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FEDERAL COURT OF AUSTRALIA
N.S.W. DISTRICT REGISTRY
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IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

GENERAL DIVISION

No. NSD 2020 of 2007

JOHN WATSON & KAYE WATSON
in their own right and as representatives of the Group Members

Applicants

AWB LIMITED

Respondent

RESPONDENT'S OUTLINE OF OPENING SUBMISSIONS

CT

Part I: Introduction and Overview

1. The circumstances surrounding the United Nations Oil-for-Food Program (***UN OFFP***), the Volcker Inquiry and the Cole Royal Commission received extensive media coverage in Australia. Undoubtedly, much harm was done to the reputation of the respondent (***AWB***) and its former management and directors. It is impossible to undo that harm. This proceeding has been commenced against the background of the Cole Royal Commission, and the press coverage that ensued. There is no doubt that AWB's share price fell after damaging accusations were made against it in the Cole Royal Commission (on 16 January 2006) and in the media. The applicants' case is that the fall in the price was attributable to the disclosures at the Royal Commission, that AWB was required to make the same disclosures from 11 March 2002, and that the effect of the disclosures on any day from 11 March 2002 to 13 January 2006 would have been the same. There is substantial dispute about this. In this proceeding the Court will be concerned to assess the admissible evidence carefully, and to weigh that evidence against the allegations that the applicants (***Watsons***) have pleaded and particularised. The Watsons will be required to prove their case to the *Briginshaw v Briginshaw* standard. The Court will be careful to determine what price movements are attributable to non-disclosure and what price movements are attributable to the damaging publicity arising out of the Cole Royal Commission. Once price movements are linked to "disclosures" in January 2006, the Court will need to determine what relevant disclosures were required to be made by AWB, and when during the 1404 days from 11 March 2002 to 13 January 2006. Of course, a non-disclosure contravention that occurred after a Group Member acquired his or her shares cannot have caused that person to have paid "too much" for the shares.

2. This proceeding relates to some matters that were the subject of the Volcker Inquiry and the Cole Royal Commission. This is true also of proceedings brought in the Supreme Court of Victoria by the Australian Securities and Investments Commission (***ASIC***) against several former employees of AWB, and by various plaintiffs in New York against AWB and others,

3. In this proceeding, the Cole Royal Commission has an added significance. This is because the group on whose behalf claims are made is defined by reference to matters that were publicly disclosed by Senior Counsel Assisting the Cole Royal Commission when the Commission opened on 16 January 2006. See the definition

of the "Relevant Period" in 3FASOC, para 1(b). That is, no claim is made in respect of any alleged non-disclosure after the opening of the Cole Royal Commission.

4. In relation to non-disclosure, the ultimate task for the Court is to determine precisely what "information" AWB was required to disclose, and when it was required to disclose it. This is something that the Watsons have never articulated adequately.

5. AWB's case in relation to the alleged non-disclosure of information is that the matters that are alleged to have required disclosure:

   (a) did not constitute disclosable "information"; and/or

   (b) were not material and for that reason were not required to be disclosed; and/or

   (c) were generally available to the market before the end of the Relevant Period.

6. The other major issue in relation to non-disclosure is whether the alleged non-disclosures caused the AWB share price to be "inflated" throughout the Relevant Period and, if so, by how much. In that respect, a curiosity is that the Watsons do not calculate their claimed loss or damage by reference to the alleged price inflation. They have never articulated the basis of calculation of the loss and damage allegedly suffered by the group members.

7. Another curiosity about the "inflation" case is that Dr Dunbar's whole evidence is predicated upon the assumption that if the 'disclosures' on 13 January 2006 had been made on any day within the Relevant Period (ie 11 March 2002 to 13 January 2006), the effect on the share price on each such day would have been the same. This assumption will not be established by the evidence, and cannot be established.

8. Issues of justiciability arise because much of the non-disclosure case would require the Court to speculate about what the Australian Government and the United Nations (*UN*) would or would not have done in hypothetical circumstances. Even if such speculation were appropriate, the evidence before the Court as to what the Government and the UN knew and did do is very limited, and does not provide a sound basis for making any relevant finding.

9. A particular feature of the Watsons' case is the lack of attention to the UN OFFP, the reasons for it, and the manner in which it was administered by the UN. This is discussed in more detail below. In summary:

(a) when sanctions were imposed by UNSCR 661 after Iraq invaded Kuwait, the sanctions included an exception for humanitarian goods, including food;

(b) however, because the sanctions prevented Iraq from selling its oil, a grave humanitarian crisis developed;

(c) this led the UN to establish the UN OFFP. Important features of the Program were that Iraq was permitted to sell oil provided that payments for purchase of the oil were made into a bank account held under the supervision of the UN Secretary-General (the ***Escrow Account***). Member States were permitted to allow the supply of food and other humanitarian goods provided that the supply contracts had been approved by the 661 Committee (as that term is defined below at paragraph 22). Suppliers were to be paid from Iraq's funds in the Escrow Account;

(d) the food and humanitarian goods so purchased by Iraq were required by the UN to be distributed throughout Iraq in accordance with the Memorandum of Understanding between Iraq and the UN and the various Distribution Plans. The distribution was to be monitored by or on behalf of the UN;

(e) the Distribution Plans provided for the equitable distribution by the Iraqi government of food and other goods supplied under the OFFP to all but three[1] northern governorates of Iraq. This obviously involved substantial cost. The cost had to be incurred in Iraq and by Iraq because that it is where the distribution had to be carried out, and it was Iraq that was responsible to the UN for the distribution;

(f) Iraq's response was to require suppliers under the UN OFFP to supply at a price that included transportation and to require suppliers to pay an amount equal to the surcharge to Iraq's nominated "Maritime Agents". The effect was to enable Iraq to obtain from the Escrow Account amounts equal to the surcharges;

(g) although from at least March 2001, the UN was aware that Iraq was requiring payment of the surcharges, it took no action to prevent the relevant payments from the Escrow Account;

[1] These three northern governorates were the responsibility of the UN Inter-Agency Humanitarian Programme.

(h) the Court does not have jurisdiction to determine whether by imposing the surcharges Iraq breached the UN Sanctions or the Memorandum of Understanding or failed to comply with the Distribution Plans. As discussed further below, the better view seems to be that the payment of reasonable transportation and other distribution costs did not contravene the sanctions. There is no evidence that the surcharges demanded by Iraq were not reasonable. Nor is there evidence that AWB knew that the surcharges were not reasonable;

(i) the Watsons appear to contend that payment of the surcharges would have caused the UN to refuse approval to the supply of wheat to Iraq, and the Minister of State for Foreign Affairs (***Minister***) to refuse export permission. However, assuming that this question is justiciable, there is no evidence to this effect, and it is most unlikely that the UN would have blocked the export of the wheat. There was a humanitarian crisis to which the UN was responding. The most likely response by the UN would have been to satisfy itself that the surcharges were reasonable. At worst it may have said that no surcharges could be paid from the Escrow Account. The scenario that the Watsons postulate is the least likely of all.

10. In any event, the critical issue is what disclosure AWB was required to make about the payment of the surcharges and when. The Watsons' case appears to be that from the start of the Relevant Period (11 March 2002) there was a duty to disclose a whole litany of matters. That case will fail.

11. The Watsons allege that, between 11 March 2002 and 13 January 2006, the respondent (***AWB***):

(a) contravened s 674(2) of the *Corporations Act 2001* (Cth) (***Corporations Act***) by failing to inform the ASX of certain information (***Continuous Disclosure Contravention***) (3FASOC, para 43); and

(b) contravened one or more of s 1041H of the Corporations Act, s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***), s 52 of the *Trade Practices Act 1974* (Cth) (***TP Act***) and s 9 of the *Fair Trading Act 1999* (Vic) (***FT Act***) by making various express and implied representations (***Express*** and ***Implied Representations Contraventions***) (3FASOC, paras 48, 54).

12. The Watsons further allege that, by reason of these contraventions, the market price at which they purchased AWB's "B Class" securities (***AWB securities***) was materially greater than their true value (3FASOC, para 57) and that, by reason of this, they suffered loss and damage resulting from the contraventions (3FASOC, para 59). As noted above they do not particularise their loss and damage by reference to the alleged price inflation. By way of particulars of this alleged loss and damage, they allege that but for the contraventions they would not have purchased AWB securities at all (3FASOC, Sched B, para 3). They say that they would have purchased Commonwealth Bank of Australia securities (***CBA securities***) that would have produced a much better return.

