agreement in the short term, so they were trying to get enough by way of a letter of comfort that the bank might be prepared to continue negotiations or finance without a pre-commitment. However, such a letter couldn’t be such an unequivocal commitment that INPEX wouldn’t sign it, hence the ambiguous/equivocal nature of the 13 February letter. That may be so, but it is not necessary for me to speculate about the motives of the parties. All that is necessary is that I make findings of fact, based on the evidence as to what was said and done and what was not in relation to events relevant to the pleaded case.

agreement had been reached between Halikos and INPEX for Halikos to provide to INPEX the additional accommodation described in the revised draft variation agreement, for the period set out in that document and on the terms contained in that document. (The draft variation agreement relied on by Halikos as incorporating the terms of the Additional Accommodation Variation (with some exclusions discussed at [228] to [130] below) is referred to in the statement of claim, and these reasons as “the Variation Document”.)

[98] Mr Weeks deposed that he had understood from earlier discussions with Mr Wheeldon that Mr Wheeldon had said he was happy with the revised draft variation agreement previously sent to him (on 12 February) and that INPEX’s legal team had signed off on the variation. He also understood, from the meeting on 17 January 2014, that no RFA or other INPEX internal sign-offs were required. Instead, Okawa san had told them (at that meeting) that they needed to go and get the agreement done, and that is what they had done.

[99] Mr Weeks went on to depose that after this, Mr Dignan asked that INPEX provide a letter confirming that Halikos was to secure the additional accommodation INPEX had agreed it would take, and said that he wanted a commitment in writing before he would start work on H105. He deposed that Mr Kildare asked Mr Dignan, in an obliging manner, what he needed the letter to say and that he (Mr Weeks) pulled up a draft that he and Mr Dignan had prepared earlier. He said that Mr Kildare reviewed the draft letter and

dictated some changes which Mr Weeks made to the letter as he spoke. He then printed the letter and gave it to Mr Kildare to read. He deposed that Mr Kildare then said that INPEX could send that letter to Halikos. He deposed that Mr Kildare said that Mr Wheeldon had the authority to sign the letter, but given he was on leave, Mr Davies (Mr Wheeldon's deputy) had the authority to sign it, and that he telephoned Mr Davies and made arrangements for Mr Davies to sign the letter and email it to him and to Mr Weeks and Mr Dignan.

[100] Mr Dignan's evidence was to the same effect.

[101] Mr Kildare's evidence about that meeting was very different. He deposed that at the beginning of the meeting, Mr Weeks repeated what he had said the previous day: that Halikos was having difficulty speaking with other accommodation providers and it was preventing them from putting forward their proposal to INPEX and that Halikos could not complete a proposal for accommodation management unless INPEX provided a letter setting out its interest in a broad accommodation agreement. He deposed that he (Mr Kildare) said that anything INPEX provided in writing was subject to final approvals from INPEX and that Mr Weeks said, "Yes," and that he understood that. He (Mr Kildare) said that he had discussed the matter with Mr Wheeldon and that Mr Wheeldon had agreed to provide a letter, but that the letter had to be subject to all final approvals from INPEX. He deposed that Mr Weeks pulled up a draft letter on his computer. After he had a quick read of the document, Mr Kildare pointed to the screen after the sentence

that begins “In the interim,” and said that this was “subject to” either final approvals or a final contract. (He could not recall which exact words he used, except “subject to”.) Mr Weeks said words to the effect of, “Yes, yes, yes – understood.” Mr Kildare was not given a hard copy of the letter at the meeting. Mr Kildare then telephoned Mr Davies and made arrangements for him to sign the letter in the absence of Mr Wheeldon.

[102] Mr Kildare deposed that they did not discuss any draft variation agreement at the meeting; he was not given or shown a copy of any draft variation agreement; and one was not put up on the screen. The only document put up on the screen was the draft letter.

[103] Mr Kildare deposed that when he later saw the signed letter, it did not contain the change he had requested.

[104] I accept the evidence of Mr Kildare, and find that the meeting occurred substantially as he deposed. This is partly for the reason set out at [77] above, and partly because the evidence of Mr Weeks and Mr Dignan is inherently implausible. Mr Kildare occupied a relatively junior position in the INPEX hierarchy and he was attached to the “Corporate Co-ordination” division so that the accommodation requirements for either the construction or operational phases of the Ichthys Project did not fall within his area of responsibility. Whether or not Halikos knew about INPEX’s internal requirements for entering into a contract, Mr Kildare certainly did. Given those matters, it is inconceivable that he would purport to finalise the terms

of an agreement with Halikos which would involve a commitment by INPEX to pay many millions of dollars over a 15 year period and which concerned a different division of the company from the one in which he was employed.

[105] I do not accept Mr Weeks' evidence that Mr Wheeldon had told him he was happy with the revised draft variation agreement previously sent to him (on 12 February) and that INPEX's legal team had signed off on the variation. There is no evidence at all that the revised draft variation agreement had even been sent to INPEX's lawyers. Mr Wheeldon went on leave the following day, and it is unlikely in the extreme that even if the lawyers had seen the revised draft variation agreement they would have "signed off" on it so quickly and no reason why Mr Wheeldon would have told Mr Weeks that they had.

[106] Mr Weeks' evidence that Mr Kildare said, "I am happy with the Variation Document. It is correct and is all that is required. The RFA for the first agreement [Accommodation Agreement] was fully signed off and that is all that's needed for the variation," is likewise implausible. Mr Kildare knew that a contract of this nature required a decision note to be prepared, circulated and signed by the appropriate people, an RFA to be prepared and other processes to be gone through within INPEX. There is no reason at all why he would tell Mr Weeks and Mr Dignan that this was not necessary. This evidence of Mr Weeks is also inconsistent with later documents and other communications passing between Mr Weeks and Mr Dignan and INPEX personnel in which Mr Wheeldon sought information for preparation

of a decision note<sup>12</sup> and Mr Dignan said in an email to Okawa san that he was “totally unaware that the internal decision note had not yet been completed” and that “we do understand that this is required”;<sup>13</sup> as well as the evidence that Mr Dignan had discussed the progress of the decision note with Mr Wheeldon.<sup>14</sup>

[107] Further, the letter of 13 February itself does not purport to annex the Variation Document and does not signal unambiguously that it is intended to bind INPEX. There is other evidence that Mr Dignan wanted to extract from INPEX a letter that would commit INPEX to taking the rooms and apartments referred to in the Variation Document. Mr Dignan instructed Halikos’ solicitor, Mr Henschke, to draft such a letter and he did so in the following terms:

This letter is to record INPEX’s agreement to enter into a Variation of Contract No 800575 for the purpose of appointing Halikos Hospitality Pty Ltd as INPEX’ sole and exclusive accommodation service provider.

It is a term of that appointment that Halikos Hospitality Pty Ltd provide ..... Hotel Rooms and Apartments with effect from .....

Prior to the terms of the Variation of Contract being documented and the Variation of Contract being executed by all parties this letter serves as a request for Halikos Hospitality Pty Ltd to secure ..... Apartments and Hotel Rooms for that purpose.

INPEX commits to entering into the Variation of Contract No 800575 within 45 days of this letter.

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12 paragraphs [164] to [170] below

13 paragraph [216] below

14 paragraphs [182] and [220] below

[108] Mr Dignan and Mr Weeks did not use the draft prepared by the solicitor: they drafted their own using words that did not signal an intention to create binding legal relations. The inescapable inference is that Mr Dignan and Mr Weeks were well aware that Mr Kildare would not have agreed to sign (or procure Mr Davies' signature on) an unambiguously binding document.

### **Dealings after the meeting on 13 February 2014**

[109] Halikos also relies on evidence of conduct subsequent to the 13 February meeting to support its contention that the parties regarded themselves as bound to a 15 year agreement in terms of the Variation Document. (Particulars of the conduct relied on are set out at [236] below.) However, the documentary evidence does not support such a conclusion.

#### **(a) Events from 17 February to 28 February 2014**

[110] On 17 February 2014, Mr Weeks sent an email to Mr Wheeldon and Mr Kildare enclosing a copy of the Variation Document in word format.<sup>15</sup>

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**15** This is the document that Halikos claims sets out the terms of the binding agreement between the parties made on 13 February 2014. The substance is the same as the revised draft variation agreement sent to Mr Wheeldon on 12 February.

There are minor amendments to the recitals. In recitals B and C, the term “sole and exclusive accommodation service provider” has been replaced with the term “primary accommodation service provider”, and the words “in Darwin in the Northern Territory of Australia” were added at the end of Recital C. Mr Weeks deposed that this change was requested by Mr Kildare on 13 February 2013. Mr Kildare deposed that they did not discuss the proposed Variation Agreement on that day.

The endorsement on the front cover of this document reads:

Issue date: 13 February 2014

4:21 PM

FINAL

On the second page it recites: THIS VARIATION AGREEMENT is made on the 13<sup>th</sup> day of February 2014.

The covering email reads:

Please find final draft of the Variation which includes the recommended changes from both Chris and Sean. I have left document in word format just in case.

We will finalise for signing when Chris Wheeldon and myself return from our respective annual leave.

[111] Mr Kildare deposed that he had never provided any comments on the draft variation agreement and had not discussed the terms of the draft variation agreement with Mr Wheeldon. The email of 17 February provides some objective support for Mr Weeks' (and Mr Dignan's) evidence that Mr Kildare did make suggested changes to the draft variation document, and it is possible that he did so either on 13 February or at another time and that Mr Kildare is mistaken about that. (The changes that were made to the recitals are such that INPEX would have been likely to want in any final draft.) Nevertheless, I am satisfied on the balance of probabilities that the meeting on 13 February occurred substantially as deposed to by Mr Kildare. Crucially, I accept Mr Kildare's evidence about Mr Weeks' explanation as to why Halikos wanted the letter; his evidence that he requested the words "subject to" either final approvals or a final contract be inserted (which was not done); and that he made it clear to Mr Dignan and Mr Weeks that anything INPEX provided in writing was subject to final approvals from INPEX.

[112] Neither Mr Kildare nor Mr Wheeldon responded to the email of 17 February. (Nor had anyone in INPEX responded to any of the previous draft variation

agreements they had been sent.) Mr Wheeldon deposed that he ignored the Variation Document attached to the email. At that time he had not completed the analysis of the accommodation requirements for the project and did not know whether a proposal for an appointment of an accommodation service provider would be supported within INPEX because he had not commenced the decision note procedure.

[113] Towards the end of February 2014, Mr Wheeldon and Mr Weeks had a telephone conversation. Again the evidence of each of them concerning the content of that conversation is diametrically opposed. Mr Wheeldon deposed that after he read the email of Mr Weeks dated 13 February 2014 and the attached letter, he telephoned Mr Weeks and said words to the general effect that the letter should not have been signed and that he disagreed with the letter.

[114] Mr Weeks has denied this. He deposed that Mr Wheeldon telephoned him and said that he had received updated figures from JKC that the additional accommodation it required outside the INPEX Village, together with that needed by INPEX, was more than the 225 apartments and hotels provided in the Additional Accommodation Variation and that he would be asking Halikos to also try and find that additional accommodation beyond the 225 that had already been agreed. Mr Weeks deposed that he asked Mr Wheeldon what that meant in terms of the Variation and where it was up to in terms of being signed; and that Mr Wheeldon said that there were no problems with the Variation, that the Variation Document would be signed

and that INPEX was a big company and that documents took time to be signed.

[115] Mr Weeks also deposed that he said to Mr Wheeldon for the first time in that telephone conversation that if he had to speak to other developers, he would need INPEX's authorisation. He said that up to that point, although numbers in excess of about 250 apartments had been mentioned, the numbers were in the range of what Halikos could comfortably provide from its existing stock, together with H105. He deposed that Mr Wheeldon authorised him to speak to other developers.

[116] I do not accept the evidence of Mr Weeks that in a telephone conversation towards the end of February 2014, Mr Wheeldon said that there were no problems with the Variation, and that the Variation Document would be signed. Whatever the state of the Halikos parties' knowledge of INPEX's internal procedures, Mr Wheeldon knew them. He knew that there was no guarantee that the Variation Document would be approved in its present form or at all. He had not yet started the decision note process. It is therefore most unlikely he would have told Mr Weeks that it would be signed.

[117] On 24 February 2014, Mr Wheeldon sent two emails to Mr Weeks forwarding an email exchange and a graph prepared by JKC showing the Ichthys Project personnel (JKC staff and subcontractors) staying outside the Village. From that, Mr Weeks would have learned that JKC were projecting

that from about February 2014 until about July 2016 there would be over 1,000 Ichthys Project personnel staying outside the INPEX Village, with the numbers peaking at over 3,000 for the period April to September 2015.

[118] Mr Wheeldon deposed that in February 2014, after he returned from leave, he had a discussion with either Mr Weeks or Mr Dignan in which he told them that he had spoken to Operations and they may be interested in a proposal for an accommodation service provider, but it had to await the tender process which would be undertaken by Operations. Mr Dignan and Mr Weeks deny that this conversation took place. I accept the evidence of Mr Wheeldon in relation to this. It is consistent with the later request by INPEX Operations for expressions of interest in the provision of accommodation by a tender process.

[119] On 25 February, Mr Weeks and Mr Kildare discussed a media release about H105. Mr Kildare sent an email to Mr Weeks on that date providing the following comments for the purpose of that media release.

There is a perception and comments being made that corporates and project staff are filling accommodation resources in the CBD area. INPEX welcomes developments such as this that increase available capacity and provide quality accommodation for the corporate and business travelling market.

[120] Mr Kildare's comments, together with comments by Mr Weeks were used in an article in the NT News on 26 February 2014. The article contained the following information, presumably provided by Mr Weeks:

With work starting in two weeks, “H105” will be a 4.5 star property with a mix of one and two-bedroom serviced apartments to accommodate resource project staff and corporate clients.

The article also contained the following quote attributed to Mr Weeks:

He [*Mr Weeks*] said the complex would only be available to Ichthys sub-contractors and other major projects contractors in Darwin.

[121] There is no mention in the article by either Mr Weeks or Mr Kildare of INPEX having agreed to take a lease of all of the rooms in H105 or of Halikos agreeing to provide 225/150 rooms and apartments to INPEX for 15 years. In fact the comments attributed to Mr Weeks are inconsistent with there being an agreement between Halikos and INPEX for INPEX to occupy the whole of H105 as claimed by Halikos.

[122] On 28 February 2014, Mr Wheeldon sent Mr Weeks and Mr Dignan an updated table of projected personnel staying outside the INPEX Village showing projected numbers for JKC and sub-contractors which, Mr Weeks deposed, were well in excess of the amount of accommodation which (on Halikos’ case) INPEX had agreed to take from Halikos.