13. The Watsons claim:

(a) declaratory relief (3FAA, paras 3(1), (3));

(b) an order, pursuant to ss 1317HA or 1325 of the Corporations Act, that AWB pay compensation for damage alleged to have resulted from the Continuous Disclosure Contravention (3FAA, para 3(2));

(c) an order, pursuant to ss 1041I and/or 1325 of the Corporations Act, ss 12GF and/or 12GM of the ASIC Act, ss 82 and/or 87 of the TP Act and/or s 159 of the FT Act, that AWB pay compensation for damage suffered by the Express and Implied Representation Contraventions (3FAA, para 3(4)).

14. The Watsons make these allegations and claims for relief not only on their own behalf, but also on behalf of all persons who obtained an interest in AWB securities between 11 March 2002 and 13 January 2006, held such an interest at the close of that period and suffered loss or damage by reason of the alleged contraventions (***Group Members***) (3FASOC, para 1). The Watsons have never indicated how any of the Group Members calculate their loss or damage. The circumstances of each Group Member will vary in that respect depending upon, among other things, when they acquired and sold their AWB securities.

15. This outline addresses:

(a) the factual background to the Watsons claims and the key parts of it which are common ground;

(b) non-justiciability;

(c) the alleged Continuous Disclosure Contravention;

(d) the alleged Express and Implied Representation Contraventions;

(e) causation and loss; and

(f) relief.

Part II: Factual background and common ground

16. The proceeding concerns allegations that, in supplying wheat to Iraq between 1999 and 2003 under the UN OFFP, AWB engaged in, and concealed from the Commonwealth Department of Foreign Affairs and Trade (***DFAT***) and the UN, conduct which was contrary to UN Security Council (***UNSC***) resolutions (***UN Sanctions*** or ***UNSCRs***) establishing and regulating the operation of that program, and that, had the Australian government and the UN known of AWB's conduct, they could not and/or would not have granted export permissions for the shipments of the wheat, or approved payment for the shipments out of the Escrow Account, respectively.

17. The Watsons contend that AWB's engagement in and concealment of this conduct, the fact that had DFAT and the UN known of it they could not and/or would not have permitted it, and the risk it posed to the continuation of AWB's near monopoly over the bulk export of Australian wheat under *Wheat Marketing Act 1989* (Cth) (***single desk***), comprised material information (***Relevant Information***) of which, in the Relevant Period AWB was obliged to inform the ASX and did not. That is the alleged Continuous Disclosure Contravention.

18. The Watsons also contend that, during the same period, AWB made express and implied representations about its conduct and its compliance with its continuous disclosure obligations (the ***Express*** and ***Implied Representations***) which were misleading or deceptive. Those are the alleged Express and Implied Representation Contraventions.

19. A helpful chronology of the UN OFFP is at C-627 (see also Shearer, Issue 1). In brief, however, the UN Sanctions against Iraq commenced on 6 August 1990, shortly after its invasion of Kuwait. Amongst other things, those sanctions placed restrictions on international trade with Iraq and the provision of funds to Iraqi entities. This led to a devastating humanitarian crisis, including acute food shortages, within Iraq (C-1, C-145). As part of attempts to address that crisis, from

late 1996, the UN OFFP eased restrictions on Iraq by permitting it to export oil and oil products and to use the proceeds of sale for certain purposes, principally (but not exclusively) the purchase of humanitarian supplies. The program continued over thirteen 180-day "Phases" until late 2003. By that time, the Second Gulf War had begun and the sanctions had been lifted.

20. Under the UN OFFP, proceeds from the export of Iraqi oil and oil products were held in the Escrow Account under the supervision of the UN Secretary-General. For each Phase of the program, the government of Iraq was required to submit for the Secretary-General's approval a Distribution Plan detailing the supplies which would be purchased with funds from the Escrow Account and how they would be distributed equitably amongst the Iraqi people. Once this plan was approved, the Iraqi government, including its agencies like the Grain Board of Iraq (***IGB***), entered into contracts to purchase the supplies from foreign suppliers.

21. These supplier contracts, once finalised, had to be submitted to the UN, together with notification forms, by the UN Mission of the supplier's country so that the UN could determine whether the supplier was eligible for payment from the Escrow Account. In Australia, suppliers submitted their contracts and notification forms to DFAT whose officers would check that those documents were complete (but not that they complied with the UN Sanctions (C-1199 at 1205; Joint Report/Shearer, para 37 and subsequent observations of Rothwell)), before forwarding them to Australia's UN mission in New York. The Australian Mission would then forward them to the UN.

22. Responsibility for determining whether suppliers were entitled to payment from the Escrow Account initially rested solely with a committee of the UNSC, known after UNSCR 661 which initiated the sanctions against Iraq as the ***661 Committee***. However, from late 1999, following the adoption of UNSCR 1284, contracts for, amongst other things, foodstuffs such as wheat, were notified only to the Secretary-General (B-631 at 635, para 17). At all relevant times, experts in the UN's Office of the Iraq Program (***OIP***) reviewed each supplier contract for compliance with the UN Sanctions, including details of price and value and whether the goods to be supplied were on the relevant Distribution Plan (eg, E-168, 271). That a supplier was entitled to payment from the Escrow Account was confirmed by letter from the UN to the UN Mission of the supplier's country (eg, E-143, 278).

23. Before a supplier could export goods from Australia to Iraq, it was necessary to obtain permission (***Ministerial Permission***) from the Minister under reg 13CA(2) of the *Customs (Prohibited Exports) Regulations 1958* (Cth). That regulation provided that the Minister may grant a permission "if ... satisfied that permitting the exportation will not infringe the international obligations of Australia". The power to grant Ministerial Permissions was delegated by the Minister to various DFAT officers and, in practice, such permissions were granted as a matter of course upon DFAT receiving a copy of the relevant letter from the UN confirming the supplier's entitlement to payment from the Escrow Account.

24. The Watsons' case concerns two types of conduct by AWB. The first relates to AWB making payments for (or, as the Watsons allege, purportedly for) the costs of transporting wheat it supplied from Umm Qasr port in Iraq, where it arrived by ship, in trucks to silos in all governorates of Iraq. Starting from July 1999, the IGB required suppliers of wheat under the UN OFFP to pay these costs (eg, E-106) and AWB contracted with the IGB on terms which so provided (eg, E-121). From November 2000, the costs were increased by the addition of a handling surcharge (eg, C-1067). The costs were included in the price for wheat under the contracts and so were met with funds from the UN Escrow Account. Payments to meet the costs were made by AWB to a Jordanian transportation company, Alia for Transportation & General Trade Co (***Alia***), and remitted by it to the Iraqi State Company for Water Transport (***ISCWT***), which was an Iraqi entity. The amounts AWB was required to pay for these transportation costs are referred to below as the ***Fees***.

25. AWB admits, in respect of the contracts pleaded in the 3FASOC, that it paid the Fees to Alia, that it knew the Fees were to be remitted by Alia to the ISCWT and that the amounts of the Fees were as set out in para 61 of the Watsons' compendium of admissions. However, it disputes the Watsons' allegations: that payment of the Fees was contrary to the UN Sanctions; that AWB knew, believed or was aware of this; that the UN and DFAT did not know AWB was paying the Fees and could not and/or would not have permitted it if they did know; and that any of this comprised material information which AWB was obliged to disclose to the ASX or was the subject of any misleading or deceptive conduct by AWB.

26. The second type of conduct relates to contracts nos. A1670 and A1680 which were made between the IGB and AWB in December 2002 for the supply of 1 million tonnes of wheat under the UN OFFP (E-786, 792). In January 1996, with UN and DFAT approval, BHP Petroleum Pty Ltd (***BHP***) had financed the supply of wheat

by AWB to the IGB under contract no. A2471 at a cost of around USD5 million (E-77, 86, 88, 89, 91, 94). In September 2000, BHP assigned Iraq's debt to it for financing the wheat to Tigris Petroleum Corporation Limited (***Tigris***) (E-964, 965). In December 2002, Tigris and the IGB agreed that the total amount of the debt outstanding was USD 8.375 million (C-2492). AWB and the IGB then agreed to increase the price for wheat in contracts nos. A1670 and A1680 by USD8.375 per tonne which AWB was to receive for and pay to Tigris in satisfaction of that debt (C-2510).

27. AWB admits that it engaged knowingly in this conduct. It disputes, however, the allegations: that the conduct was contrary to the UN Sanctions; that AWB knew, believed or was aware of this; that the UN and DFAT could not and/or would not have permitted it had they known of the conduct; and that any of this comprised material information which AWB was obliged to disclose to the ASX or was the subject of any misleading or deceptive conduct by AWB.