**(b) Draft media release and dealings from 14 to 21 March 2014**

[123] On 14 March 2014, Mr Weeks sent an email to Mr Kildare attaching a draft media release and inviting Mr Kildare to add a comment or quote. That draft media release contains the following:

In finding a solution to concerns regarding project workers filling hotels in Darwin, Halikos Hospitality Pty Ltd has been awarded a major

contract by INPEX Operations Australia as the exclusive Accommodation Services Provider for the Ichthys project.

...

The contract covers the construction, commissioning and operation phases of the project for Halikos Hospitality to supply and manage accommodation for contractor and sub-contractor project workers outside the village. Halikos Hospitality currently has an inventory of over 800 hotel rooms and apartments in Darwin and already supplies over 400 of those to the project.

...

Mr Weeks went on to say that Halikos Hospitality will increase its portfolio of hotels and apartments to cater for the demand of project accommodation with construction commencing next week of H105 Apartments in Mitchell Street. We are also in negotiations with 2 other Developers to manage and operate their properties due for completion later in the year.

[124] Mr Kildare deposed that later that day he telephoned Mr Weeks and told him

INPEX was not ready to put out a media release because they did not have the “sign offs” for any additional accommodation and INPEX had not executed any variation or other contract. He deposed that Mr Weeks said words to the effect that he understood that but that they could prepare the media release so it was ready to go when they had the “sign offs”. In the event, that media release was never issued.

[125] Halikos relies on the draft media release as supporting its case that there was a concluded agreement in place at that time. However, the draft media release does not support the agreement pleaded by Halikos. Mr Weeks deposed:

Shortly after returning from leave, in the afternoon of on 14 March 2014 (a Friday), I sent an email to Sean Kildare to which I attached a draft media release in relation to the Additional Accommodation Variation. [*ie the pleaded agreement*]

However, the email actually says:

Shane Dignan has asked that I prepare a media release for our Accommodation Services Provider Agreement.

[126] The email of 14 March 2014 refers to the preparation of a media release in relation to an “Accommodation Services Provider Agreement”. Since it is common ground that no “services provider agreement” was ever concluded, that supports Mr Kildare’s evidence that the draft media release was prepared in advance of the agreement it refers to.

[127] On 18 March 2014, Mr Weeks sent an email to Mr Kildare saying:

As discussed please find attached electronic version of the full variation document for the Accommodation Services Provider Agreement.

I would be very grateful, as discussed, if you could co-ordinate a meeting with Okawa San for Friday afternoon whilst I am in Perth to finalise the discussions and proceed.

I will work on the amended press release and send to you later today for your quote

[128] The document attached to this email was headed “Accommodation Services Provider Agreement”. It was in substantially the same terms as the Variation Document relied on by Halikos as the agreement said to have been entered into on 13 February except that it had an “issue date” of 14 March 2014 whereas the Variation Document relied on had an “issue date” of 13 February 2014. (The first operative clause in both begins: “Halikos agrees to provide a combination of not less than 225 additional Apartments and Hotel rooms” and goes on to set out the term and the rates applicable.

Both purport to be “made on the 13<sup>th</sup> day of February 2014”; both are unexecuted.)

[129] In his evidence, Mr Weeks said that the reference in the email to meeting with Okawa san “to finalise the discussions and proceed” was a reference to the discussions in relation to the media release – rather than the agreement between Halikos and INPEX. I reject that evidence. The plain meaning of the email is that Mr Weeks wished to have a meeting with Okawa san to “finalise the discussion” in relation to the proposed agreement for Halikos “to provide a combination of not less than 225 additional Apartments and Hotel rooms” – ie the pleaded agreement. There is no other reason why Mr Weeks would have attached an electronic copy of what he refers to in the email as “a document for” the Accommodation Services Provider Agreement (and not as “the agreement”) – especially one with a different issue date from the one Halikos claims was finalised on 13 February. The email goes on to talk about sending the amended press release to Mr Weeks (not Okawa san).

[130] So read, Mr Weeks’ email of 18 March 2014 is inconsistent with Halikos’ claim that, as at that date there was a concluded agreement between Halikos and INPEX in the terms pleaded which had been made on 13 February.

[131] Also on 18 March 2014, Mr Weeks sent a further email to Mr Kildare attaching a revised draft media release. This draft media release was in very similar terms to the draft sent to Mr Kildare on 14 March (including the

reference to being the “primary Accommodation Services Provider for the Ichthys project” and the reference to Halikos being “in negotiations with other Developers to manage and operate their properties”). It contained a space for Mr Kildare to add his comments. The covering email seemed to indicate that Mr Weeks intended that the draft media release would be settled by Mr Weeks and Mr Kildare. It said:

Further to our notes on the Media Release I have updated for your perusal and commentary/quote ...

Leave with you to write something that together we will silence the critics (sic)

There is no request in the email that the draft be sent to Okawa san or any mention of obtaining his input or approval.

[132] Mr Kildare, however deposes that he told Mr Weeks he would send the draft to Perth for review and approval by INPEX media management and discuss it with Okawa san and that he also told Mr Weeks that the media release was a draft only which would be used at a later date after an agreement had been executed. Mr Weeks denied that this conversation occurred. I accept the evidence of Mr Kildare that that conversation did occur substantially as he deposed.

[133] Mr Dignan deposed that he and Mr Weeks met with Okawa san in Perth on 21 March 2014 at which time Mr Weeks gave Okawa san a copy of the letter of 13 February and “the draft document formally recording the Variation for execution”. He deposed that Okawa san said words to the effect that this

agreement was “what INPEX wanted” and “this satisfies the request I made on 17 January 2014 that INPEX and Halikos agree a longer, broader arrangement that covered the Construction, Commissioning and Operations phases”.

[134] Okawa san deposed that he had been shown a calendar appointment for a meeting with Geoff Weeks at the INPEX offices in Perth on 21 March 2014, but could not recall what was discussed during this meeting.

[135] Given the findings I have made about what occurred (and did not occur) at the meeting on 17 January 2014, I do not accept Mr Dignan’s evidence of what Okawa san said at the meeting on 21 March 2014. Mr Dignan also deposed that, at that meeting, Okawa san gave the go ahead to issue a media release. I consider that highly unlikely. It should be noted that no media release was issued.

[136] Mr Dignan also deposed that in speaking to Okawa san he made reference to the provision of accommodation that “had already been agreed” and that Okawa san did not say no agreement had been reached. I also consider this unlikely.

[137] Mr Weeks also gave evidence about this meeting and deposed to references being made to “the agreement” and “the deal” in conversations with Okawa san. Again, I consider this unlikely.

[138] Mr Weeks also deposed:

I said that a media release should be issued as this would benefit the agreement and take pressure off the parties given the recent negative press regarding accommodation availability and rates. Okawa san said that he agreed, and that Sean Kildare and I should prepare this.

I do not accept this evidence. In addition, I consider that this evidence is not consistent with Mr Weeks' explanation that the reference in the email of 18 March to wanting to meet with Okawa san "to finalise the discussions and proceed" was a reference to discussions in relation to the media release, as it seems to indicate that:

- (a) Mr Weeks had not had any earlier discussions with Okawa san in relation to any media release; and
- (b) once in a meeting with Okawa san, Mr Weeks did not take the opportunity to discuss or to finalise what would be in any media release.

**(c) Meeting with the Chief Minister and dinner at Hanuman**

[139] On 24 March 2014, a meeting took place with then Chief Minister Adam Giles. Mr Dignan, Mr Weeks and Mr Kildare give differing accounts of what occurred at that meeting. Mr Dignan and Mr Weeks both say Mr Kildare was not present.

[140] Mr Kildare deposed that at that meeting they discussed broader issues of accommodation and tourism in Darwin, that the Chief Minister asked how INPEX and Halikos were going with negotiations, and that he (Mr Kildare)

said, "Fine." He deposed that Mr Weeks asked Mr Giles if he was interested in participating in a joint press release or issuing one of his own.

[141] Mr Weeks and Mr Dignan deposed that they told the Chief Minister that Halikos had entered into a 15 year agreement with INPEX to provide accommodation and that Halikos was constructing 105 Mitchell Street dedicated to INPEX's project accommodation requirements.

[142] Mr Giles also deposed to what occurred at that meeting. He could not remember whether Mr Kildare was present or not. He said that during the meeting Mr Dignan and Mr Weeks told him that an agreement had been entered into between Halikos and INPEX for additional accommodation for the Ichthys Project and that this would be in a new purpose-built building.

[143] The Chief Minister's then Chief of Staff, Mr Ron Kelly, also deposed to what occurred at the meeting on 24 March. He said that Mr Dignan and Mr Weeks told him that an agreement had been entered into between INPEX and Halikos for additional accommodation.

[144] I do not know what to make of this evidence. It may be that Mr Dignan and Mr Weeks did tell Mr Giles that an agreement was already in place. If so, it was likely in the absence of Mr Kildare. However, I have found that as at the date of the meeting, there was no concluded agreement in place for the provision of additional accommodation by Halikos to INPEX of the kind pleaded. (This does not exclude the possibility that Mr Dignan and Mr Weeks told the Chief Minister that there was such an agreement.)

[145] On the evening of 24 March 2018, Mr Dignan, Mr Weeks, Mr Kildare, Mr Giles, Mr Kelly and Mr Gary Barnes (the then Chief Executive of the Department of Chief Minister) attended a dinner together at Hanuman restaurant. Mr Dignan deposed that Mr Kildare organised the dinner; Mr Kildare deposed that Mr Dignan organised it.

[146] Mr Kildare deposed that he did not speak to Mr Dignan or Mr Giles at the dinner except to exchange pleasantries. He said he did not discuss any Accommodation Agreement Variation and did not mention negotiations with Halikos. Chief Minister Giles proposed a toast to the economic health of the Northern Territory and INPEX's role in that and he (Mr Kildare) responded in general terms without any reference to any specific building or asset owned by Halikos or to any proposal for a broader accommodation services agreement. He also said that he did not hear everything that was said at the dinner because the restaurant was very noisy.<sup>16</sup>

[147] Mr Dignan deposed that at the dinner Mr Kildare said words to the effect that, "Halikos Hospitality has been appointed as the INPEX accommodation service provider for the next 15 years," and, "Halikos is constructing a purpose-built building for INPEX which will alleviate the impact on Darwin hotel accommodation," and, "It is a great outcome for INPEX to enter into a 15 year agreement with Halikos, a local company."

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**16** Mr Weeks and Mr Giles denied that the restaurant was noisy. They also disagreed about the seating arrangements.

[148] Mr Weeks also deposed that Mr Kildare said words to that effect and also that he said that the 15 year agreement covered Construction, Commissioning and Operations; that the agreement was for 225 hotel rooms and apartments; that the purpose-built building was being built at 105 Mitchell Street; and that INPEX had given Halikos a letter to secure the apartments and it was now up to Halikos to get the apartments.

[149] Mr Giles deposed that from his perspective, based on his discussions with Mr Kildare, Mr Dignan and Mr Weeks, the purpose of the dinner was to congratulate INPEX and Halikos for making their agreement. He deposed that during the dinner, Mr Kildare said that an agreement had been entered into between INPEX and Halikos to provide accommodation for INPEX workers for 15 years and that the accommodation would be provided in a new building to be built by Halikos at 105 Mitchell Street.

[150] Mr Kelly deposed that during the dinner there was discussion about “the agreement reached between INPEX and Halikos”. He could not remember precisely what Mr Kildare said in his toast except that he said words to the effect that “the long term deal between Halikos and INPEX was good for everyone and it would relieve the pressure on tourist accommodation in Darwin”. He also deposed that the Chief Minister “made a toast and said congratulations to INPEX and Halikos on their deal,” and that someone said that INPEX would take the accommodation in 105 Mitchell Street plus other properties as numbers were expected to exceed capacity.

[151] Mr Gary Barnes did not give evidence about what occurred at the dinner.

[152] Mr Giles also deposed that in about March 2014, he frequently spoke with Mr Kildare, and that during one of those conversations Mr Kildare told him that an agreement had been entered into between INPEX and Halikos for additional accommodation. Mr Giles deposed that Mr Kildare told him that the agreement was that Halikos would build a new apartment complex at 105 Mitchell Street, which INPEX would rent for its workers for 15 years. I do not accept this evidence. All of the objective evidence points to there being no such agreement at that time, and I do not accept that Mr Kildare told Mr Giles there was.

[153] Nor do I accept the evidence of Mr Dignan, Mr Weeks or Mr Giles about what happened at the dinner on 24 March. Nor, in so far as it conflicts with the evidence of Mr Kildare, do I entirely accept the accuracy of the evidence of Mr Kelly. It is entirely possible that the construction of 105 Mitchell Street was discussed at the dinner and that someone said words to the effect that on the projected numbers of workers employed by JKC and the sub-contractors, that building would be filled as well as other properties as numbers were expected to exceed capacity. Such indeed was the expectation at the time based on the numbers supplied to Mr Weeks by Mr Wheeldon. (See above.) I do not accept that this was said in the context of anyone saying that there had been a concluded agreement between Halikos and INPEX for INPEX to take and pay for 225 apartments and rooms. It is also entirely possible that there was talk of H105 being “purpose built” for the

Ichthys Project. The Halikos promotional material in the presentation given to Okawa san and Sakamoto san on 17 January says as much, and there can be little doubt that Halikos went ahead with the construction of H105 in the expectation (no doubt encouraged by the figures supplied by Mr Wheeldon) that there would be plenty of demand for accommodation of that kind from workers on the Ichthys Project. That is a very different thing from being purpose-built to lease to INPEX. It is also possible (indeed likely) that it was said that the development of H105 “was good for everyone and would relieve the pressure on tourist accommodation in Darwin”. However, given the other evidence, I consider that Mr Kelly is mistaken when he says that this was said in the context of a discussion about a “deal” between INPEX and Halikos.

**(d) Further draft media releases**

[154] Mr Kildare deposed that at the meeting with the Chief Minister on 24 March, Mr Weeks asked Chief Minister Giles whether he would be interested in participating in a joint media release with INPEX or in doing his own media release and also suggested that a media conference be coordinated at 105 Mitchell Street. He deposed that he (Mr Kildare) said that a media conference would be a good idea after a contract had been agreed and signed. Mr Kildare also deposed that on the same day (24 March 2014), the Chief Minister's office sent him an email attaching a draft media release which referred to a 15 year agreement between Halikos and INPEX. The first email in the chain is from Danielle Perry, Mr Giles’ Media Advisor

to Mr Giles, attaching the draft. That email was forwarded by Mr Giles to Mr Kildare, Mr Dignan, Mr Barnes and Mr Kelly with the message: “Early draft”.