28. A number of other matters should be noted by way of background because of their potential bearing on the materiality of the alleged Relevant Information. In April 2004, after the start of the war in Iraq and the lifting of the UN Sanctions, an Independent Inquiry Committee, led by former US Federal Reserve chairman Paul Volcker, was tasked with reviewing the administration and management of the UN OFFP. A report of the committee, published after the close of the ASX on 27 October 2005 (***final Volcker Report***), said that AWB had paid US$221.7 million in inland transportation fees to Iraq in connection with contracts for the supply of wheat under the UN OFFP and that these payments had been contrary to the UN Sanctions. On 10 November 2005, in response to a request from the UN Secretary-General, the Australian government appointed the Hon TRH Cole AO RFD QC to conduct an inquiry into whether decisions, actions, conduct or payments by Australian companies mentioned in the final Volcker Report breached any Australian law (***Cole Inquiry***). The first substantive public hearing of the Cole Royal Commission was conducted on 16 January 2006 and hearings continued through to the end of April 2006, with a few further sitting days in each of May, August and September 2006. Commissioner Cole's report was released to the public on 24 November 2006.

Part III: Non-justiciability

29. In AWB's submission, the critical issues in the proceeding are non-justiciable with the result that the Court does not have jurisdiction, or ought not to exercise any jurisdiction it has, to determine them.

Non-justiciable issues

30. The non-justiciable issues, and the paragraphs of the 3FASOC giving rise to them, are identified in general terms in para 1A of AWB's defence. In this section, those issues are identified in more detail particularly by reference to the 3FASOC and the UN Sanctions and related documents.

3FASOC

31. The Watsons' case depends on establishing that:

(a) AWB's conduct in paying the Fees *via* Alia to the ISCWT and obtaining funds under contracts nos. A1670 and A1680 from the Escrow Account for repayment of the Tigris debt was contrary to the UN Sanctions;

(b) the UN and DFAT did not know of this conduct (3FASOC, para 26, 28(c));

(c) had the UN known of the conduct, UN approval could not have been given to the relevant contracts or for payments in relation to those contracts out of the UN Escrow Account in accordance with the UN Sanctions (3FASOC, para 28(b));

(d) had DFAT known of the conduct, given Australia's international obligations under the UN Sanctions, Ministerial Permission for the export of wheat pursuant to the relevant contracts could not lawfully have been given and/or would not have been given (3FASOC, paras 28(a), 36).

32. It should also be noted that the issue of whether Ministerial Permissions could and would have been given had DFAT known of AWB's conduct cannot be determined without determining what the UN could (or would) have done had it known. That is because, as mentioned above, DFAT did not review contracts submitted by suppliers such as AWB for compliance with the UN Sanctions: Ministerial Permissions were granted as a matter of course upon DFAT receiving a copy of the relevant letter from the UN confirming the supplier's entitlement to payment from the Escrow Account.

UN Sanctions

33. What is involved in these allegations can be seen more clearly from a consideration of the terms of the UN Sanctions themselves, and related documents. The key UN Sanctions are UNSCR 661, UNSCR 687, UNSCR 986, UNSCR 1284, UNSCR 1409 and UNSCR 1483. The related documents comprise that UN/Iraq MOU and the procedures of the UN 661 Committee recorded in S/1996/636 (C-130).

UNSCR 661

34. UNSCR 661 was adopted by the UNSC on 6 August 1990, shortly after the invasion of Kuwait by Iraq (B-555). By UNSCR 661 the UNSC relevantly decided, *inter alia*, that all States were:

(a) to prevent the sale or supply, or the promotion thereof, by their nationals, from their territories, or using their flag vessels of any commodities or products to any person or body in Iraq or Kuwait, or for the purposes of any business carried on in or operated from Iraq or Kuwait, except "supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs" (para 3(c)); and

(b) not to make available to the government of Iraq, or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and to prevent their nationals and any persons within their territories from doing the same and from remitting any other funds to persons or bodies within Iraq or Kuwait, "except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs" (para 4).

35. In addition, the UNSC:

(a) called upon all States to "act strictly in accordance with the provisions of the present resolution notwithstanding any contract entered into or licence granted before the date of the present resolution" (para 5);

(b) decided to establish the UN 661 Committee, consisting of all of the members of the UNSC, to examine progress reports from the Secretary-General on the implementation of the UNSCR and to seek from all States further information concerning the action taken by them to implement the UNSCR (para 6);

(c) called upon all States to co-operate fully with the UN 661 Committee in the fulfilment of its tasks, including supplying such information as may be sought by the Committee pursuant to the UNSCR (para 7).

UNSCR 687

36. UNSCR 687 was adopted by the UNSC on 3 April 1991, not long after the liberation of Kuwait from Iraqi occupation, and reaffirmed a number of earlier resolutions, including UNSCR 661, subject to certain amendments (B-560). In particular, para 20 of UNSCR 687 amended UNSCR 661, effective immediately, so that the prohibitions against the sale or supply to Iraq of commodities or products and related financial transactions would not apply to foodstuffs, even in non-humanitarian circumstances, notified to the UN 661 Committee.

UNSCR 986

37. UNSCR 986 was adopted by the UNSC on 14 April 1995 and established the UN OFFP as a temporary measure to provide for the humanitarian needs of the Iraqi people (B-574).

38. Under the UN OFFP, as established by UNSCR 986:

(a) States were authorized, as an exception to UNSCR 661 and subject to certain conditions and limitations, including 661 Committee approval of each transaction and payment of the full amount of each purchase into an Escrow Account, to permit the import of Iraqi petroleum and petroleum products sufficient to produce a sum not exceeding a total of USD 1 billion every 90 days (para 1);

(b) the Escrow Account was to be established by the Secretary-General who was to appoint independent and certified public accountants to audit it, and to keep the government of Iraq fully informed (para 7);

(c) the funds in the Escrow Account were to be used to meet the humanitarian needs of the Iraqi population and for other identified purposes, for which the Secretary-General was requested to use those funds, including to finance the export to Iraq, in accordance with the 661 Committee procedures, of foodstuffs and other materials and supplies as referred to in para 20 of UNSCR 687, provided that each export was at the request of the government of Iraq, Iraq effectively guaranteed the equitable distribution of the exported

goods and the Secretary-General received authenticated confirmation that the exported goods had arrived in Iraq (para 8(a));

(d) the 661 Committee was requested to develop procedures to implement the arrangements in, *inter alia*, paras 1 and 8 of the resolution and to report to the UNSC (para 12);

(e) the Secretary-General was requested to take actions necessary to ensure the effective implementation of the resolution, authorised to enter into any necessary arrangements or agreements, and requested to report to the UNSC when he had done so (para 13); and

(f) all States were required, *inter alia*, to take any steps that may be necessary under their respective legal systems to ensure that the proceeds of the sale of Iraqi petroleum and petroleum products were not diverted from the purposes laid down in the resolution (para 14).

39. In addition, pursuant to UNSCR 986, the Escrow Account and all persons appointed by the Secretary-General to implement the UNSCR were to enjoy the privileges and immunities of the UN (paras 15-16). The resolution also affirmed that it did not infringe upon the sovereign or territorial integrity of Iraq (para 18).

UN/Iraq MOU

40. As part of the implementation of the UN OFFP, the UN Secretariat and the government of Iraq entered into the UN/Iraq MOU (B-579). The MOU noted that its contents did not infringe the sovereignty of Iraq. Section II of the MOU provided that the government of Iraq undertook to effectively guarantee equitable distribution to the Iraqi population of goods, including foodstuffs, purchased with the proceeds of the sale of Iraqi petroleum and petroleum products (para 5). The government of Iraq was to prepare a Distribution Plan detailing the procedures to be followed by the competent Iraqi authorities with a view to ensuring such distribution and that plan was to be submitted to the Secretary-General for approval (paras 6-7). Section V of the MOU dealt with the purchase of foodstuffs by Iraq under the UN OFFP. The MOU relevantly provided that the purchase of foodstuffs would be carried out by the government of Iraq, follow normal commercial practice and be on the basis of the relevant resolutions of the UNSC and procedures of the 661 Committee (para 19). The MOU provided that the government of Iraq would contract directly with suppliers (para 21). In addition, the MOU noted that, as

provided in UNSCR 986, each export of goods to Iraq was to be at the request of the government of Iraq and referred to the role and procedures of the 661 Committee in reviewing applications from exporting States for the export of goods (paras 22-24).