[155] The draft media release begins:

Territory company Halikos Hospitality is joining forces with INPEX in a 15 year agreement to reduce pressure on Darwin’s tourist accommodation.

It continues:

I am delighted to report that INPEX has signed a new deal to put employees in the 1100 apartments that Halikos Hospitality will have in its inventory by the end of the year.

...

This deal will get our executive staff into more appropriate, permanent accommodation improving their Top End experience and enhancing their Darwin lifestyle.

Halikos Hospitality is constantly adding to its stock of accommodation with construction due to begin this week on its apartment block at 105 Mitchell St.

“We are delighted to have won this contract and to be part of stabilising Darwin’s tourist accommodation market,” Halikos Hospitality General Manager Geoff Weeks said.

We will have a portfolio of 1100 properties available for use by Ichthys staff by the end of the year and we are working with a range of apartment developers to secure more.

[156] On 25 March 2014, Mr Dignan’s Executive Assistant, Debbie Long sent an email to Mr Kildare, Mr Weeks and Mr Dignan attaching a redrafted proposed media release. That draft began:

Darwin company Halikos Hospitality has signed a major deal with INPEX to provide short and long term accommodation for corporate and management staff in Darwin’s CBD.

INPEX General Manager Sean Kildare said a key aspect of appointing Halikos Hospitality as its accommodation services provider was to avoid disruption to the tourism market in Darwin.

“Halikos will increase its portfolio of hotels and apartments in the city to cater for our demand,” he said.

“They have already built the H Hotel in Smith Street, which has become a popular address for INPEX workers, and this week started demolition of the old Top End Hotel, with plans to build an 18-storey apartment building to cater for increased demand,” he said.

Halikos Hospitality General Manager Geoff Weeks said the deal was a major coup for a local business that would mean a substantial boost to the local economy.

“We have an inventory of more than 1200 hotel rooms and apartments,” he said. “Since 2012 we have committed 400 of these to the project, including the H Hotel and the C2 serviced apartments on the Esplanade”.

“We will have another xxxxxxxx rooms available at 105 Mitchell Street by mid-2015,” Mr Weeks said.

It also contained the following:

A service agreement signed by the two companies includes the construction, commissioning and operations of quality city rooms that will be dedicated to INPEX’s use.

“This helps meet our commitment to both INPEX staff and to growing local business, with flow-on benefits to a range of suppliers used by Halikos,” he [*ie Mr Kildare*]said.

He said the three key considerations for INPEX in signing the agreement were:

- not impacting on city accommodation available for tourists and events
- Halikos increasing its stock of quality apartments, which they are doing with the construction of xxx new apartments at 105 Mitchell Street
- that INPEX would also enter into agreements with other accommodation providers as their properties come onto the market.

[157] Mr Weeks' response to that redrafted proposed media release is instructive.

On the same day (25 March) he sent an email to Debbie Long, Mr Kildare and Mr Dignan in the following terms:

Guys

Whilst it has been tidied up it has gone off course.

This reads more about Halikos construction and buildings being built for INPEX which is not the case

It also says that INPEX will enter into agreements with other developers which is not the case

It mentions the H Hotel is also purpose built for INPEX which is not the case.

I also agree with Shanes comments that the photo shoot should not be at Mitchell St

Sean I think we can use what has been re drafted but tidy up and correct the anomalies

Your thoughts

[158] Mr Weeks' evidence about the underlined words in his email of 25 March, is that he was concerned that the focus of the media release was on Halikos' construction activities rather than the accommodation activities. I do not accept that this is all that was intended by the words in the email. The email plainly states that it is "not the case" that Halikos "buildings [were] being built for INPEX", contrary to the case now put by Halikos in these proceedings.

[159] Mr Kildare deposed that, in addition to this email, there was a telephone conversation between Mr Kildare and Mr Weeks in which Mr Weeks made similar comments including a comment that the draft media release

“incorrectly suggested INPEX would enter into agreements with other developers, instead of referring to Halikos as the conduit”.

[160] Mr Giles annexed a further draft media release to his affidavit which he deposed was prepared by his office together with Mr Kildare. The draft is dated “April 2014”.<sup>17</sup> That draft media release contains the following:

Planning and preparing for the future, Territory company Halikos Hospitality is joining forces with INPEX in a 15 year agreement to reduce pressure on Darwin’s tourist accommodation.

...

The draft quotes Mr Giles as saying:

I am delighted to report that INPEX has signed a new Accommodation Services Agreement to place executives and corporate management in some of the 1100 apartments and rooms that Halikos will have in its inventory by the end of the year. ...

....

Halikos Hospitality already houses 400 INPEX project staff and now has a 15 year contract as the primary accommodation provider for the Ichthys project.

.....

It continues:

Halikos Hospitality is constantly adding to its stock of accommodation with construction pre-commenced on its apartment block at 105 Mitchell St.

---

<sup>17</sup> Mr Weeks and Mr Dignan depose that at a meeting on 25 March 2014, Mr Kildare took the lead in dictating changes to the proposed media release. It may be that the draft media release annexed to the affidavit of Mr Giles, reflects changes proposed by Mr Kildare. This is not entirely clear on the evidence. (There were a lot of emails exchanged between Mr Kildare and various Halikos people over this period concerning the draft and proposed changes to it.)

It quotes Mr Weeks as saying:

We will have a portfolio of 1100 apartments and rooms available for use by Ichthys workers by the end of the year and we are working with a range of apartment developers to secure more.

[161] It should be noted that:

- (a) none of the draft media releases say anything about an agreement between INPEX and Halikos for Halikos to supply and INPEX to pay for not less than 225/150 apartments and rooms over a 15 year period;
- (b) there is no reference in any of them to Halikos building H105 for INPEX or INPEX agreeing to take all of the apartments in H105 (and when one of the media releases seemed to suggest as much, Mr Weeks sent an email denying that that was the case);
- (c) the final draft (attached to Mr Giles Affidavit) refers to an “Accommodation Services Agreement” and an earlier draft talks about INPEX appointing Halikos Hospitality as its “accommodation services provider”;
- (d) the drafts refer to Halikos’ portfolio of 1100 apartments and rooms not to H105 alone; and
- (e) the drafts refer to the fact that Halikos was working with other developers to supply rooms.

[162] All of these factors point to the draft media releases being about the proposal which was then being negotiated, for the parties to enter into an

“Accommodation Services Agreement”. It is common ground that such an agreement was never finalised. That, the fact that none of these media releases was ever issued, and the fact that the draft media release talks about an agreement being “signed” when at that time nothing had been signed, all support Mr Kildare’s evidence that the purpose of these drafts was to have a media release prepared to be issued once an agreement had been finalised.

[163] These drafts do not support Halikos’ contention that the media releases were intended for immediate issue and were intended to refer to an agreement said to have been made on 13 February, for Halikos to supply, and INPEX to pay for, not less than 225 (later reducing to 150) additional apartments and rooms, including all of the rooms in H105. Nor is there any credible explanation as to why, if that were the case, the parties should wait until 24 and 25 March to announce the agreement to Government and prepare media releases announcing the agreement which were never issued.

**(e) Communications re “decision note”, tenders and “internal processes” to 9 July 2014**

[164] Mr Wheeldon deposed that, before April 2014 he told Mr Weeks what he needed to enable him to work up a decision note for the engagement of an accommodation service provider. He said that he needed:

- (a) from Halikos, as much information as they could obtain on the available accommodation inventory in Darwin and accommodation being used by JKC and the subcontractors, knowing as he did that

personnel from JKC and the subcontractors were staying in accommodation owned or operated by Halikos;

- (b) the Northern Territory government's support for the engagement;
- (c) a manning schedule from JKC;
- (d) the support of the Operations unit within INPEX; and
- (e) an idea of how the accommodation service provider would be engaged.

[165] Mr Weeks deposed that Mr Wheeldon did ask him to find out information about the Darwin accommodation market and the amount of accommodation being occupied by Ichthys Project personnel in Darwin, but that was because INPEX did not have accurate figures about this: Mr Wheeldon did not say he needed this information to prepare a decision note.

[166] I accept Mr Wheeldon's evidence that he asked for this information to enable him to prepare a decision note, and that he said so to Mr Weeks. That is consistent with a proposal prepared by Halikos and given to Mr Wheeldon in late March or April 2014.

- (a) The proposal has a front cover on which is written "INPEX" and "Accommodation Service Provider Agreement" along with pictures of the proposed H105 and Halikos Hospitality's logo.

- (b) The first page inside the front cover is headed “Halikos Hospitality Pty Ltd Darwin Accommodation Proposal” and contains a Table of Contents.
- (c) Following brief biographies of Mr Dignan and Mr Weeks, there is a page headed “Executive Summary”. The executive summary provided is as follows:

On the 17th January 2014 INPEX and Halikos Hospitality met at INPEX Perth offices to discuss project accommodation in Darwin, in particular securing additional accommodation that is required for the Ichthys project, and to address concerns in the media that Tourism accommodation had been adversely impacted.

INPEX Operations Australia Pty Ltd and Halikos Hospitality Pty Ltd have an existing Accommodation Contract 800575. In those discussions both parties agreed the best way forward was a variation to the existing contract by negotiating and agreeing a more robust, longer-term and broader Accommodation Services Provider contract, that meets the long term needs of our construction phase commissioning phase and the on-coming operations phase, and is much more suitable to both parties needs, and over a 15 year period would be suitable period. The tasks to be undertaken were:

- Chris Wheeldon to determine numbers and timing of ex-village accommodation requirements in the Darwin area. This will include INPEX, EPCs and their sub-contractors (as best as can be determined).
- The current accommodation services contract is held with Chris Wheeldon. Chris will take the lead to negotiate a broader, longer term contract and propose that for execution.
- The process from here is for the INPEX – Halikos relationship to full develop into a long-term one of client (INPEX) and accommodation services provider (Halikos).

The Accommodation Services Provider agreement would be a variation of existing contract 800575 and demonstrate the following actions:-

- INPEX management resources are not taken up with administratively working with accommodation issues, nor do we have to be concerned about availability of suitable accommodation.

- Assurances from Halikos Hospitality that the pricing and priority terms and conditions agreed within the current contract 800575 will form the basis of the new variation document.
- Halikos Hospitality to manage the suitability of accommodation required by the Ichthys Project and to monitor and manage project accommodation does not adversely impact Tourism and Major Events.
- Ensure that Government and Industry bodies are informed of and maintain support.
- INPEX acknowledge that Halikos is a local Darwin company, has an international reputation of high standing and already provides excellent service to INPEX and our contractors.
- Halikos Hospitality Pty Ltd demonstrate it has the inventory to provide additional accommodation.

On the 13th February 2014, INPEX Operations Australia Pty Ltd provided to Halikos Hospitality Pty Ltd the minimum number of additional accommodation that project required to be secured and would be read in the preparation of the variation document.

Enclosed in this variation document presentation, Halikos Hospitality demonstrates its ability to provide the additional accommodation and undertake the additional responsibilities and duties as the project Accommodation Services Provider.

Sincerely

Geoff Weeks

Executive General Manager – Halikos Hospitality Pty Ltd

[spelling and punctuation in original; emphasis by underling added]

- (d) There follows a section headed “Current Inventory” in which the Halikos Hospitality buildings are listed and described, and mention is made of the number of rooms available “for the Ichthys Project management contractors and sub contractors”.
- (e) The next section of the proposal is headed “Future Inventory”. That includes the following entry:

105 Mitchell Street Apartments

Due for completion in March 2015 will provide a further 254 hotel suites and apartment rooms specifically for the Ichthys Project management, contractors and sub contractors.

This property will be the main hub for INPEX Operations Australia Pty accommodation requirements over the 15 years in the variation document for the construction, commissioning and operation phases. As the construction phase accommodation nears completion and its existing accommodation contract periods end, those apartment rooms and hotels will be released back to Halikos Hospitality Pty Ltd and used for additional Tourism accommodation requirements in Darwin.

- (f) The section on inventory ends with this sentence:

No other company can provide the quantity and quality of accommodation required for the Ichthys Project. Halikos Hospitality is the “One Stop Shop”.

- (g) The next section is headed “Document Overview”, and reads as follows:

Enclosed is the full set of documents making up 800575. The Contract Variation allows the following variation amendments and agreed by both parties.

- The variation of Accommodation Contract 800575 is to provide additional accommodation for the Ichthys Project and appointing Halikos Hospitality Pty Ltd as the primary Accommodation Services Provider for the Ichthys Project.
- Subject only to these variations contained in the document and the understandings agreed by both parties in the document overview, the principal contract 800575 remains in force and will read as if terms of this document were inserted in the principal agreement.
- Additional accommodation inventory will be managed and operated by Halikos Hospitality Pty Ltd.
- This variation secures a minimum requirement of additional apartments and rooms for the construction, commissioning, and operational phases of the project.
- It is agreed by both parties that from time to time further accommodation may be required over shorter periods. In this instance Halikos Hospitality Pty Ltd will supply the

accommodation on a user pay basis and in this instance the parties would not require variations each time.

- As the Accommodation Services Provider, Halikos Hospitality Pty Ltd will monitor and ensure that the Ichthys project accommodation does not adversely affect accommodation availability for Tourism in Darwin. This “One Stop Shop” approach will ensure INPEX is no longer exposed to public and political criticism for doing uncontrolled harm to other business eg: Tourism. While ensuring reliable continuity of supply of appropriate accommodation services that will meet planned and unplanned project needs.

INPEX Operations Australia Pty Ltd are required to assist in the management of additional project accommodation demands

- A. Contractor and Sub Contractor accommodation that is required outside the Howard Springs Village and is reimbursable must be allocated and managed by Halikos Hospitality Pty Ltd under the Accommodation Services Provider Agreement.
- B. Contractor and Sub Contractor accommodation that is required outside the Howard Springs Village and is not reimbursable must be reported to the Accommodation Services Provider. This information will be recorded for the purpose of monitoring the impact on Tourism accommodation in the community and made available to Senior Executive INPEX Operations Australia Pty Ltd.
- C. Where from time to time the additional accommodation scheduling is disrupted due to unforeseen circumstances, Halikos Hospitality Pty Ltd at its discretion in providing that accommodation may be required to change, alter or implement tentative accommodation arrangements over the period of time that is affected.

(h) Finally, the proposal annexes three things:

- (i) the letter of 13 February 2014 which is described as “INPEX OPERATIONS AUSTRALIA” “LETTER OF INTENT”;
- (ii) the Variation Document; and
- (iii) a full set of contract documents for ACCOMMODATION CONTRACT 800575.

[167] Mr Wheeldon deposes that the document was given to him in response to his request for the information for a decision note.