661 Committee Procedures

41. As a further part of the implementation of the UN OFFP, on 8 August 1996 the Chairman of the 661 Committee communicated to the President of the UNSC the procedures which the Committee had adopted, to be employed by it in the discharge of its responsibilities under the UN OFFP (***661 Committee Procedures***) (C-130). Section III of the 661 Committee Procedures provided for the procedures to be followed with respect to the export to Iraq of humanitarian supplies, including foodstuffs.

42. The procedures under that section provided, *inter alia*, that:

(a) applications for export would be submitted to the Committee, at the request of the government of Iraq, by the exporting States with all relevant documentation, including the concluded contractual documentation (para 30);

(b) in the case of foodstuffs, the exporting State was to notify the Committee. The notification was to indicate that the exporter requested payment from the Escrow Account and attach the relevant documentation, including the concluded contractual arrangements (para 32(d));

(c) experts in the 661 Committee Secretariat[2] would examine each contract for export, "in particular the details of price and value", and inform the Committee of their findings (para 33);

(d) if the 661 Committee found the contract to be in order, it would immediately inform the parties that the exporter was eligible for payment from the Escrow Account; otherwise, the parties would be informed that payment could not be made from the UN Escrow Account, but the exporter could ship the foodstuffs anyway (para 34(b));

(e) once the Committee informed the parties that the exporter was eligible for payment from the UN Escrow Account, the Central Bank of Iraq would request the bank holding the account to open a letter of credit in favour of the

[2] This became the OIP when it was established in October 1997.

exporter providing for payment from that account; that request would be submitted by the bank holding the UN Escrow Account to the Secretary-General for expeditious approval; and payment would require the "usual commercial documentation", a copy of the 661 Committee's letter stating that the exporter is eligible for payment and confirmation from the Secretary-General that the goods had arrived in Iraq (para 35);

(f) the arrival of the humanitarian supplies in Iraq would be confirmed by independent inspection agents, appointed by the Secretary-General pursuant to UNSCR 986, who were to report all irregularities to the Secretary-General and to the Committee (para 36).

UNSCR 1284

43. On 17 December 1999 the UNSC adopted UNSCR 1284 which made substantial amendments to the UN OFFP (B-631). In particular, para 15 authorised States to permit the import of *any* volume of petroleum and petroleum products originating in Iraq for the purposes and on the conditions set out in paras 1(a) and (b) of UNSCR 986 and subsequent resolutions. Paragraph 17 directed the 661 Committee to approve lists of humanitarian items, including foodstuffs, and decided that, as an exception to para 3 of UNSCR 661 and para 20 of UNSCR 687, supplies of these items would not be submitted for approval of the Committee and would be notified to the Secretary-General and financed in accordance with the provisions of paras 8(a) and (b) of UNSCR 986, and requested the Secretary-General to inform the UN 661 Committee in a timely way of all notifications received and actions taken.

UNSCR 1409

44. On 14 May 2002 the UNSC adopted UNSCR 1409 (B-669). Paragraph 3 authorised States to permit, as an exception to para 3 of UNSCR 661, the sale or supply of any (other than certain military-related) commodities or products to Iraq. Paragraph 4 decided that the funds in the UN Escrow Account could be used to finance the sale or supply to Iraq of those commodities or products, provided that the conditions of para 8(a) of UNSCR 986 were satisfied. In addition, attached to UNSCR 1409 were new procedures for the approval of applications for the export to Iraq of humanitarian goods, including foodstuffs (***2002 Procedures***), replacing the 661 Committee Procedures outlined above. Under the new procedures, each application to export goods to Iraq was to be forwarded to the OIP by the exporting State's UN

Mission and to include complete technical specifications, contracts, and other relevant information (para 2). In the case of applications relating solely to the export of foodstuffs to Iraq, following a satisfactory review for technical completeness, the OIP was immediately to inform the government of Iraq and the exporting State's UN Mission in writing, and the exporter was eligible for payment from the Escrow Account upon verification by the UN's independent inspection agents that the items in the application had arrived in Iraq (para 10).

UNSCR 1483

45. Under UNSCR 1483, adopted on 22 May 2003, the UNSC decided that, with the exception of prohibitions related to the sale or supply of arms to Iraq, all prohibitions related to trade with and the provision of financial resources to Iraq established by UNSCR 661 and subsequent resolutions would no longer apply (para 10) (B-702). UNSCR 1483 provided for the termination of the UN OFFP within six months of the making of the resolution (para 16). The 661 Committee was also to be terminated at the end of this six month period (para 19).

Non-justiciable issues – conclusion

46. As the foregoing demonstrates, not only does the Watsons' case depend on establishing the allegations set out in para 31 above, but in determining those allegations the Court would unavoidably be drawn into examining and making findings about the propriety, under public international law, of the conduct of the UN/661 Committee (and, therefore, the States represented on the 661 Committee), the Australian government, and the government of Iraq.

UN/661 Committee

47. In relation to the UN/661 Committee, determination of the allegations would require the Court to examine and make findings as to:

(a) the content and effect of the UN Sanctions and the UN/661 Committee's responsibilities in relation to the administration of the UN OFFP;

(b) whether, notwithstanding the terms of the contracts between AWB and the IGB which were submitted for approval, other information the UN had about the situation in Iraq, and that the experts in its Secretariat/OIP were to examine, in particular, the details of price and value in each contract, the fact

that AWB was obliged to pay and was paying inland transportation costs was not identified;

(c) whether, as a result, the UN/UN 661 Committee authorised payments from the UN Escrow Account to AWB which should not have been made; and/or

(d) what the UN/UN 661 Committee would have been required to do in administering the UN OFFP, and what it would have done, if it had known of AWB's conduct, in particular, whether the UN/UN 661 Committee would have nevertheless approved each individual contract.

Australian government

48. So far as the Australian government is concerned, in determining the allegations, it would be necessary for the Court to examine and make findings as to:

(a) the content of Australia's international obligations under the UN Sanctions;

(b) whether, notwithstanding the terms of the contracts between AWB and the IGB and the other information the Australian government had about the situation in Iraq, DFAT did not know that AWB was obliged to pay and was paying inland transportation costs;

(c) whether, as a result, the Australian government infringed those obligations by granting Ministerial Permissions to AWB when it should not have done so; and/or

(d) what the Australian government would have been required to do under the UN Sanctions, and what it would have done (such as refusing Ministerial Permission), had it known of AWB's conduct.

Government of Iraq

49. Determination of the Watsons' claims would also require the Court to examine and make findings, at least implicitly, as to reasons why the government of Iraq imposed the Fees, whether the Fees were used to meet transportation costs or for other purposes and, as a consequence, whether the government of Iraq breached para 19 of the Iraq/UN MOI by entering into contracts with AWB for the purchase of foodstuffs which were inconsistent with the relevant UN Sanctions and the procedures of the UN 661 Committee.

Non-justiciability of relevant issues

50. While the outer limits of the concept of non-justiciability may be uncertain, at its core are well-established principles which apply to the issues identified in the preceding section. Elaborated below, the two principles of particular importance in this case are:

(a) that domestic courts will not adjudicate on the transactions of foreign States (which, for present purposes, includes the UN); and

(b) that domestic courts will not adjudicate on obligations and undertakings which depend entirely on political sanctions and understandings, such as agreements and understandings between Australia and other foreign governments.

First principle: domestic courts will not adjudicate on the transactions of foreign States

51. In *Buttes Gas Oil Co v Hammer (No. 3)* [1981] 3 All ER 616 at 628g, the House of Lords held unanimously that there exists in English law a "general principle that the courts will not adjudicate on the transactions of foreign sovereign states". The principle was said to be "not one of discretion, but ... inherent in the very nature of the judicial process" and to be a principle of long-standing, its origins being traced back to 1673 (*Buttes* [1981] 3 All ER 616 at 628j). This principle as applied in *Buttes* led to the conclusion that counterclaims alleging conspiracy and libel in relation to a dispute between two oil companies over rights to exploit oil in a location in the sea bed of the Arabian Gulf were non-justiciable;[3] the counterclaims giving rise to questions as to the State which had sovereignty over the location, the circumstances in which rights to exploit the location had been granted by different States with claims to sovereignty over it, and how and why one of the parties had been deprived of its alleged rights.