[168] Mr Dignan deposes that the document was prepared at the request of Mr Wheeldon. He refers to it as “information” and deposes that “it was not prepared as a presentation or proposal”. He deposes, “In particular, it was not prepared to convince INPEX to take accommodation in 105 Mitchell. Instead, I had it prepared simply to help Chris Wheeldon out by giving him the information that he said he needed for his internal processes.”

[169] I accept the evidence of Mr Wheeldon that the proposal was given to him in response to his request for information for a decision note (noting that the preparation of a decision note before a decision is made to enter into a contract is one of INPEX’s “internal processes”.)

[170] The following should be noted about the proposal.

(a) Firstly, it plainly is a proposal and not just “information” as asserted by Mr Dignan.

- It is headed “Halikos Hospitality Pty Ltd Darwin Accommodation Proposal” and describes itself as a “presentation” in the section signed by Mr Weeks: *Enclosed in this variation document presentation, Halikos Hospitality demonstrates its ability to provide the additional accommodation and undertake the*

*additional responsibilities and duties as the project*

*Accommodation Services Provider.*

- It contains a “sales pitch” at the end of the section on the current and future inventory: *No other company can provide the quantity and quality of accommodation required for the Ichthys Project. Halikos Hospitality is the “One Stop Shop”.*
  - Although the language is hard to understand and, in places, devoid of meaning, it is generally cast in the future tense.
  - The section headed “Document Overview” contains proposals about the mutual obligations to be assumed by both INPEX and Halikos under an Accommodation Service Provider Agreement which appear in the documentation for the first time.
- (b) The description in the proposal of what occurred at the meeting on 17 January 2014 supports the evidence of the INPEX witnesses about what occurred at that meeting and does not support the evidence of Mr Dignan and Mr Weeks. (The INPEX personnel gave evidence that at the 17 January meeting, Okawa san asked Mr Wheeldon to determine numbers and timing of ex-village accommodation requirements in the Darwin area – as stated in the Proposal. Mr Dignan and Mr Weeks denied this and deposed that Mr Wheeldon said he already had the numbers.)

- (c) The proposal refers to the letter of 13 January 2014, now said to confirm the existence of the pleaded agreement, as a “letter of intent”.
- (d) The proposal includes the statement: “This variation secures a minimum requirement of additional apartments and rooms for the construction, commissioning, and operational phases of the project,” not an assertion that “the minimum requirement of additional apartments and rooms” had already been the subject of a concluded agreement reached some months before.
- (e) The proposal refers to the attached draft as “the Variation Document”, not an “agreement”.
- (f) Mr Dignan is correct in saying that the proposal was not prepared to convince INPEX to take accommodation in 105 Mitchell. Like all of the documentation in this case before 9 July 2014, it appears pitched at a proposed “Accommodation Services Provider Agreement”.  
  
(Presumably, if an agreement was concluded for Halikos to be the primary accommodation services provider for the Ichthys Project, it would preferentially provide that accommodation from its own inventory, including H105.)

[171] This proposal is not consistent with the claim by Halikos that at the date the proposal was made it already had a binding agreement with INPEX in terms of the pleaded Additional Accommodation Variation (ie to provide INPEX with 225/150 rooms over a 15 year period).

[172] On 11 April 2014, Mr Weeks wrote to Mr Wheeldon:

We write to confirm that in accordance with your instructions contained in your letter of 13 February 2014 Halikos Hospitality has secured the additional 225 apartments and hotel accommodation as detailed in the Variation.

No particulars were given as to where the 225 apartments and hotel rooms which had been secured were located. Mr Weeks did not receive a reply to this letter.

[173] Mr Wheeldon deposed that in mid-April he told Mr Weeks that the internal processes within INPEX would take a couple of months to reach an outcome. Mr Weeks denies this. For the reasons set out in [81] above, (and also at [181] to [183] below) in general I have preferred the evidence of Mr Wheeldon where it differs from that of Mr Weeks or Mr Dignan.

[174] It seems that in April 2014, Mr Weeks and Mr Giles were both asking Mr Kildare when the media releases would be issued. Mr Kildare deposes that he told Mr Giles that he had not yet seen a decision note and so INPEX's internal approval processes were not yet completed and because of that they could not make the press release. On 16 April 2014, Mr Kildare sent an email to Mr Weeks in the following terms:

Updating the situation regarding announcements, as you know we have not yet completed our project internal processes to assess, and review the Variation to the accommodation services contract.

This work is actively underway and the range of construction, operational, legal, commercial, contractual, joint venture and managerial stakeholders involved is significant. The materiality of the numbers in question and the adjoining issues engaged by this

significant change (eg aviation, bus transport, site logistics, etc) warrants careful planning that cannot be rushed.

The internal due diligence processes are not complete at this time and until they are, Inpex will not be in a position to make any public announcements regarding accommodation services.

At this stage, I anticipate the announcement will be ready to go sometime after Easter.

This email unequivocally conveyed to Halikos that INPEX was yet to decide whether to agree to the Variation Document. Mr Halikos gave evidence that Halikos could have stopped construction of H105 at this time.

[175] Mr Weeks did not, at the time, contradict anything said in that email.

Mr Weeks deposed that he understood that the comment, “The internal due diligence processes are not complete at this time and until they are, Inpex will not be in a position to make any public announcements regarding accommodation services,” referred to the additional services issues only and not to the agreed 225/150 apartments and hotel rooms. I do not accept that evidence. The email speaks unambiguously about “the Variation to the accommodation services contract.” For the reasons which follow, I do not accept the evidence of Mr Dignan and Mr Weeks that there was ever any discussion about anything other than a single accommodation services provider agreement before 9 July 2014 when the possibility of two separate agreements was first raised by Mr Dignan.

[176] On 17 April 2014, Mr Dignan sent an email to Mr Wheeldon saying (inter alia):

On another note, regarding 105 Mitchell St, you mentioned the other day that you believed the variation would be signed in May. For me to give my camp an update, would it be possible to email me today an approximate schedule date in May. That would be greatly appreciated.

He did not receive a reply until 7 May 2014 when Mr Wheeldon emailed him saying:

Sorry matey for the late reply.

I now have a promise that the manning curves from JKC will be formally submitted to us 15th May at which time the DN can be submitted for approval through the company. Without these curves the DN would not be sufficient enough to move forward quickly. The manning curves I have seen will now indicate a significant increase in manning for both blue and white collar staff all of which supports the proposal you have put forward so it was worth the wait.

On the reasonable assumption that “DN” stands for “decision note”, this email would tend to indicate a mutual familiarity with the term and to confirm that there had been previous discussions between Mr Wheeldon and Mr Dignan about the internal processes involved within INPEX and the need for a decision note in relation to “the variation” (singular).

[177] Mr Dignan deposed that he believed that the decision note related only to the provision of accommodation over and above the 225/150 that he says had already been agreed. There is no support in any of the documents for any such understanding. The email correspondence to that point (and after) talked about “the variation”. Further, on 22 May 2014, Mr Weeks sent an email to Mr Wheeldon (cc to Mr Dignan) saying (inter alia):

Chris

Here are the 1<sup>st</sup> estimates only of potential requirements for the 225 apartments/hotel in the agreement. I have included your INPEX 1<sup>st</sup> look numbers we discussed as estimates:

INPEX (Construction)	20
INPEX (Commissioning/Operations)	38
KENTZ	120

Total (estimates only) = 178 ... which I will set aside for 105 Mitchell Street. I still have balance available in C2, One30, Kim on Smith, H Hotel etc as we receive further requests.

This is a clear indication that, as at 22 May, Mr Weeks regarded “the 225 apartments/hotel in the agreement” as potential only – not the subject of a concluded agreement.

[178] Mr Dignan deposed that at a meeting on 26 May 2014, he told Mr Kildare that he was becoming concerned that Halikos had still not received the final signed Variation document and that Mr Kildare said, “You’ve got your letter. It’s as good as money in the bank”; also that INPEX was an honourable company, Halikos had no need to worry about the agreement, and he would follow up with Mr Wheeldon. It may be that a meeting occurred: Halikos appears to have been constantly pushing for its Variation Document to be signed. It may also be the case that Mr Kildare said he would follow the matter up with Mr Wheeldon. However, I do not accept that Mr Kildare said, on that date or any other, anything to the effect that Halikos could rely on the letter of 13 January 2014 as binding INPEX to an agreement to take and pay for 225/150 rooms over a 15 year period. Nor do I accept that Mr Wheeldon made any such statements.

[179] Mr Dignan deposed that during a drive to Winnellie Point to inspect some office accommodation on 20 June 2014, he asked Mr Wheeldon what was the hold up with the signature on the formal documentation regarding the variation and that Mr Wheeldon told him (among other things) that there were no issues, that the decision note had been done and that Legal and Operations were all on board. Since the other evidence (supported by later documentation) is to the effect that Legal and Operations were not “all on board”, I do not accept Mr Dignan’s evidence that Mr Wheeldon told him they were. Mr Dignan deposed that several times over this period, Mr Wheeldon said words to the effect of, “Don’t worry about it. You have your letter.” Mr Wheeldon denied this and I do not accept Mr Dignan’s evidence that this occurred.

[180] The evidence of Mr Dignan and Mr Weeks was not internally consistent and coherent. In cross-examination, it was put to both Mr Weeks and Mr Dignan that various documents emanating from them referred to negotiations or otherwise used language which indicated that there was as yet no concluded agreement after 13 February 2014, the date on which Halikos contends that the Additional Accommodation Variation was entered into. In answer, Mr Weeks gave evidence that there were two proposed agreements – the Additional Accommodation Variation (entered into on 13 February 2014) and a broader “services provider agreement”, which was never finalised, for the provision of services and additional accommodation over and above the 225 accommodation units the subject of the Additional Accommodation

Variation. Mr Dignan gave similar evidence, distinguishing between the Additional Accommodation Variation and what he referred to as “the over and above”.

[181] Mr Weeks began by saying that he believed that no decision note or RFA was necessary for the Additional Accommodation Variation because that was being done as a variation to the Accommodation Agreement.

Mr Dignan gave evidence to the same effect. Both of them explained away all references to a decision note in the documents as referring to the broader accommodation services agreement that was being negotiated, despite the fact that most, if not all, of that correspondence referred to “the variation” to the Accommodation Agreement.

[182] Mr Weeks gave evidence that after receiving the email from Mr Wheeldon of 7 May, he spoke to Mr Wheeldon who told him that the decision note had already been approved. In cross-examination, Mr Weeks said that he understood this to mean a decision note in relation to the broader agreement that was being negotiated. It was pointed out to him that the email of 7 May 2014 said (in part): “the manning curves from JKC will be formally submitted to us 15th May at which time the DN can be submitted for approval through the company” – that is to say that the decision note would not be submitted for approval until after 15 May. Mr Weeks then changed his evidence. He said the earlier evidence had been a mistake and that Mr Wheeldon had told him the decision note would be approved. I do not

accept the evidence of either Mr Weeks or Mr Dignan that they believed that no decision note was necessary for the Additional Accommodation Variation.

[183] On 3 July 2014, Mr Dignan sent an email to Mr Wheeldon saying (inter alia):

On a separate issue Chris just wanted to get an update of when you believe the “Accommodation Services Agreement” might be finalised?

[184] On 8 July 2014, Mr Dignan sent an email to Mr Wheeldon saying (inter alia):

Also just wanted to get an ETA of when the Accommodation Services Agreement with Halikos Hospitality will have the required signatures? They have been moving ahead sourcing accommodation.

[185] On 9 July 2014, Mr Wheeldon sent an email to Mr Dignan saying (inter alia):

Re the accommodation not much traction here as I have more work to do as there’s been a push back from JKC on this ( KBR legal) so need to have some further dialogue with Okawa and Sean to find a better way forward as we have to have JKC on board with this for it to fly. Okawa san is here early next week so will discuss then face to face. Sorry its not better news but we are working on it.

**(f) Discussions re “two agreements”**

[186] On 9 July 2014, Mr Dignan sent an email to Mr Wheeldon saying (inter alia):

Regarding the Accommodation Agreement is it better and more simplistic that we break down the Agreement in two separate variations as follows:-

1. Commitment for additional number apartments/hotel rooms for INPEX’s and or its stakeholders Construction/Commissioning & Operations.
2. We acknowledge that there may be a concern with Halikos Hospitality having the title of Official Accommodation Services Provider we are happy to step down from this title, and work with INPEX & JKC on assisting the project with accommodation requirements in addition to Item 1.

This could be an option allowing the variation for the 225/150 apartment/hotel rooms to be signed.

Chris, can I sit with you as early as tomorrow, or Friday so I can go through this with you. Just so we both on the same page?

This is the first time that the concept of two different agreements occurs in the documents.

[187] Mr Dignan deposes that on 10 July 2014, he made a phone call to Mr Kildare as he was becoming worried that he still had not received a signed copy of the Variation Document, and wanted to arrange a meeting with Mr Kildare, Mr Wheeldon and Okawa san, who was in (or was coming to) Darwin. Mr Dignan says that Mr Kildare told him Okawa san was unavailable to meet, but that “105 is committed to INPEX” and not to worry. Mr Dignan may have made a phone call to Mr Kildare on that date but I do not accept that Mr Kildare said anything to the effect that there was a binding agreement for INPEX to lease H105.

[188] On 11 July 2014, Mr Wheeldon had a meeting with Mr Dignan.

Mr Wheeldon deposes that at that meeting Mr Dignan said he would try and split the draft variation document and Mr Wheeldon said something like, “Try and split it and let’s see what it looks like.” Mr Wheeldon deposes that Dignan said he wanted to push the accommodation draft variation document forward to get a number for H105, and that he (Mr Wheeldon) said that any proposed agreement needed to be in a decision note and had to go through the contract approval process. He deposed that he also told Mr Dignan that Mr Kildare was taking over as it was getting quite political and Mr Kildare and Okawa san would be more involved.

[189] Once again, Mr Dignan gives a very different version of what occurred at that meeting. Mr Dignan deposed that Mr Wheeldon agreed that Halikos and INPEX were already committed to the 225/150 apartments and hotel rooms, including in 105 Mitchell, and that INPEX’s only concerns were with the accommodation over and above this, and that there was “no issue” with the Variation as INPEX was committed. Mr Dignan deposed that he said to Mr Wheeldon that separating the variation into two parts should simplify the procedure of sign off for INPEX until its internal issues had been resolved, and that Halikos would step aside as the accommodation service provider for INPEX until the issues with JKC had been resolved. Mr Wheeldon agreed, asked Mr Dignan to send him (another) copy of the Variation Document, and said that he would send Mr Dignan “a confirmation”. They talked about how construction was going for H105 and Mr Wheeldon said, “You just

need to make sure you have the accommodation available under the agreement,” “Hurry up and get it built,” and “Don’t worry about us – you just worry about getting it built on time.”

[190] For all of the reasons already outlined, I do not accept the evidence of Mr Dignan about what occurred at that meeting. I find that it occurred substantially as deposed to by Mr Wheeldon.

[191] On 11 July 2014, following that meeting, Mr Dignan sent an email to Mr Wheeldon saying (inter alia):

As per our discussions today I am separating the variation of Contract 800575 into two parts as you suggested, the first being the 225/150 apartment/hotel rooms as per INPEX’s letter dated 13 February, 2014 this will expediate (sic) the execution of the document prior to the July 23, 2014. Chris in the interim I would really appreciate you sending me a confirmation email as we discussed.

Please find attached the following:-

- Variation document 800575-2
- Signed copy of Contract 800575
- Signed Letter of Intent

Variation 800575-3 would be the Accommodation Service Provider document which may take time to finalise, however Geoff and I are happy to work with yourself and JKC on this document. This document will be emailed on Monday.

The “letter of intent” attached was the letter of 13 January 2014.

**(g) Halikos asserts existence of concluded agreement: negotiations continue**

[192] Further emails from Mr Dignan followed. On 15 July 2014, he sent an email to Mr Wheeldon:

Chris, as per our telephone conversation earlier today can I ask that you confirm in writing that the documentation forwarded to by email on Friday 11 July at 5.40pm has been agreed to and accepted, allowing sign off prior to July 23, 2014.

This was followed by a telephone call asking for a meeting with Okawa san.

[193] Also on 15 July, Mr Dignan and Mr Wheeldon exchanged text messages.

Mr Dignan:

Chris was the confirmation email ok? thanks Shane

Mr Wheeldon:

Shane, I've been laid up crook for the last couple of days so haven't been in top of anything. I briefly spoke to Okawa who will take over this from Sakamoto. He will discuss the way forward with Sakamoto and revert ASAP. It's had a lot of play Shane but a lot of people to convince and Okawa can do that

Mr Dignan:

Hope you are feeling better soon. Chris the 225 deal has been agreed as per the Feb 13 letter, am I to understand your text is referring to the Service Providers Agreement 800575/3?

This is the first mention in any of the documents of there having been an agreement arising out of the letter of 13 February, referred to by the Halikos parties in earlier documents as a "letter of intent". Mr Wheeldon did not respond to that text and Mr Dignan sent a further text on 20 July 2014.

Mr Dignan:

Chris, I hope you are getting over your tonsillitis. When you are up for it could you please contact me. Thanks Shane

[194] Mr Dignan deposed that when he did not receive a response to that text that day, he arranged to meet Mr Kildare the following day at which time Mr Kildare said, "Shane you are a worrier - you have nothing to worry about! You have your letter. INPEX is an honourable company, but I will

chase up Chris for the confirmation. I will see what the delay is!”

Mr Weeks deposed that he was at the meeting on 21 July and gave similar evidence about what Mr Kildare said, adding that he also said, “There is no problem with the variation.” Mr Kildare deposed that he did not recall meeting with either Mr Dignan or Mr Weeks on 21 July 2014.

[195] Given the content of the email from Mr Wheeldon of 9 July 2014, and his text of 18 July 2014, I do not accept the evidence of Mr Weeks that Mr Kildare said, “There is no problem with the variation.” I also have very serious doubts that Mr Kildare said anything about, “You have your letter,” given that no-one seems to have attached any significance to the letter of 13 February before Mr Dignan’s text to Mr Wheeldon on 18 July which Mr Kildare presumably knew nothing about; and given that (as I have found) Mr Weeks and Mr Dignan had told Mr Kildare on 13 February that the purpose of the letter was to have something to show other developers so that they could negotiate with them on INPEX’s behalf.

[196] On 21 July 2014, Mr Wheeldon sent an email to Mr Dignan in the following terms:

Shane,

Just to confirm our discussion and your subsequent adjustment of documents provided by yourself is correct and based upon our assumption.

Further work is required on the service provision to encompass our main contractor which may need some addition information from yourselves to secure the agreement which I will be in touch for shortly.

The original signed letter should suffice for the first agreement until such time all agreements can be again rolled up into one tidy provision which I believe will be more easily executable.

My apologise for the delay but you must try and understand there are many players and processes associated with this type of agreement that need to be considered and we appreciate your moving forward in good faith.

Hope to speak to you soon

Cheers

Chris

[197] It is difficult to know what to make of this email, given its vagueness, particularly the enigmatic opening sentence. Halikos relies on the sentence: *“The original signed letter should suffice for the first agreement until such time all agreements can be again rolled up into one tidy provision which I believe will be more easily executable,”* as an acknowledgment that the letter of 13 February 2014 evidenced a binding agreement, and on one view of the email, it could amount to an expression of opinion by Mr Wheeldon that he considered there had been a “done deal” in terms of that letter. However, it could also be consistent with the email meaning that Halikos would have to be content with that letter (previously referred to by Halikos as a letter of intent) until such time as a binding agreement could be reached following INPEX’s compendious procedures for making such agreements. That would be consistent with the following sentence: *“My apologise for the delay but you must try and understand there are many players and processes associated with this type of agreement that need to be considered and we appreciate your moving forward in good faith.”*

[198] The evidence is that Mr Wheeldon and Mr Weeks were on very friendly terms. They took a holiday together in Bali with their families, for example, and Mr Wheeldon seems to have been advocating for Halikos within INPEX. The legal implication of assuming the construction of this email most favourable to Halikos is discussed in footnote 35, at [236](k) below.

[199] On 21 July 2014, Mr Weeks wrote to Okawa san. That letter included the following:

I would like to give you a personal update on the progress from my last correspondence on the 12<sup>th</sup> April 2014 (copy attached).

As previously confirmed, we have secured the additional 225/150 hotel and apartment rooms in line with schedules for use by INPEX and its subcontractors.

...

On the basis of correspondence exchanged, we have openly discussed the understanding that the Ichthys project accommodation needs over the next several years, will far exceed what was originally planned when our original agreement was signed on the 8<sup>th</sup> February 2012. Halikos Hospitality is pleased to continue to work with INPEX for solutions of accommodation beyond what was initially envisaged. Significant projects such as our 105 Mitchell Street and our relationship with other developers, will play the most significant role in solving the need for additional accommodation.

I have received today confirmation from INPEX that the original letter signed on the 13<sup>th</sup> February 2014 is suffice for the agreement 800575/2 calling for 225/150 hotel and apartments as agreed by both parties. We will be in Perth this week to seek a meeting with you to finalise any outstanding questions on issues and to move to final signatures.

The matter surrounding accommodation services provision relating to document 800575/3 we understand that at this time the document is not ready for finalisation and in good faith we await your further discussion or any assistance we can provide to closing out this document. Whilst this is being undertaken, we will continue to provide accommodation services only as instructed.

He received no reply to this letter.

[200] It is noteworthy that the letter to Okawa san does not state that there has been a concluded agreement in terms of the pleaded Additional Accommodation Variation. Mr Dignan wrote: “We have secured the additional 225/150 hotel and apartment rooms in line with schedules,” not, “We have secured the additional 225/150 hotel and apartment rooms in accordance with the agreement reached on 13 February.”

[201] In July 2014, Chris Taylor from INPEX Operations wrote to Halikos (and others) inviting expressions of interest in providing “to lease”, “a fully serviced and managed accommodation complex (or subset of), in a single location (in and around the greater Darwin area) incorporating ... fully furnished/serviced one bedroom/one bathroom or two bedroom/two bathroom units/apartments to accommodate approximately 60-70 FIFO Operations personnel”.

[202] Mr Dignan deposed that he spoke to Mr Wheeldon about the invitation for expressions of interest and that Mr Wheeldon told him not to worry about it, that it was just part of INPEX’s internal processes and also said that their agreed variation for the 225/150 apartments and hotel rooms “was unaffected by this tender.” I do not accept that Mr Wheeldon said this.

[203] Mr Weeks deposed that he too spoke to Mr Wheeldon about the invitation for expressions of interest and that Mr Wheeldon told him not to worry about it, that Operations was just checking prices. He deposed that he also spoke to Mr Kildare who also told him not to worry about it.

[204] In any event, by letter dated 28 July 2014, Mr Weeks responded to this invitation in the following terms:

Halikos Hospitality Pty Ltd is pleased to reconfirm its interest and ability to supply accommodation services for FIFO personnel as detailed in the “EOI”.

Halikos Hospitality Pty Ltd is the largest accommodation supplier of hotel rooms and serviced apartments in Darwin with over 1000 rooms available nightly. In this EOI submission we introduce 105 Mitchell Street hotel and apartment rooms that will meet both the required service and operational service outlined in the EOI. We will also demonstrate our experience, capability and portfolio of our existing hotels and apartments to show we can meet the provision of accommodation.

This is an exciting opportunity for Halikos Hospitality Pty Ltd who currently enjoy a mutually beneficial working relationship and a proven track record to deliver quality accommodation by operational professionals in the hospitality industry.

[205] On 11 August 2014, Mr Weeks sent an email to Mr Wheeldon in the following terms:

Further to our catch up yesterday, and discussed with Sean Kildare this morning, that I seek your agreement that in your absence I shall continue engaging with INPEX to finalise the Accommodation Services Agreement through Sean Kildare, Okawa San and Ritchie Davies.

Thanks Chris - Appreciated

[206] On 14 August 2014, Mr Weeks sent an email to Mr Kildare attaching two draft variation agreements. On 15 August 2014, Mr Kildare responded:

Many thanks for the redrafted proposed documents.

Alongside and in support of the relevant issue/budget/staff owner(s), I will review and discuss.

This encompasses a number of people in Darwin, Perth and Tokyo, so it will take a day or two.

Look forward to catching up on Monday next week with an update.

[207] Again, this email exchange is in terms of a proposal.

[208] On 19 August 2014, Mr Dignan and Mr Weeks met with Mr Kildare.

(Mr Wheeldon was on leave.) I accept the evidence of Mr Kildare that at that meeting:

- he said that he was not aware of the status of the process of the decision note or the Variation Document being reviewed and asked him whether he had spoken to Mr Wheeldon about it;
- he told them that INPEX's internal processes took time and that INPEX was committed to the process and was working through the process, though he was not aware of where in the process it was up to;
- he also said that Mr Wheeldon was the person who was negotiating and that it was his responsibility to see it through the internal processes;
- Mr Dignan asked why the media statements had not gone out, and Mr Kildare told him that INPEX would not be making any media statements until they had an agreement in place, and it had not been signed yet;
- Mr Dignan responded that he was not being treated fairly;
- Mr Kildare told him that INPEX was an honourable company and that he was not aware of any problems with the process but he also said that INPEX would not be rushed and that it would only proceed when the internal due diligence and review process was completed;



Pty Ltd and respectfully seek your signature to execute the document. Can I highlight that as per our correspondence of the 11<sup>th</sup> April 2014 (enclosed) Halikos Hospitality has confirmed that in accordance with INPEX instructions they have commercial committed (sic) to securing the apartments as per INPEX's "Instruction To Secure" letter dated 13 February, 2014 (enclosed).

I acknowledge this has been a mammoth task commencing back in January this year which I thank all the staff involved, many hours of work and commitment have culminated in a mutually agreeable document now ready to be signed. Okawa San I respectfully request you to forward the signed document prior to 27 August, 2014 to my email account shane.dignan@halikos.com.au. I do have a scheduled visit to Perth on 6-8 September, 2014 and can accept the original document personally.

[emphasis added]

[211] The covering email enclosed the letter of 13 February 2014 and the (rather strange and ambiguous) email from Mr Wheeldon to Mr Weeks and Mr Dignan of 21 July 2014. The underlined portion of the letter is inconsistent with Halikos' contention that the deal had been finalised on 13 February 2014 – before the "more than six months of work". It is also noteworthy that the letter speaks of the many hours of work having culminated in "a mutually agreeable" (not "agreed") document only now ready to be signed.

[212] Once again, Halikos received no response to the letter or the further draft variation.

[213] On 9 September 2014, Mr Dignan and Mr Weeks met with Okawa san and Mr Kildare at the INPEX offices in Perth. Once again, the evidence of the INPEX personnel (Okawa san and Mr Kildare) differs from that of Mr Dignan and Mr Weeks. I accept the evidence of Mr Kildare that:

- Mr Dignan said they had worked very hard on this; they had done everything INPEX asked them to do, that they wanted to work with INPEX and saw INPEX as a valued client, and also that negotiations on the Variation Document had been completed and Halikos wanted to see the agreement executed as soon as possible;
- he asked what else had to be done for the Variation Document to be signed;
- he said that construction on H105 was on schedule and everything was going well;
- Okawa san said that there was an internal review process for the draft Variation Document which would ultimately lead to a decision being made by Ichthys Excom; that if the recommendation from the Ichthys Excom review came to him and said INPEX should sign it then he would support it, but if Ichthys Excom said that INPEX should not sign it, then he would not;
- Mr Weeks said that Halikos had been talking with Mr Wheeldon and Mr Kildare, they had seen the numbers and they knew that INPEX needed the accommodation;
- Okawa san responded that it was the Onshore Construction team's role to determine what the additional accommodation requirements would be;

- Okawa san also said that Mr Kildare was here to assist with the process if required, it was an Onshore Construction matter and not his responsibility to manage this issue.

[214] I do not accept the evidence of Mr Dignan that:

- Okawa san said that he could not execute the document that day but that “INPEX does require the additional accommodation for the Project”; or that
- Okawa san said that he shared Halikos’ concerns that it had taken seven months, but that “this is merely an internal process;” or that
- he said that both companies should “continue their good relationship” and “continue to move to execute the document in good faith;” or that
- Mr Kildare said, “Shane, you have two letters from us now! What more do you need?”

[215] In relation to this meeting, Mr Dignan deposed:

This meeting was the first time that I heard of INPEX’s ‘Excom’. My understanding at that time, based on my discussions with Chris Wheeldon, Sean Kildare and Okawa-san was that Okawa-san could and would sign the Variation, and that he was just waiting to receive INPEX’s internal paperwork before doing so.

This would seem to support the evidence of Mr Kildare (supported by that of Okawa san) that Okawa san did mention needing the approval of the Ichthys Excom at the meeting.

[216] On 11 September 2014, Mr Dignan sent an email to Okawa san as follows:

I write to personally thank you and Sean for the meeting on Tuesday to discuss the variation documents for additional accommodation. I have taken the liberty of providing everyone of a copy of the minutes, please advise if there are any errors or omissions.