52. The principle identified in *Buttes* applies equally in Australia. It was applied by a majority of the Full Federal Court in *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354 at [46]-[63] (see, especially, [47] and [63] per Black CJ and Hill JJ). Indeed, the majority rejected a submission that the principle had no application in Australia (*Petrotimor* (2003) 126 FCR 354 at [5]). And earlier *Buttes* had been approved by the High Court in *Attorney-General (United Kingdom)*

[3] The plaintiff, Buttes, had offered to submit to a stay of its claim if the counterclaims were stayed as non-justiciable (*Buttes* [1981] 3 All ER 616 at 633h).

v Heinemann Publishers Australia Pty Ltd (1988) 165 CLR 30 at 41.3. Further, in both cases, the principle in *Buttes* was identified as being (at least) closely related to the principle, often referred to as the act of State doctrine, that the courts of a State will not adjudicate on the validity of acts and transactions of a foreign State within the foreign State's own territory (*Heinemann* (1988) 165 CLR 30 at 40.9-41.3; *Petrotimor* (2003) 126 FCR 354 at [46] per Black CJ and Hill JJ).[4] The act of State doctrine has a long history in Australian law (see, for example, *Potter v Broken Hill Pty Company Ltd* (1906) 3 CLR 479 at 495.5 per Griffiths CJ), making it unremarkable that the *Buttes* principle is also part of Australian law.

53. A number of interrelated considerations underlie the *Buttes* principle. As the High Court acknowledged in *Heinemann* (1988) 165 CLR 30 at 41.2, the principle rests "partly on international comity and expediency". In support of that proposition, their Honours quoted the statement of the United States Supreme Court in *Oetjen v Central Leather Company* (1918) 246 US 297 at 304 that:

> "To permit the validity of the acts of one sovereign State to be re-examined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations'."

In addition, at least in Australia, the principle may be seen as reflecting the fact that relations with foreign States are generally the province of the executive branch of government, rather than the courts. A further consideration is the lack of judicial or manageable standards by which to judge such issues (see, in particular, *Buttes* [1981] 3 All ER 616 at 633e per Lord Wilberforce). Encompassing all of these considerations is a general recognition of the desirability of judicial restraint or abstention from the determination of such issues (*Buttes* [1981] 3 All ER 616 at 628g-j per Lord Wilberforce; see also *Petrotimor* (2003) 126 FCR 354 at [48] per Black CJ and Hill JJ).

54. However, while the matters set out in the preceding paragraph are considerations which, over time, have given rise to the *Buttes* principle, it is not necessary that all or indeed any of those considerations should be present in a given case. The considerations have led to the development of the principle; they are not preconditions to its application. Such considerations were not manifest, for example,

[4] Indeed, in *Buttes*, a number of authorities establishing that doctrine were relied on by House of Lords, although the expression "act of State" was not favoured because of the different meanings attributable to it (*Buttes* [1981] 3 All ER 616 at 627j, 628g-h, 629j-630g).

in *Potter*; and, if they were not required for that application of the act of State doctrine, it is difficult to see why they should be required for the application of the *Buttes* principle. In particular, it is not the case that there must be some possibility of embarrassment in foreign relations before the principle will be applied. In *Buttes*, Lord Wilberforce left aside all possibility of such embarrassment (this not having been drawn to the attention of the court by the executive) and still found the issues raised to be non-justiciable (*Buttes* [1981] 3 All ER 616 at 633e).[5]

55. Although, like the act of State doctrine, the principle in *Buttes* will not apply if an issue concerning transactions of foreign States arises only incidentally in a proceeding, whether or not the issue is incidental is to be determined as a matter of substance, not form. This can be seen from the decision of the Full Federal Court in *Petrotimor*. In that case, the Watsons sued the Commonwealth and other parties in relation, *inter alia*, to the alleged expropriation of rights they claimed to have, under an agreement with the Government of Portugal, to prospect and develop resources within an area of the Timor Sea. The Watsons' claims were relevantly concerned with the expropriation of those rights, not the validity of their grant, but a majority of the Full Court held it to be an essential ingredient of those claims that the Watsons did in fact hold valuable rights granted by the Government of Portugal and that, accordingly, this non-justiciable issue did not arise incidentally (*Petrotimor* (2003) 126 FCR 354 at [43] and [70] per Black CJ and Hill J; see also *Buttes* [1981] 3 All ER 616 at 625b-e per Lord Wilberforce).

56. Further, there is no warrant for narrowing the *Buttes* principle in light of the decision of the House of Lords in *Kuwait Airways Corporation v Iraqi Airways Company* [2002] 2 WLR 1353. That decision was the subject of careful review in *Petrotimor*, and appears to have been confined by the majority to its facts, or at least to cases involving a plain and acknowledged breach of international law by a foreign State (see *Petrotimor* at [62]-[63] per Black CJ and Hill JJ). The present is not such a case.

57. Having regard to these matters, in AWB's submission, the *Buttes* principle precludes the Court from adjudicating on a number of the issues relating to the UN 661 Committee identified above. The first of these is whether, in implementing the UN OFFP, the UN 661 Committee and/or the UN should not have approved the pleaded

[5] On a related issue, and in contrast with *Buttes*, at least in Australia the possibility of embarrassment in foreign relations may be inferred from the subject matter of the proceeding, whether or not there is evidence of it from the executive (*Petrotimor* (2003) 126 FCR 354 at [52] per Black CJ and Hill JJ).

contracts between AWB and the IGB. This would inevitably give rise to related issues about whether the UN 661 Committee failed adequately to implement the Program. Another issue is whether UN 661 Committee would have approved the pleaded contracts had the alleged contract inflation been disclosed. That would require the court to make findings as to what the UN 661 Committee would have been required to do in administering the UN OFFP in such circumstances, and whether or not it would have done this (see para 47(d)). Further, it is submitted that the *Buttes* principle precludes the Court from adjudicating on issues which would involve whether the government of Iraq breached its obligations under its Memorandum of Understanding with the UN (see para 49 above).

58. The non-justiciability of these issues under the *Buttes* principle is plain. Although the issues relate to acts or transactions of the UN 661 Committee (or the UN), rather than foreign States, that is not a valid ground of distinction. The UN has international legal personality and is comprised of foreign states, so that it is difficult to see any principled basis for treating it differently from its member states. In any event, the acts or transactions of the UN 661 Committee were engaged in by its members, each of whom as a foreign state has the benefit of the principle. Were the Court to attempt to determine these issues, it would be standing in judgment on the performance by the UN 661 Committee of its functions. Moreover, in seeking to determine what the UN 661 Committee would have done had the alleged contract inflation been disclosed, the Court would not only be making findings about the Committee's responsibilities, it would be speculating about the manner and competence with which the Committee would have performed those responsibilities. This is not a role for which an Australian municipal court is properly equipped, nor is it an appropriate role for such a court to undertake.

59. The position regarding the non-justiciability of acts and transactions of the UN 661 Committee (or the UN) is made plain by the *Charter of the United Nations Act* 1945 (Cth) (the ***UN Charter Act***). The UN Charter Act binds the Crown and gives approval to the UN Charter. Article 105 of the UN Charter makes it clear that the UN and its officials enjoy relevant immunities and privileges, including privileges and immunities "necessary for independent exercise of their functions...". As a consequence, the actions and conduct of the UN 661 Committee and officers discharging functions in relation to that Committee, are not subject to review in a municipal Court.

Second principle: that domestic courts will not adjudicate on obligations and undertakings which depend entirely on political sanctions and understandings, such as agreements and understandings between Australia and foreign governments

60. This principle is also supported by a considerable body of authority. It was stated by Gummow and Crennan JJ in *Thomas v Mowbray* (2007) 233 CLR 307 at [106] in the following terms (footnotes omitted):

> "... there will be no 'matter' if determination of the controversy would require adjudication of obligations and undertakings which depend entirely on political sanctions and understandings. Examples are agreements and understandings between governments in the Australian federation and between Australia and foreign governments."

The principle had earlier been stated by Gummow J in *Re Ditford; Ex Parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 370.5 and was reflected in earlier decisions of the High Court, in particular that of Brennan J in *Gerhardy v Brown* (1985) 159 CLR 370 at 138-9.

61. The same principle, although stated in slightly narrower terms, was also explicitly recognised by the Full Federal Court in *Petrotimor* (2003) 126 FCR 354 at [65] when Black CJ and Hill J referred to the "general principle" that:

> "... the question whether there has been a breach of Australia's international obligations [is] not a justiciable issue and [is] not a 'matter' in the constitutional sense. The general principle can be said, at least in part, to be an element of the separation of powers between the functions of the executive government on the one hand and the Courts on the other".