I would also thank you for advising us of the delay for the variation document being executed. We were totally unaware that the INPEX internal decision note had not yet been completed. We do understand this is required and accompanies the variation document to EXCO for the process of execution.

I kindly accept your offer of assistance to prioritise the full document being presented to EXCO and if I may propose the following timeline which we can work towards:-

- I understand the internal decision note needs to be completed by Chris Wheeldon who is scheduled to return to work on 22/09/14. Given the research and assumptions have been completed is it reasonable that the internal decision note can be completed within seven days to accompany the variation document for presentation to EXCO?
- Okawa should EXCO have the full documentation from the 29/09/14 would it again be reasonable that the review for execution could be achieved within a further seven days?
- This would tie in with my schedule business trip to Perth on the 6/10/14 – 8/10/14.

Once again I appreciate your time with this matter and look forward to hearing from you shortly.

Halikos did not receive a reply to this email.

[217] This email to Okawa san is inconsistent with evidence given by Mr Dignan that he believed no decision note was necessary for the pleaded Additional Accommodation Variation.

[218] Mr Dignan sent a follow up email to Okawa san on 22 September 2014:

I'm just following up on my email dated 11 September 2014, I assume the email and minutes were correct.

In our meeting it was noted that Chris Wheeldon needed to provide the Decision Note and would be addressed upon his return to work on the

22 September 2014. However Geoff Weeks in following up this morning, has informed me that Chris Wheeldon has an out office reply that he is now on R&R until 29 September, 2014 (copy attached).

Can we please confirm that Chris Wheeldon and Geoff Weeks (with assistance from Sean Kildare as required) will commence finalisation of the decision note on 29 September 2014? Thus allowing for us to meet our execution date of 6 October, 2014?

I appreciate your confirmation at your earliest convenience.

Halikos did not receive a reply to this email either.

[219] Shortly after that Mr Wheeldon left the employ of INPEX and Cornelis van der Linden took over responsibility for negotiating with Halikos. Mr Weeks and Mr van der Linden met on 29 February 2014. Mr Weeks said that Halikos had a deal with INPEX to supply 225 rooms until 2019, and then 150 rooms until 2029 and showed Mr van der Linden a copy of an unsigned Variation Document. I accept the evidence of Mr van der Linden that Mr van der Linden commented that the numbers looked different to what INPEX needed and said that no-one would agree to a 6% per year increase.

[220] The next day, 30 September 2014, Mr Weeks sent an email to Mr van der Linden:

Thank you for your time yesterday to discuss the Variation Document – it was appreciated.

I can respond to 2 items we discussed in our meeting:

1. I have spoken with our Directors and they are willing to agree the CPI increases should be reviewed from 6% to a more suitable percentage average of around 3.9% annually
2. The Directors also understand the issue for the construction phase should be amended to a mix of 225 apartments and hotel rooms to 2017 and then reduced to a mix of 150 apartments and hotel rooms to 2029.

I am further advised that our Managing Director, Shane Dignan, crossed paths in Mitchell Street today with Chris Wheeldon who informed

Shane that he did complete the Decision Note along with all supporting documents several months ago, and advised the decision note currently is with Tom Hargreaves Contracts Manager Onshore at INPEX in Perth. This information may now save us many hours of additional work.

If I could confirm with you our next meeting at 2pm Monday 6<sup>th</sup> October 2014 at INPEX Mitchell Street offices.

[221] This email is consistent with the terms of the proposed agreement still being negotiated, as is the further email from Mr Dignan to Okawa san sent on 7 October 2014, in which Mr Dignan complains of meetings being cancelled and says:

Okawa-san, I seek your understanding that this raises serious concerns is there any reason that is hindering the ability of our companies to work together co-operatively and prevent meetings to finalise and execute the documents.

**(h) Negotiations are terminated**

[222] On 15 October 2014, there was a meeting between Mr Dignan and Mr Weeks and Mr Kildare and Mr van der Linden. There is some disagreement about the details of who said what, but in essence, Mr van der Linden said that they didn't need 225 rooms; that construction did not need any more rooms and that the requirement for rooms for Operations was being dealt with by a competitive tender. Mr Dignan said that INPEX had made representations and also that he had obtained legal advice that the letter of 13 February 2014 "was a deal". (This is the first communication relied upon by Halikos as constituting repudiation of the pleaded agreement.)

[223] On 16 October 2014, Mr Dignan wrote to Mr van der Linden saying (among other things):

Halikos Hospitality Pty Ltd maintains its position that amongst other matters the statement in INPEX's letter of 13 February 2014 that "in the interim of the document being executed by both parties we now require Halikos Hospitality to proceed to secure accommodation as set out in the Variation", demonstrates beyond a doubt that INPEX is legally committed to the transactions as outlined in the Variation of Contract 800575/2.

[224] At about this time, it seems that Mr Dignan approached the then Chief Minister Mr Giles and asked him to intervene on Halikos' behalf. On 6 November, Mr Giles wrote to Mr Seiya Ito President Director INPEX Australia, putting Halikos' position. This does not appear to have been well received by the INPEX executives with whom Halikos had been dealing.

[225] On 20 November, Mr Dignan, Mr Weeks and Halikos' lawyer met with Okawa san and Mr Kildare. Okawa san told them that INPEX did not require additional accommodation, that no agreement had ever been finalised, and that the people Halikos had engaged with did not have the authority to have concluded a deal. (This is the second meeting which Halikos pleads, in the alternative, amounted to a repudiation of the pleaded Variation Agreement.)

### **The pleaded claims**

#### **The claim in contract**

[226] Halikos claims that on 13 February 2014, Halikos and INPEX entered into and became bound by a variation to the Accommodation Agreement ("the Additional Accommodation Variation"). Halikos pleads that the relevant terms of the Additional Accommodation Variation are in writing, and are

included in a document entitled “Accommodation Services Provider Agreement” dated 13 February 2014 (“the Variation Document”).<sup>18</sup>

[227] Halikos pleads that the Additional Accommodation Variation “was finalised and entered into in a meeting between Messrs Dignan and Weeks and Mr Kildare” at Halikos’s offices in Darwin on 13 February 2014.<sup>19</sup> Halikos pleads that, at that meeting, Mr Kildare was shown a draft of the Variation Document; that he requested some changes to the Variation Document and that those changes were made;<sup>20</sup> following which “Mr Kildare announced that he was happy with that agreement, that a variation was the right way to proceed legally, that this technique would avoid the need for an additional RFA<sup>21</sup> and confirmed that nothing further was required from INPEX’s perspective for the parties to proceed”.<sup>22</sup> This, it is pleaded, constituted a binding agreement.

[228] Halikos pleads that the Additional Accommodation Variation, formed by means of the above process, consists of some only of the terms of the Variation Document – namely:

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**18** Amended Statement of Claim [16]

**19** Amended Statement of Claim [17](a)

**20** Amended Statement of Claim [17](c)

**21** “RFA” refers to an internal INPEX process called ‘Recommendation for Award’ in which an employee proposes that a contract be entered into, giving reasons in writing and this is circulated among a series of other INPEX officials of varying levels of seniority who are required to “sign off” on the recommendation before the contract is finally entered into. (See [8] above.)

**22** Amended Statement of Claim [17](d); Halikos pleads that “the meeting had been convened at the request of Mr Kildare for the express purpose of assuring himself that, in addition to Mr Wheeldon, he was happy with the terms of the variation: Amended Statement of Claim [17](b). The Amended Statement of Claim pleads in earlier paragraphs that Mr Weeks and Mr Wheeldon had been negotiating and that Mr Wheeldon had provided figures to be inserted into the Variation Document and comments on a draft of the Variation Document, but does not plead that Mr Wheeldon was “happy” with it.

(a) Recital B which states:

INPEX has appointed Halikos as INPEX's primary accommodation service provider to provide accommodation in various properties in Darwin including but not limited to 105 Mitchell - 105 Mitchell Street, C2 Esplanade - 102 Esplanade, One130 Esplanade - 130 Esplanade, H Hotel - 81 Smith Street, H20 Apartments - 6 Briggs Street, Novotel Atrium - 100 Esplanade, Eden Gardens - 69 Boulter Road, Frontier Hotel - 3 Buffalo Court and H Apartments Parap - 2 Mitaros Place; and

(b) clauses 1, 2, 3.1, 3.2, 3.3, 3.4, 3.5, 4, 5, 6.1, 6.2, 6.3, 7 and 8 (ie all of the operative clauses).

[229] Halikos does not plead that recitals A and C of the Variation Document form part of the Additional Accommodation Variation. Recital A simply recites the existence of the original Accommodation Agreement (called Contract 800575). Recital C provides:

The parties have been operating under and agreed to vary Contract 800575 to record the terms of appointment of Halikos as INPEX's primary accommodation service provider in Darwin NT in support of the Ichthys Project.

[230] Halikos does not explain why these recitals would not have become part of the Additional Accommodation Variation in the same way as Recital B and the operative clauses, given the way the Additional Accommodation Variation is said to have been formed with no alleged discussion about excluding parts of the Variation Document. The reason why Halikos chose not to plead these recitals as part of the Additional Accommodation Variation, however, is apparent. Halikos's case – discussed above – is that Halikos was negotiating with INPEX in relation to two separate agreements; one for the provision of additional accommodation (the Additional

Accommodation Variation) which they say was concluded on 13 February 2014 and a second “wider accommodation services agreement” which was never finalised.

[231] The Variation Document contains provision for the document to be executed for and on behalf of Halikos by Mr Dignan and for and on behalf of INPEX by a Director and a Director/Secretary. It was not executed.

[232] In summary, the terms of the Additional Accommodation Variation are said to be as follows:

- (a) From the date of entry into the agreement until 28 February 2019, Halikos was to provide 225 additional apartments (consisting of 150 apartments and 75 hotel rooms) “furnished and equipped with the furniture and items detailed in Schedule 1” for the prices set out in clause 1. (The Variation Document did not contain a Schedule 1.)
- (b) From 1 March 2019 to 20 February 2029, “the number of Apartments and Hotel rooms shall not be less than 150”.
- (c) The rate payable was to increase by 6% per annum.
- (d) Up until 28 February 2015, INPEX was only obliged to pay for such rooms as are occupied by its employees and sub-contractors.

Thereafter, the obligation was to pay for “not less than 225 additional Apartments and Hotel rooms” (until 28 February 2019) and “not less

than 150 additional Apartments and Hotel rooms” (from 1 March 2019 to 28 February 2029).

[233] Halikos pleads further that at the 13 February meeting, “Mr Kildare settled, confirmed that he was happy with, organised the signing of, and confirmed the authority of the person signing in the absence of Mr Wheeldon, a letter from INPEX to [Halikos] dated 13 February 2014 and instructed Halikos to secure the accommodation as required by the Additional Accommodation Variation.<sup>23</sup> The 13 February 2014 letter reads as follows:

**VARIATION TO EXISTING CONTRACT 800575**

INPEX and Halikos Hospitality have prepared a Variation Document to existing contract 800575. The document calls on Halikos Hospitality as its Accommodation Services Provider to provide a combination of an additional 225 apartment and hotels over an extended period from 13th January 2014 to 2019, decreasing to 150 apartments and hotels from 2019 to 2029.

In the interim of the document being executed by both parties we now require Halikos Hospitality to proceed to secure accommodation as set out in the variation.

[234] The letter concludes:

Yours sincerely  
Chris Wheeldon  
Project Manager – Construction

It was signed by P Davies, who was the deputy project manager for construction, as Mr Wheeldon was on leave.

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<sup>23</sup> Amended Statement of Claim [17](e).

[235] The amended statement of claim does not allege that the 13 February 2014 letter is part of the Additional Accommodation Variation. Halikos pleads that by that letter, “INPEX confirmed the finalisation of” the Additional Accommodation Variation and “gave a direction to HH to secure the accommodation provided for in that variation”.<sup>24</sup>

[236] Halikos relies on the following post-contractual conduct by INPEX as confirming the entry into the Additional Accommodation Variation:<sup>25</sup>

- (a) a representation by Mr Wheeldon during a telephone conversation with Mr Weeks on 24 February 2014 that the Variation Document would be signed;<sup>26</sup>
- (b) a statement by Okawa san to Mr Dignan and Mr Weeks at a meeting on 21 March 2014, that he welcomed the variation and the agreement reached between Halikos and INPEX, thanked the Halikos Group and confirmed that the Variation Agreement was what INPEX wanted and that it was consistent with his instruction given at the 17 January 2014 meeting;<sup>27</sup>
- (c) statements by Mr Kildare at a dinner on 24 March 2014 that Halikos had been appointed to provide accommodation services to INPEX for 15 years; that Halikos was constructing H105 as a purpose-built

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**24** Amended Statement of Claim [18]

**25** Amended Statement of Claim [20]

**26** Mr Wheeldon denied making this representation and I have found that it did not occur. See [114] to [116] above.

**27** I have found that this did not occur. See [133] to [138] above. I have also found that Okawa san did not give the instructions referred to at the meeting on 17 January 2014. See discussion and conclusions at [62] to [77] above.

building for INPEX for that purpose; that INPEX and HH had entered into an agreement; that INPEX had given Halikos a letter to secure the apartments and it was now up to Halikos to get the apartments”;<sup>28</sup>

- (d) participation by Mr Kildare in the preparation of a joint media release which stated amongst other things that Halikos had signed a major deal with INPEX to provide short and long-term accommodation in Darwin’s CBD and quoted Mr Kildare as referring to the construction of H105 as a “key consideration” in signing the agreement and “settling” a media release by the Chief Minister announcing a 15 year agreement;<sup>29</sup>
- (e) statements by Mr Kildare to Mr Dignan on 26 March 2014 to the effect of, “You’re a panicker. Don’t worry, everything is on track,” and in April 2014 to the effect that Mr Dignan was to relax as he had the 13 February 2014 letter and needn’t worry;<sup>30</sup>
- (f) further statements by Mr Kildare at a meeting on 26 May 2014 to the effect that:
  - (i) the Variation Document was just “doing the rounds” and he was not aware of any problem with it being signed off;

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**28** Mr Kildare denied making these statements. I have found that he did not. See [145] to [153] above.

**29** Mr Kildare’s evidence was that these draft media releases were prepared in anticipation of an agreement being reached and I have found that this was the case. See [153] to [163] above.

**30** I have been unable to locate evidence in relation to what Halikos says Mr Kildare said on 26 March 2014. I do not accept that, at any time, Mr Kildare made statements to either Mr Dignan or Mr Weeks to the effect that there had been a concluded agreement reached on 13 February 2013. See [178] above.

- (ii) INPEX was an honorable company and would stick to the agreement;
- (iii) INPEX Operations was “on board” so there was no need for Mr Dignan to worry;
- (iv) Halikos had the 13 February 2014 letter which was “as good as money in the bank”;
- (v) Halikos had Mr Kildare’s full support;
- (vi) no-one from INPEX had said that the accommodation was not required; and
- (vii) INPEX would fill 105 Mitchell;<sup>31</sup>
- (g) similar comments made by Mr Wheeldon to Mr Dignan and Mr Weeks at meetings on 20 June and 11 July 2014;<sup>32</sup>
- (h) further statements to similar effect by Mr Kildare to Mr Dignan and Mr Weeks on 21 July 2014;<sup>33</sup>

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**31** I have found that Mr Kildare did not say on 26 May 2014 (or any other date) anything to the effect that Halikos could rely on the letter of 13 January 2014 as binding INPEX to an agreement to take and pay for 225/150 rooms over a 15 year period. See [178] above.

**32** Mr Wheeldon denied making these statements. I have found that he did not. See [179] above re 20 June and [188] to [190] above re 11 July.

**33** Mr Kildare denied making these statements. I have found that he did not. See [193] to [194] above. However, even if one were to assume in Halikos’ favour that Mr Kildare did say, “You have nothing to worry about! You have your letter,” and other comments of a like nature attributed to him, and one were to assume also that these amounted to representations about the effect of the letter, it would not assist Halikos’ case. Mr Kildare had no authority to enter into any agreement of the kind pleaded or to make representations to Halikos about the legal effect of the letter of 13 February. (See [239] to [253] below.)

- (i) a statement by Mr Kildare to Mr Dignan, in a telephone call on 10 July 2014 to the effect that INPEX was committed to H105;<sup>34</sup>
- (j) the failure by INPEX to respond to letters from Halikos confirming that Halikos had secured the additional 225 apartments and hotel rooms;
- (k) an email from Mr Wheeldon to Mr Dignan sent on 21 July 2014 in which Mr Wheeldon wrote, “The original signed letter should suffice for the first agreement . . .”;<sup>35</sup>
- (l) a statement by Okawa san to Mr Dignan and Mr Weeks at a meeting on 9 September 2014 that both companies should “continue to move towards execution of documents in good faith”;<sup>36</sup>
- (m) a request by Cornelis van der Linden, Project Deputy Director – Onshore of INPEX that “the agreed rate by which the consumer price index (**CPI**) increased on an annual basis under the Additional Accommodation Variation be reduced”;<sup>37</sup>
- (n) a statement by Mr Kildare to Mr Weeks in a telephone conversation on 30 October 2014, to the effect that at a meeting of key INPEX Project personnel earlier that day, INPEX’s legal counsel had stated that

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**34** There may have been a telephone conversation between Mr Dignan and Mr Kildare on 10 July 2014. I have found that Mr Kildare did not make any statement to the effect that INPEX was bound to take a lease over H105. See [187] above.

**35** This is discussed at [197] to [198] above. The letter is ambiguous and to the extent that it can be construed as Mr Wheeldon expressing a view that there had been a concluded agreement on 13 February, Mr Wheeldon had no authority to make any such representation on behalf of INPEX.

**36** Okawa san does not admit making such a statement and I have found that he did not. See [213] to [214] above.

**37** Mr van der Linden did not request that the agreed rate be varied; he said that no-one would agree to a 6% per year increase. See [219] above.

INPEX was both legally and morally obligated to comply with the Additional Accommodation Variation;<sup>38</sup>

- (o) statements by Mr Kildare and Mr Wheeldon to Mr Weeks from time to time in the period from 13 February 2014 to about 14 October 2014, to the effect, “Thank God we have secured the additional accommodation with Halikos”.<sup>39</sup>

[237] Halikos claims that INPEX repudiated the Variation Agreement on 15 October 2014 or alternatively on 20 November 2014, and seeks damages for breach of contract.

[238] INPEX has denied the existence of any binding agreement of the kind pleaded.

- (a) INPEX denies that the 13 February meeting occurred in the manner pleaded by Halikos. INPEX pleads that the meeting occurred in the manner outlined in evidence by Mr Kildare<sup>40</sup> and I have found this to be the case.<sup>41</sup>
- (b) INPEX also pleads that there was no intention to create legally binding relations by the signing of the 13 February 2013 letter. It relies on:

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**38** I do not accept that this statement was made by Mr Kildare.

**39** I do not accept that any such statements were made.

**40** Amended Defence [35] to [37]

**41** See [94] to [106] above.

- (i) the fact that no representative of INPEX engaged in any conduct or made any statement to the effect that there was an immediately binding agreement made on or 13 February 2014;
  - (ii) the fact that no representative of INPEX was authorised to make a immediately binding agreement on that date and that Halikos knew that;
  - (iii) the fact that no version of a draft variation agreement was given, shown or sent by Halikos to INPEX on 13 February 2014; and
  - (iv) the email of 17 February 2014 from Mr Weeks to Mr Wheeldon and Mr Kildare which attached a revised draft variation, described as “a final draft” which would be finalised for signing when Mr Weeks and Mr Wheeldon returned from leave.<sup>42</sup>
- (c) INPEX pleads further that neither Mr Wheeldon, Mr Kildare nor Mr Davies had any authority to bind INPEX to a contract of the kind pleaded by Halikos (which would last for 15 years and involve expenditure of over \$300 million) other than by following a set procedure which involved such a proposed transaction:
- (i) first being recommended by the holders of several senior positions within INPEX, including directors of relevant business units, and the recommendation being made in a form of document entitled “Recommendation for Award” (RFA);
  - (ii) then being approved by the Contracts Committee;

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42 Amended Defence [18]

- (iii) then being approved by senior INPEX officers, including, from time to time, Project Director, Deputy Managing Director, Managing Director and President Director for Australia;
  - (iv) if involving INPEX incurring expenditure of US\$40m or more, then being approved by INPEX Corporation;
  - (v) then being approved by the other joint venture participant in the Project; and
  - (vi) then being entered into by a formal contractual instrument which was duly executed by one or more authorised officers of INPEX.<sup>43</sup>
- (d) INPEX pleads that Halikos was aware that it was necessary for internal procedures to be carried out before INPEX could enter into a binding agreement and was aware of the details of all of these steps except that set out in (iv) as a result of information given to its governing minds during the negotiations for and entry into the Accommodation Agreement in 2012.<sup>44</sup>

### **The contract claim: authority**

[239] The first issue on the contract claim is whether the officers of INPEX who it is alleged entered into the Additional Accommodation Variation on behalf of INPEX had the authority to do so. There is no real factual dispute about the internal processes required for the formation of contracts by INPEX. The

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**43** Amended Defence [13]

**44** Amended Defence [14]

evidence about these matters is summarised at [9] and [10] above and is to the effect that those procedures were as pleaded in INPEX's defence. This evidence was not challenged.

[240] Nor is there any doubt that the process set out in the Amended Statement of Claim for the formation of the alleged Amended Accommodation Variation did not conform to those procedures. Halikos bases its claim that the Variation Agreement was entered into on 13 February 2013 on ostensible authority.

[241] The principles relating to ostensible authority are well-known and non-controversial.

An "apparent" or "ostensible" authority ... is a legal relationship between the principal and the contractor created by a representation made by the principal to the contractor that the agent has authority to enter on behalf of the principal into a contract within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed on him by the contract.

....

The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract.

....

The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts

with other persons of the kind which an agent so acting in the conduct of his principal's business has usually "actual" authority to enter into.<sup>45</sup>

There are circumstances where the actual representation of authority may be made by the agent but in such cases it will be found that the relevant representation is made by the principal (or by the person to whom the principal has given actual authority) either by a previous course of dealing or by putting the agent in a position or by allowing him to act in a position from which it can be inferred that his actual representation of authority in himself is in fact correct. It is therefore always necessary to look at the conduct of the principal (or the person to whom he has actually delegated authority).<sup>46</sup>

[242] Counsel for Halikos contends that the High Court has recently expanded the range of acts that can give rise to ostensible authority, relying on remarks in *Northside Developments Pty Ltd v Registrar General*<sup>47</sup> to the effect that ostensible authority had its genesis in estoppel, as well as the following passage from the judgment of Gaudron J in *Northside Developments*:<sup>48</sup>

The critical question is whether the company has played such a part in the adoption of that assumption that it should be held to it. ... the company may have played such a part in the adoption of that assumption by refraining from correcting a mistake that the other was known to be labouring under; by acting imprudently, when care was required, which imprudence was a proximate cause of the other party's adopting and acting on the faith of the assumption; or by making a representation which founded the assumption.

[243] I do not understand these authorities to be applying any wider basis for ostensible authority than the earlier cases, but whether they do or not is immaterial for present purposes: Halikos has failed to establish the factual

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<sup>45</sup> *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* (1964) 2 QB 480 at 503-504 per Diplock LJ

<sup>46</sup> *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* [1975] HCA 49; (1975) 133 CLR 72 at p 78

<sup>47</sup> (1989) 170 CLR 146 per Dawson J at 200 and Gaudron J at 212 – cited in *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; 218 CLR 451 at [38]

<sup>48</sup> at p 515

basis on which it relies for its contention that Messrs Kildare and Wheelan had ostensible authority to bind the company to the Additional Accommodation Variation.

[244] The facts relied upon by Halikos as establishing the ostensible authority of Mr Wheeldon and Mr Kildare to enter into the variation Agreement are these.

- (a) At a meeting on 17 January Okawa san (in the presence of Sakamoto san) directed that Mr Wheeldon (with Mr Kildare's assistance) finalise the amount of accommodation needed, and then negotiate or finalise an agreement with Halikos.
- (b) Mr Wheeldon, and subsequently Mr Kildare, negotiated and finalised that agreement and confirmed that INPEX's internal processes had been satisfied, "including because the agreement was proceeding by way of clause 3 of the Accommodation Agreement".
- (c) INPEX equipped Mr Wheeldon and Mr Kildare with the positions and titles of senior executives.
- (d) INPEX armed Mr Kildare and Mr Wheeldon with the ability to send the 13 February letter. (No particulars of how INPEX did this have been provided.)

Halikos contended that, by these matters, INPEX held out Mr Wheeldon and Mr Kildare as authorised to enter into the Variation Agreement.

[245] INPEX contended that Mr Wheeldon and Mr Kildare did not have actual or ostensible authority to enter into the alleged Variation Agreement on the basis of the following reasoning.

- (a) It is not seriously contended that either of them had actual authority to bind INPEX to the Variation Agreement.
- (b) The most senior people within INPEX with whom Halikos dealt were Okawa san and Sakamoto san.
- (c) The evidence is that neither Okawa san nor Sakamoto san had actual authority to bind INPEX to the alleged agreement. They therefore had no authority to hold out Mr Kildare or Mr Wheeldon as having that authority.
- (d) In any event, neither Okawa san nor Sakamoto san held out Mr Wheeldon or Mr Kildare as having any such authority. It was plain after the 17 January meeting that the dealings Mr Kildare and Mr Wheeldon were expected to have with Halikos fell well short of any authority to bind INPEX.
- (e) Halikos knew that Mr Wheeldon and Mr Kildare did not have authority to bind INPEX to the alleged agreement. It was a feature of Halikos' conduct that whenever they sought to materially progress discussions towards concluding an agreement, an approach to Okawa san was made. Halikos' dealings with Mr Wheeldon and Mr Kildare were characterised

by their informal and personal nature and typically limited to ascertaining from them what would be required in order to persuade or encourage INPEX to conclude a binding agreement.

- (f) Halikos knew, from its prior dealings with INPEX that INPEX had internal processes such as a decision note/RFA, and that no individual officer would be empowered to bind INPEX or execute a written agreement without those processes being completed.
- (g) Mr Wheeldon's position within INPEX was Project Manager – Construction. Mr Kildare was part of the Corporate Co-ordination division with the title General Manager, INPEX Darwin office. These are not positions which would ordinarily carry with them the authority to bind the company to a multi-million dollar contract to be performed over 15 years.

[246] I find that neither Mr Kildare, nor Mr Wheeldon had ostensible authority to enter into the pleaded agreement. First, the pleaded factual basis for the existence of ostensible authority in Mr Wheeldon and Mr Kildare has not been established. I have rejected the evidence of Mr Weeks and Mr Dignan that at the 17 January meeting in Perth:

- (a) Mr Wheeldon said that he had already run the numbers and that INPEX needed the accommodation that Halikos was proposing, or that he said INPEX needs every bit of accommodation it can get for the project;

- (b) Mr Kildare or Okawa san said, “I am happy,” “I agree with what is proposed,” “This is what INPEX wants,” or, “Halikos and INPEX should move forward on this basis;”
- (c) Okawa san said, “I want the 148 rooms in 105 Mitchell but also need more;”
- (d) Okawa san said that Mr Wheeldon or Mr Kildare should finalise how many more rooms were needed over and above the 148 in H105 and get back to Halikos;
- (e) Okawa san said, “The agreement should be for longer than 4 years so it covers construction, Commissioning and Operations. It should be for 15 years;”
- (f) Okawa san said, “Chris, you are responsible for finalising the amount of accommodation we need. I then want you to finalise the agreement and get things moving.”

[247] I have accepted the evidence of the INPEX witnesses that the discussion at the 17 January meeting centred around the accommodation needs of the Ichthys Project (which included workers for the head contractor JKC and sub-contractors); and that Okawa san asked Mr Wheeldon to check the Project accommodation requirements (referring to INPEX, JKC and the subcontractors) and to begin negotiating a broader accommodation services

agreement with Halikos, not limited to the provision of accommodation in a single building. No such agreement was ever concluded.

[248] Second, Okawa san did not have actual authority to bind INPEX to the alleged agreement and neither did Sakamoto san. They therefore had no authority to hold out Mr Kildare or Mr Wheeldon as having that authority – even if they had purported to do so, which they did not.

[249] Third, both Mr Dignan and Mr Weeks were well aware, at least in broad outline, of the processes that needed to be followed before anyone in INPEX was authorised to bind INPEX to any agreement. They were familiar with the decision note and RFA procedures as a result of the procedures followed before the making of the original Accommodation Agreement in 2012.