62. As authority for the second sentence in that passage, their Honours cited two single judge decisions of the High Court. Those were a decision of Brennan J, *Re Limbo* (1989) 64 ALJR 241, and one of Kirby J, *Thorpe v Commonwealth (No 3)* (1997) 71 ALJR 767.

63. *Re Limbo* was a decision on an application that, *inter alia*, Court fees and other costs be waived in a proceeding in which the plaintiff sought declarations that the Commonwealth government's policy on Australian military exports was contrary to international human rights standards set out in the United Nations Charter, the Universal Declaration of Human Rights and other international treaties. In his

reasons for judgment, Brennan J observed (*Re Limbo* (1989) 64 ALJR 241 at 242.C-D):

> "It is essential to understand that courts perform one function and the political branches of government perform another. ... it would be a mistake for one branch of government to assume the functions of another in the hope that thereby what is perceived to be an injustice can be corrected."

64. Later his Honour added (*Re Limbo* (1989) 64 ALJR 241 at 243.C-D):

> "The proposed plaintiffs seem to have mistaken the branch of government to which their plea must be directed. ...their pleas are political pleas. ... Human rights which are internationally agreed may, of course, become part of the domestic law of this country and thus subject to enforcement by the domestic courts of Australia. That is not the case, however, which the Watsons seek to make. This Court cannot assume a function of determining the truth of political issues unless those issues are critical to the existence of some power."

65. In *Thorpe* the plaintiff sought declaratory relief, including declarations that the Commonwealth, by motion in the United Nations General Assembly, seek an advisory opinion from the International Court of Justice as to the separate rights and legal status of Australia's aborigines, and negotiate with the plaintiff about the preparation of that case before the International Court. Referring to the decision of Brennan J in *Re Limbo*, Kirby J similarly held that the issues raised by those claims for declaratory relief were non-justiciable, being matters for the executive government not the courts (*Thorpe* (1997) 71 ALJR 767 at 778A-779F).

66. It may be argued that *Re Limbo* and *Thorpe* should be distinguished from the present case because they were entirely concerned with Australia's compliance with its international obligations, rather than the adjudication of those obligations arising as an issue in a wider cause of action. However, the principle applies even in cases of the latter kind. This is consistent with the application of the first of the *Buttes* principle on which AWB relies in such cases; that is, the principle applies unless the non-justiciable issue can be said to be incidental to the proceeding. It is also illustrated by the decision of Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70.

67. *Gerhardy* was ultimately concerned with whether s 19 of the *Pitjantjatjara Land Rights Act 1981* (SA), which prohibited entry upon certain lands by a person who was not a Pitjantjatjara and did have the permission of Anangu Pitjantjatjaraku, was invalid by reason of the *Racial Discrimination Act 1975* (Cth). This turned on whether s 19 was a "special measure" to which Art 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination applied; that is, broadly, a measure taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection. Indeed, Art 2(2) of the Convention created an obligation on States to take a special measure "when the circumstances so warrant". If s 19 were such a measure, the section would come within an exception to the relevant provisions of the *Racial Discrimination Act* which were said to render it invalid.

68. In considering the approach to be taken to determining whether or not s 19 was a "special measure" within the meaning of the Convention, Brennan J made a number of relevant observations. First, his Honour held that the obligation under Art 2(2) of the Convention to take a special measure when the circumstances so warrant was "an obligation in international law, and no municipal court has jurisdiction to enforce that obligation or to determine 'when the circumstances so warrant' (*Gerhardy* (1985) 159 CLR 70 at 138.2). Brennan J went on to say (*Gerhardy* (1985) 159 CLR 70 at 138.3-.4):

> "If a political branch of government decides that a racial group is in need of advancement to ensure that they attain effective, genuine equality and that a particular measure is likely to secure the advancement needed and that the circumstances warrant the taking of the measure, a municipal court has no jurisdiction under international law to determine whether those decisions have been validly made and whether the measure therefore has the character of a special measure under the Convention."

69. Most significantly, his Honour then said (*Gerhardy* (1985) 159 CLR 70 at 138.4-.8):

> "But when the rights and liabilities of individuals are in issue before a municipal court and those rights and liabilities turn on the character of the Land Rights Act as a special measure, the municipal court is bound to determine for the purposes of municipal law whether it bears that character. But the character of a special measure depends in part on a political assessment that advancement of a racial group is needed to ensure

that the group attains effective, genuine equality and that the measure is likely to secure the advancement needed. When the character of a measure depends on such a political assessment, a municipal court must accept the assessment made by the political branch of government which takes the measure. It is the function of the political branch to make the assessment. It is not the function of a municipal court to decide, and there are no legal criteria available to decide, whether the political assessment is correct. The court can go no further than determining whether the political branch acted reasonably in making its assessment".

70. It is clear from this last passage that even where the requirements of Australia's international obligations are in issue in a case involving the rights and liabilities of individuals, the municipal court is obliged to observe the separation of powers and avoid adjudicating on those requirements, being instead limited to determining whether the political branch acted reasonably in the steps it took to satisfy them. The other justices in *Gerhardy* took similar approaches to that of Brennan J set out above. Further, this part of Brennan J's decision in *Gerhardy* has been relied on, as noted above, in subsequent cases, including *Re Ditford* and *Thomas v Mowbray*.

71. This second principle on which AWB relies, it is submitted, also precludes the Court from deciding a number of the issues required to be determined by the Watsons' case. Those include the content of Australia's obligations under the UN Sanctions and whether those obligations were such that Ministerial Permission would not and/or could not lawfully have been granted for the export of wheat by AWB pursuant to its pleaded contracts with the IGB. Adjudication of these issues will, inevitably, involve findings as to whether Australia breached its obligations under the UN Sanctions by not preventing AWB's exports and what those obligations would have required of Australia, and what the Australian Government would have done, had the alleged contract inflation been disclosed. As with the issues precluded by application of the *Buttes* principles, those set out in this paragraph are plainly not appropriate for determination by a municipal court.

Consequences of non-justiciability

72. AWB will submit that if its submissions on non-justiciability are accepted, the consequence is that there is no "matter" in the constitutional sense and that, therefore, the Court does not have jurisdiction to determine the Watsons' case, rather than that the Court is obliged to decline to exercise its jurisdiction. Indeed, that view

is binding as a result of the decision of the Full Federal Court in *Petrotimor* (2003) 126 FCR 354 at [64]-[68]. Alternatively, AWB submits that the Court is obliged to decline to exercise its jurisdiction. Either way, the proceeding should be dismissed.

Part IV: Alleged Continuous Disclosure Contravention

Provisions of the Corporations Act and ASX Listing Rules and their construction

The provisions

73. The relevant parts of s 674 of the Corporations Act are ss 674(1) and 674(2).

74. Throughout the Relevant Period, ss 674(1) and (2) were in the following terms:

> "(1) Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.
>
> (2) If:
>
> (a) this subsection applies to a listed disclosing entity; and
>
> (b) the entity has information that those provisions require the entity to notify to the market operator; and
>
> (c) that information:
>
> (i) is not generally available; and
>
> (ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;
>
> the entity must notify the market operator of that information in accordance with those provisions."

75. There is no dispute that the requirements of ss 674(1) and 674(2)(a) were met here. It is common ground that AWB securities were "ED securities" (Corporations Act, s

111AE). It is also common ground that the listing market in question was Australian Stock Exchange Limited (*ASX*) and that the provision of the ASX's listing rules requiring notification of information to the market operator was LR 3.1.

76. The terms of LR 3.1 during the Relevant Period were, relevantly, as follows:

> "Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must tell ASX that information."

77. The term "aware" was defined as follows:

> "an entity becomes aware of information if a director or executive officer ... has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as a director or executive officer of that entity."

78. Also relevant are the terms of ss 676 and 677 of the Corporations Act.

79. During the Relevant Period, s 676 was in the following terms:

> "(1) This section has effect for the purposes of sections 674 and 675.
>
> (2) Information is generally available if:
>
> (a) it consists of readily observable matter; or
>
> (b) without limiting the generality of paragraph (a), both of the following subparagraphs apply:
>
> (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who would commonly invest in securities of a kind whose price or value might be affected by the information; and
>
> (ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.

(3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:

(a) information referred to in paragraph 2(a);

(b) information made known as mentioned in subparagraph 2(b)(i)."

80. Section 677 of the Corporations Act was in the following terms during the Relevant Period:

> "For the purposes of sections 674 and 675, a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities."

Construction of s 674

81. Two points of construction of s 674(2) have significance for this case, namely that:

(a) a corporation's mere belief about a specified event or matter is not "information" about that event or matter for the purposes of s 674; and

(b) the requirement in s 674(2)(b) that the corporation "has" information about a specified event or matter is a requirement that the corporation have actual (rather than constructive) knowledge of the information in question.

82. A number of matters support the first of these points.

83. First, "information" in s 674 is undefined, but is given an extended definition for the purposes of the insider trading provisions by s 1042A of the Corporations Act. That definition provides that "information" includes "matters of supposition and other matters that are insufficiently definite to warrant being made known to the public". Section 1042A was inserted into the Corporations Act by the same amending legislation as inserted the forerunner to the current s 674. Two relevant matters can be discerned from it. One is that "information" in s 674 was not intended to have the same extended meaning as given by s 1042A. If it was, it would have been simple to include the same definition in Ch 6CA. The other is that the legislature was of the

view that matters of supposition are insufficiently definite to warrant being made known to the public. Both matters support a construction of "information" in s 674 as excluding a corporation's belief about a specified event or matter because a belief, falling short of knowledge of the event or matter, must involve an element of supposition.

84. Secondly, it is apparent from s 674(1) that the section as a whole is concerned with "information about specified events or matters". The meaning of a similar expression, "specific information", was considered in the insider trading case of *Ryan v Triguboff* [1976] 1 NSWLR 588. In that case it was alleged that, through involvement in negotiations with a third party, the defendant had "specific information" that the third party was prepared to purchase a large parcel of shares in a company. It was held that this "generalised deduction" did not amount to "specific information" which "must be capable of being pointed to and identified, and must be capable of being expressed unequivocally" (at 597E-598B). Although "deductions, conclusions and inferences" may constitute "information" for the purposes of s 674 (see s 676(3)), the need for "information" to be readily identifiable and capable of being expressed unequivocally applies equally to the use of that term in s 674. A corporation's mere belief about an event or matter, which must by definition entail some level of doubt, cannot satisfy those requirements.

85. Thirdly, construing "information" as excluding a corporation's mere belief is consistent with the purpose of s 674. As was said in CLERP Paper No. 9, *Proposals for Reform: Corporate Disclosure*:

> "The primary rationale for continuous disclosure is to enhance confident and informed participation by investors in secondary securities markets. ... Continuous disclosure of materially price sensitive information should ensure that the price of securities reflects their underlying economic value. It should also reduce the volatility of securities prices, since investors will have access to more information about a disclosing entity's performance and prospects and this information can more rapidly factored into the price of the entity's securities."

86. An obligation that corporations disclose to the market their beliefs about events and matters, which beliefs involve supposition and are attended by doubt, is not consistent with this rationale. Such an obligation is more likely to ensure that prices

of securities do not reflect their underlying economic value because they are affected by disclosure to the market of erroneous beliefs.

87. Fourthly, it would be incongruous, and would cause mischief, if the provisions were construed to require the disclosure of mere beliefs. What standard of confidence would be required? How would one know what the belief of a corporation was if some senior officers held the belief and others did not? Whose belief would be the belief of the corporation? Would the belief need to be reasonable, or supported by any objective evidence? To what extent would the belief need to be verified before it was required to be disclosed?

88. Turning to the second point of construction, not only does "information" in s 674 exclude a corporation's mere belief, but the requirement in s 674(2)(b) that the corporation "has" information is a requirement that it have actual, rather than merely constructive, knowledge of that information. To construe the provision otherwise would be to say that a company "has" information where it does not, in fact, have it, but merely ought to have it. While this makes s 674(2) narrower than LR 3.1 (given the definition of "aware"),[6] it would require clear words for the section to impose on corporations an obligation – contravention of which is both a criminal offence (Corporations Act, s 1311(1)) and gives rise to liability to pay a pecuniary penalty (Corporations Act, s 1317G(1A)) – to disclose information of which they do not have actual knowledge. An example of clear words being used is found in the insider trading provisions of the Corporations Act which apply where a person "possesses inside information" and "knows, or ought reasonably to know" that the information is, in fact, inside information (Corporations Act, ss 1043A(1), 1043A(2)).[7] The first of those requirements is only satisfied where the person has actual knowledge (in other words "possesses" or, as in s 674(2)(b), "has") of the inside information, and the second is satisfied if the person has actual or constructive knowledge ("knows, or ought reasonably to know") that the information is inside information. Clear words are used to convey that constructive knowledge will suffice for this second requirement.

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[6] The ASX is, in any event, able to impose its own sanctions for a breach of LR 3.1. See LR 17.3 (suspension from quotation and LR 17.12 (removal of an entity from the official list).

[7] Like s 1042A, these provisions were also inserted into the Corporations Act by the same amending legislation as inserted the forerunner to the current version of s 674.

Elements of the alleged Continuous Disclosure Contravention

89. It is apparent from these provisions (accepting that the requirements of ss 674(1) and 674(2)(a) were met) that, to establish the alleged Continuous Disclosure Contravention, it is necessary for the Watsons to prove that:

(a) the alleged Relevant Information existed or, in other words, that the alleged Relevant Information accords with the true facts;

(b) the alleged Relevant Information was "information" for the purpose of s 674 of the Corporations Act;

(c) the alleged Relevant Information was information which, for the purposes of s 674(2)(b), AWB had during the Relevant Period;

(d) the alleged Relevant Information was information which, during the Relevant Period, LR 3.1 required AWB to notify to the ASX (s 674(2)(b)), namely:

(i) that it was information of which AWB was "aware"; and

(ii) that it was information that a reasonable person would expect to have a material effect on the price or value of AWB securities;

(e) the Relevant Information was not generally available during the Relevant Period (s 674(2)(c)(i));

(f) during the Relevant Period, the Relevant Information was information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of AWB securities (s 674(2)(c)(ii)); and

(g) AWB did not notify the ASX of the alleged Relevant Information in accordance with LR 3.1 during the Relevant Period.

(The overlap between paras 89(d)(ii) and 89(f) is due to overlap in the requirements of LR 3.1 and s 674. They are treated below as a single requirement that the alleged information be "material information".)

90. The alleged Relevant Information is said to have comprised four different types of information: Contract Inflation Information, Concealment Information, Iraqi Entity Payment Information and Regulatory Risk Information. Ultimately, therefore, it will be necessary to examine whether the Watsons have proved each of the elements set

out in the preceding paragraph for each of those types of information. For the purposes of these opening submissions, however, it is sufficient to consider these elements of the alleged Continuous Disclosure Contravention more generally.

91. Accordingly, the balance of this section addresses the questions whether:

(a) the alleged Relevant Information accords with the true facts;

(b) the alleged Relevant Information was "information" for the purposes of s 674 of the Corporations Act;

(c) the alleged Relevant Information was information of which, during the Relevant Period, AWB had actual knowledge (for the purposes of s 674(2)) or, for completeness only, was aware (for the purposes of LR 3.1);

(d) during the Relevant Period, the Relevant Information was material information;

(e) during the Relevant Period, the Relevant Information was generally available; and

(f) whether, during the Relevant Period, AWB notified the ASX of the Relevant Information.

Does the alleged Relevant Information accord with the true facts?

92. Taken as a whole, the alleged Relevant Information consists essentially of the following matters, namely, that:

(a) AWB's conduct in paying the Fees *via* Alia to the ISCWT and obtaining funds under contracts nos. A1670 and A1680 from the Escrow Account for repayment of the Tigris debt was contrary to the UN Sanctions;

(b) AWB concealed this conduct from the UN and DFAT and that they did not know of it;

(c) had the UN known of the conduct, UN approval could not have been given to the relevant contracts or for payments in relation to those contracts out of the UN Escrow Account in accordance with the UN Sanctions;

(d) had DFAT known of the conduct, given Australia's international obligations under the UN Sanctions, Ministerial Permission for the export of wheat pursuant to the relevant contracts could not lawfully have been give and/or would not have been given; and

(e) these matters created a material additional risk that the single desk would be terminated or reviewed at a time earlier than 2010.

Conduct contrary to the UN Sanctions?

93. *Payment of the Fees to the ISCWT.* The proposition that it was contrary to the UN Sanctions for AWB to pay the Fees *via* Alia to the ISCWT is incorrect and is not supported by the expert opinion of Prof Shearer or, subject to one exception, that of Prof Rothwell.