[250] I have rejected the evidence of Mr Weeks and Mr Dignan that either Mr Wheeldon or Mr Kildare said that there was no need for a decision note or an RFA or that the internal processes of INPEX had already been satisfied because the agreement was proceeding by way of a variation of the Accommodation Agreement, relying on clause 3 of that agreement. It is probable that Mr Weeks and Mr Dignan initially thought that they could circumvent INPEX's ponderous processes and go straight to an agreement made with a known individual (probably Okawa san given who they were always keen to refer things to) by casting the new agreement as a variation of the existing Accommodation Agreement. However, the evidence is that they were disabused of this well before 13 February 2014. There is

abundant evidence that the proposal put by Halikos was to be the subject of a decision note prepared by Mr Wheeldon; that INPEX's other internal processes needed to be adhered to; that this would take time and involve a number of senior people within INPEX and that Mr Weeks and Mr Dignan were told this, both orally and in writing a number of times. I have rejected the evidence of Mr Dignan and Mr Weeks that they believed all such references in the documents were to the need for a decision note in relation to the "broader" accommodation services agreement (or "the over and above") and did not apply to the proposal for INPEX to take 225/150 rooms over a 15 year period which was the main (indeed the only) subject matter of the draft variation agreements which Halikos kept sending to INPEX.

[251] Fourth, I reject the contention by Halikos that INPEX equipped Mr Wheeldon and Mr Kildare with the positions and titles of senior executives and armed Mr Kildare and Mr Wheeldon with the ability to send the 13 February letter. Mr Wheeldon was Project Manager – Construction. Mr Kildare was the General Manager of the Darwin office. I agree with the contention by INPEX that these are not positions which would ordinarily carry with them the authority to bind the company to a multi-million dollar contract to be performed over 15 years.

[252] No particulars have been provided about how INPEX is said to have armed Mr Davies with the ability to sign the 13 February letter. If it is nothing more than providing him with a work station and the ability to access a pen and some company letterhead, that would not suffice to equip him with

ostensible authority to sign a multi-million dollar 15 year term agreement. Otherwise every junior clerk in every company would have such ostensible authority.

[253] The finding that Mr Wheeldon and Mr Kildare did not have ostensible authority to enter into the pleaded agreement means that Halikos' claim in contract must fail.

**The contract claim: intention to create legal relations**

[254] Although not strictly necessary to decide given that finding, I also agree with the submission by INPEX that there was in fact no intention by those participating in the events of 13 February 2014 to enter into binding legal relations as a result of what occurred on that date. For there to be a binding contract, both parties must have had an objective intention, at the time the "agreement" was made, to enter into a contractual (that is, a legally binding) relationship. Objective intention refers to what reasonable people in the position of the parties with their knowledge of surrounding circumstances, would have understood by the relevant communications.<sup>49</sup>

[255] So far as what actually occurred at the meeting on 13 February 2013 is concerned, Mr Dignan and Mr Weeks gave evidence which broadly supported Halikos's pleaded version of events and Mr Kildare gave evidence that broadly supported INPEX's pleaded version of events. I have made findings of fact (above) that the meeting occurred, broadly speaking, as

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<sup>49</sup> *Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22]

deposed to by Mr Kildare. I have rejected the evidence of Mr Weeks that before 13 February Mr Wheeldon had said he was happy with the version of the Variation Document sent to him on 12 February and that INPEX's legal team had signed off on the variation. I have likewise rejected the evidence of Mr Weeks and Mr Dignan that, at the meeting on 13 February, Mr Kildare said, "I agree with Chris [Wheeldon] that using a variation is the right way for us to finalise this deal. I am happy with the variation document. It is correct and is all that is required. The RFA for the first agreement [Accommodation Agreement] was fully signed off and that is all that's needed for the variation."

[256] However, even if one were to assume, in Halikos' favour, that Mr Wheeldon and Mr Kildare made statements to this effect, that would not assist Halikos' contract claim. I agree with the submission by counsel for INPEX that it is inherently unlikely that INPEX, a subsidiary of a large, multinational corporation and operator of a commercial joint venture, objectively intended to bind itself legally to a long-term contract supposedly worth (on Halikos' case) hundreds of millions of dollars by one of its employees telling Halikos that he was "*happy with that agreement*" and "*happy with*" and arranged for the signing of the 13 February letter, the contents of which letter were conspicuous for the absence of any language to suggest that a legally binding agreement had been made.

[257] The subjective belief or intention of a particular party is irrelevant, but it is equally unlikely that Mr Dignan and Mr Weeks would have entertained any

belief that such statements would have had the effect of binding INPEX to a 15 year multi-million dollar agreement.<sup>50</sup> More to the point, reasonable people knowing the background dealings between Halikos and INPEX, and the scope and terms of the proposed agreement as set out in the Variation Document, would not have understood those statements (had they been made) as evincing an objective intention to enter into a multi-million dollar contract over a period of 15 years. This is particularly so given that the surrounding circumstances known to the parties included that Mr Wheeldon had not yet ascertained the numbers of accommodation units that would be required by the participants in the project, that it had not yet been ascertained whether JCK and its sub-contractors would be interested in participating in the proposed arrangement.

### **The estoppel claims**

#### **The conventional estoppel claim**

[258] In the alternative to the claim in contract, Halikos has pleaded a claim based on conventional estoppel.

[259] Halikos pleads that on or about 13 February Halikos and INPEX adopted the mutual assumption that they had entered into a binding legal relationship with each other in terms of the Additional Accommodation Variation (and

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**50** Counsel for Halikos placed great emphasis on the fact that, in cross-examination, Mr Wheeler was referred to the words, “We will finalise for signing when Chris Wheeldon and myself return from our respective annual leave,” in an email from Mr Weeks, was asked what he thought that “contemplated”, and said, “They thought they had an agreement in place.” It is hard to see why he would have construed the email that way, but in any event, the evidence is that both Mr Wheeldon and Mr Kildare told Mr Weeks and Mr Dignan orally and in writing many times, from shortly after 17 February that INPEX’s normal internal procedures would need to be followed. What is more, they were advised this before 13 February in the meeting on 17 January, in Perth.

each knew that the other had done so) and thereafter conducted their relationship on the basis that they would be bound by the terms of that agreement. Halikos pleads that, accordingly, INPEX is estopped from denying that INPEX and Halikos had entered into a legal relationship in the terms of the Variation Agreement and that INPEX is bound by those terms.

[260] The matters relied upon as leading to the mutual assumption were (in summary):

- (a) discussions between Mr Dignan and Mr Weeks and various INPEX personnel between August 2012 and 2013 in which they discussed Halikos constructing a purpose built accommodation building for INPEX; and
- (b) negotiations between Mr Dignan and Mr Weeks for Halikos and Mr Wheeldon, Mr Kildare and Okawa san to vary the Accommodation Agreement “to make that agreement a bigger, broader scale and longer-term solution to INPEX’s accommodation requirements ... such that Halikos would provide additional accommodation for a longer period to meet INPEX’s longer term requirements”.<sup>51</sup>

[261] The matters relied on by Halikos as supporting the allegation that the parties conducted themselves after 13 February 2014 on the mutual assumption that

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**51** Amended Statement of claim [15]; The negotiations are said to have taken place in discussions “in October 2013”; by email dated 24 October 2014; discussions on 14 November 2013; a meeting on 10 January 2013; a meeting in Perth on 17 January 2014; an email dated 18 January 2014; a meeting on 29 January 2014; an email of 29 January 2014 and reply of 31 January 2014; a meeting on 6 February 2014; an email of 7 February 2014; telephone calls between 7 and 12 February 2014; and the meeting and letter of 13 February 2014. The evidence and findings of fact in relation to all of them are set out above in the section on evidence and findings of fact.

they had entered into a binding agreement are those things relied upon in the contract claim as post-contractual conduct by INPEX confirming the entry into the Additional Accommodation Variation<sup>52</sup> as well as its own actions in terminating existing leases over parts of 105 Mitchell Street, demolishing the existing structures and building H105.<sup>53</sup>

[262] Halikos pleads that by the conduct that amounted to a repudiation of the Additional Accommodation Variation, INPEX departed from the mutual assumption and Halikos has suffered detriment as a result.<sup>54</sup>

[263] In its amended defence, INPEX denies that Halikos and INPEX adopted the pleaded mutual assumption. In doing so it relies on an email dated 17 February 2014 from Mr Weeks to Mr Wheeldon and Mr Kildare, attaching a draft Variation Document that was dated 13 February 2014 and bore an issue date of 14 February 2014 and stating “in effect, that the instrument was a final draft which was not itself sufficiently complete for agreement and execution, but would be finalised sufficient for agreement and execution later, meaning if approved and authorised by INPEX”.<sup>55</sup> INPEX also denies the balance of the pleaded conventional estoppel claim.<sup>56</sup>

[264] The applicable principles are set out in *Waltons Stores (Interstate) Ltd v Maher*:

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**52** Amended statement of claim [20] summarised at [236] above.

**53** Amended statement of claim [22], [24] and [25]

**54** Amended statement of claim [37] and [38]

**55** Amended defence [43]

**56** Amended defence [80] to [84A]

[T]o establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.<sup>57</sup>

[265] For the same general reason that the contract claim fails, Halikos' claim based on conventional estoppel must fail. Halikos has failed to establish the factual basis of its claim. The correspondence makes it abundantly clear that the parties did not adopt a mutual assumption that they had entered into a binding agreement.

[266] I have found that:

- (a) Mr Wheeldon did not represent to Mr Weeks on 24 February 2014 (or at any other time) that the Variation Document would be signed;

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57 [1988] HCA 7; (1988) 164 CLR 387 per Brennan J at [34]

- (b) Okawa san did not represent to Mr Dignan and Mr Weeks on 21 March 2014 (or at any other time) that an agreement had been reached, or that he approved of the terms of the Variation Document;
- (c) Mr Kildare did not state, at a dinner on 24 March 2014, that Halikos had been appointed to provide accommodation services to INPEX for 15 years; that Halikos was constructing H105 as a purpose-built building for INPEX for that purpose; that INPEX and Halikos had entered into an agreement; that INPEX had given Halikos a letter to secure the apartments and it was now up to Halikos to get the apartments;
- (d) the draft media releases to which Mr Kildare contributed were intended for future use after an Accommodation Services Agreement had been finalized and this was made clear to Mr Weeks and Mr Dignan;
- (e) neither Mr Kildare nor Mr Wheeldon made statements to the effect that Halikos could rely on the letter of 13 February in lieu of a signed agreement;
- (f) neither Mr Wheeldon, Mr Kildare nor Okawa san represented to Mr Weeks or Mr Dignan that the “internal procedures” within INPEX were a mere formality, that there was already a binding agreement in place; that INPEX Operations was “on board” so there was no need for Mr Dignan to worry; that INPEX was committed to H105; or that the

parties should “continue to move towards execution of documents in good faith”;

- (g) nor was there a request by Cornelis van der Linden, Project Deputy Director – Onshore of INPEX that “the agreed rate by which the consumer price index (CPI) increased on an annual basis under the Additional Accommodation Variation be reduced”; rather he told Mr Weeks and Mr Dignan that no-one would agree to a 6% per annum increase.

References to the paragraphs in which the relevant findings of fact are made are set out in the footnotes to para [236] above.

[267] Rather, in email correspondence and conversations, Mr Wheeldon, Mr Kildare and Okawa san made it clear that there was, as yet, no binding agreement and that there would not be unless and until INPEX’s “due diligence” and internal procedures led to the proposal being accepted and a written agreement signed. Further in the email of 17 February, in the proposal provided to Mr Wheeldon in late March/early April 2017, and in other emails and correspondence, Mr Weeks and Mr Dignan indicated that they understood that there was no binding agreement in place.

[268] The failure by INPEX to respond to letters from Halikos confirming that Halikos “had secured the additional 225 apartments and hotel rooms” – also relied upon by Halikos as evidencing a mutual assumption that a binding agreement was in place - does not do so. The correspondence in which

Halikos says this conspicuously does not refer to the alleged existence of a binding agreement whereby INPEX was to pay for those rooms over a 15 year period.

### **Estoppel by representation**

[269] Halikos also pleads an estoppel by representation. Relying on the same alleged facts (discussions, phone calls, meetings and correspondence) Halikos pleads that INPEX made a promise and/or gave an assurance to Halikos that the parties had entered into the Additional Accommodation Variation, or that it would execute the Variation Document, and would be bound by its terms; that induced by that promise or assurance, Halikos assumed that the Variation Document would be executed, and in reliance on that the various plaintiff companies acted to their detriment in terminating existing leases at 105 Mitchell Street, demolishing the existing buildings and constructing H105, entering into a new lease over H105 (between HH and HI), borrowing funds and forgoing other developments and investments.

[270] The estoppel by representation claim fails for the same reason. Halikos has not established that the representation it relies on was ever made. The evidence, referred to above, is all the other way.

### **Misleading and deceptive conduct claim**

[271] Finally Halikos pleads a claim based on misleading and deceptive conduct on behalf of the second plaintiff based on the same alleged conduct

(discussions, telephone calls, meetings and correspondence). This too is denied by INPEX.

[272] The essence of the claim by the second plaintiff (and the related claims of the third and fourth plaintiffs) is an allegation that Mr Dignan and Mr Weeks made known to INPEX that it was proposing to build H105 as a purpose built building for INPEX and that it would only go ahead with the development if INPEX made a binding commitment (the precise nature of which is, on the pleadings and the evidence unclear). Halikos pleads that, by words and conduct, INPEX represented that it had made a such a commitment (either to “take H105” or in terms of the pleaded Additional Accommodation Variation) and that in reliance on those representations and conduct by INPEX, Halikos terminated existing leases, closed down an existing business, demolished the existing buildings at 105 Mitchell Street and constructed H105 and that the various plaintiffs have suffered detriment as a result.

[273] I do not accept that Mr Dignan and Mr Halikos had, subjectively, decided that they would only go ahead with the development of H105 if they got some kind of binding pre-commitment from INPEX, but even if they did have such a subjective intention, they did not communicate it to INPEX. In the presentation that Mr Dignan and Mr Weeks made to Okawa san and Sakamoto san on 17 January 2014 they unequivocally stated that they were going ahead with the development. They made similar representations in other documents referred to above.

[274] Nor do I accept that INPEX made any representations by way of oral representations, correspondence or conduct that it would lease all of the rooms in H105 or that it considered itself bound by any agreement to take 225 or 150 rooms and apartments as set out in the Variation Document. I do not accept that INPEX personnel made the oral representations pleaded to the effect that INPEX would take H105 or was committed to H105, and Halikos cannot point to any written representations to that effect.

[275] The meeting of 17 January 2014 forms a key plank in this claim too. The findings of fact in relation to this meeting set out at [61] and [62] above, and summarised in connection with the dismissal of Halikos' claim in contract at [245] and [246] above, are likewise fatal to the misleading and deceptive conduct claim.

[276] As I have found that each of Halikos' claims must fail, there is no need for me to consider the issues raised in the pleading of damages.

**ORDERS:**

- (a) There will be judgment for the defendant against each of the plaintiffs.
- (b) I will hear the parties in relation to costs.

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