94. Both Prof Shearer and Prof Rothwell consider that the UN Sanctions did not prohibit Iraq from imposing the Fees on suppliers, such as AWB (Joint Report/Shearer, para 42).[8] Prof Rothwell also expresses the opinion that suppliers could pay such fees to an Iraqi entity provided that the payments were reasonably related to a service received and were in Iraqi dinars (Joint Report/Rothwell, para 53). The requirement that payments be made in Iraqi dinars is the exception referred to above. Professor Shearer agrees generally with Prof Rothwell's opinion, save for the requirement that the payments be made in Iraqi dinars (Joint Report/Rothwell, para 53(2) and see also Prof Shearer's note after para 74).

95. The requirement that payments be made in Iraqi dinars is not expressly stated in any of the relevant UN resolutions. Paragraph 4 of UNSCR 661 imposed a general prohibition on making funds available to an Iraqi entity or entities (B-555). However, had that prohibition remained unqualified, it would have prevented the making of payments whether in Iraqi dinars or not. As Prof Rothwell recognises, that aspect of UNSCR 661 was amended by para 20 of UNSCR 687 (B-560) (Joint Report/Rothwell, para 45), which permitted financial transactions in relation to sales of foodstuffs notified to the 661 Committee. Payments of the Fees, provided at least that they were for the costs of transportation and handling and were reasonable, were financial transactions of that kind. Neither para 20 of UNSCR 687, nor any

[8] Although these opinion are specifically concerned with UNSCR 986, from Prof Shearer's and Prof Rothwell's other opinions it can be inferred that neither of them is of the view that Iraq was precluded by any other UN Sanction (or the UN/Iraq MOU) from imposing the fees.

other UN Sanction, contained a requirement that such payments only be made in Iraqi dinars.

96. The only support Prof Rothwell identifies for the requirement that payments, such as the Fees, had to be in Iraqi dinars is an opinion of the UN Office of Legal Affairs (*OLA*) dated 12 June 1998 (B-332). However, that opinion provides no real support at all. First, plainly, it could not itself have been the source of a requirement that payments be made in Iraqi dinars and Prof Rothwell does not seek to suggest that it was. Secondly, although Prof Rothwell says that the opinion provides some assistance in interpreting the UN Sanctions, it is not apparent how this is so. For example, there is no relevant ambiguity in the text of the sanctions which the opinion might be used to clarify. Thirdly, even if there were, the opinion could not be used as extrinsic material in interpreting and applying the UN resolutions at least because there is no evidence that it was circulated by the UN to concerned governments, including Australia (Joint Report/Rothwell, para 53(2)). Fourthly, the OLA opinion does not identify the source of its requirement that payments be in Iraqi dinars, nor does it offer any reasoning to support it. Fifthly, the opinion is not concerned with the payment of fees analogous to those for the transportation and handling of humanitarian goods, such as wheat, but merely with fees for a shipment of construction materials passing through Iraq on the way from Syria to Iran. Sixthly, the opinion departs from an earlier OLA opinion. That opinion stated that payment of port fees would not contravene para 4 of UNSCR 661 provided the shipping activities were otherwise lawful and that the fees did not exceed what was customary in such circumstances; it did not mention any requirement that the fees be paid in Iraqi dinars (C-293). There was no relevant change in the UN Sanctions between the two opinions and there is no apparent reason why the second should be preferred to the first.

97. Further, and again provided at least that the fees were to be used for the costs of transporting and handling the wheat AWB supplied and were reasonable, it was not contrary to the UN Sanctions for AWB to recover the cost of paying the fees from the UN Escrow Account.

98. First, para 8 of UNSCR 986 expressly provided that the funds in the Escrow Account were to be used to meet the humanitarian needs of the Iraqi population and the distribution of basic foodstuffs, such as wheat, was one of those (B-574). Consistently with this, the funds in the UN Escrow Account allocated to the purchase of foodstuffs under the UN-approved Distribution Plan for Phase I of the

UN OFFP included an amount for both external and internal transport costs (C-181 at 192, 204). Although the same notation did not appear in later Distribution Plans, there is no reason to think that the funds allocated to the purchase of foodstuffs did not continue to make allowance for those costs. In addition, all Distribution Plans allocated amounts to the acquisition of equipment and spare parts for the processing, handling and transportation of foodstuffs throughout Iraq (eg, C-181 at 192, 199, para 29). Following the war in Iraq, draft resolutions proposed by the US/UK and Germany provided for the use of funds in the Escrow Account to meet internal transport and distribution costs at least for goods provided under the UN OFFP (C-2611, 2629).

99. Secondly, under various UNSCRs, the 661 Committee and later the UN Secretary-General, assisted by the OIP, were authorised to determine whether suppliers under transactions notified to them were eligible for payment out of the UN Escrow Account. Pursuant to para 12 of UNSCR 986, adopted on 14 April 1995, the 661 Committee was initially authorised to determine whether, in accordance with para 8 of that resolution, suppliers under proposed transactions were eligible for payment out of the Escrow Account (B-574). The effect of para 17 of UNSCR 1284, adopted on 17 December 1999, was that the UN Secretary-General assumed this role in relation to transactions for the supply of, amongst other things, certain foodstuffs, including wheat (B-631). As addressed in more detail below, each of the relevant contracts between AWB and the IGB was notified to the UN in accordance with these resolutions and the procedures under them and, for each of those contracts, AWB was determined to be eligible for payment out of the UN Escrow Account.

100. Lastly, the evidence does not establish that the Fees were not reasonable. The Fees were incorporated in the prices for wheat under the contracts. Those prices were reviewed by experts in the OIP and invariably found to be reasonable and acceptable (eg, E-168). This remained the case even after March 2001 by which time the UN was aware of allegations that Iraq was demanding commissions on contracts for humanitarian supplies (C-1530 at 1533). In light of that evidence there is no warrant for concluding that the Fees were not reasonable.

101. *Tigris debt.* It was also not contrary to the UN Sanctions to increase the price of wheat under contracts nos A1670 and A1680 so that the Tigris debt could be repaid with funds from the UN Escrow Account.

102. As noted above, the price for wheat under contracts nos A1670 and A1680 included amounts to facilitate repayment of the Tigris debt. Those contracts were made in mid-December 2002 (E-786, 792) and notified to the UN Secretary-General some time in mid-January 2003 (E-868, 870). By those dates, UNSCR 1409 had been adopted, para 4 of which permitted the funds in the UN Escrow Account to be used to finance the sale or supply to Iraq of any (other than certain military-related) commodities or products, provided that the conditions of para 8(a) of UNSCR 986 were satisfied (B-669). Although contracts were still reviewed by the OIP (and other agencies), this was only for the purpose of ensuring that they did not concern the sale or supply of prohibited military-related commodities or products (B-669, 671-672, paras 3, 4, 10). There was, accordingly, no reason why, by that time, the funds in the UN Escrow Account could not be used to facilitate the repayment of the Tigris debt. As explained above, that debt related to a genuine UN-approved sale to Iraq of some 20,833 tonnes of wheat in December 1995 and using the funds to repay it was, in that sense, merely financing the earlier sale. It is not surprising that the funds could be used in this way – although they were held in the UN Escrow Account, they were Iraqi funds, generated by the export of Iraqi oil to third parties.

103. Professor Rothwell expresses a contrary opinion, apparently on the footing that discharging the debt conferred a financial benefit on the Iraqi government or the IGB and the funds in the Escrow Account were principally to be used for humanitarian purposes and, after the adoption of UNSCR 1409, also for the purposes of infrastructure rehabilitation (Joint Report/Rothwell, paras 100-101). However, discharging the debt conferred no real financial benefit on the Iraqi government or the IGB. No funds were received by them, nor were they likely to be sued by Tigris if they did not pay the debt. In addition, the debt had been incurred in acquiring grain to meet the humanitarian needs of the general population and its repayment was part of that transaction, rather than being for the particular benefit of the Iraqi government. Further, while prior to the adoption of UNSCR 1409 the funds in the Escrow Account were principally to be used for humanitarian purposes, after its adoption use of the funds was not confined to humanitarian purposes and infrastructure rehabilitation. Provided the conditions in para 8(a) of UNSCR 986 were met, use of the funds was relatively unconfined, save that they could not be used for the purchase of certain military-related commodities.

104. It should also be noted that no payments were made to AWB pursuant to contract A1670 until after the UN Sanctions had ended and all but one of the payments made

to AWB pursuant to A1680 were made after UN Sanctions ended. Accordingly the making of those payments cannot have involved any contravention of UN Sanctions.

105. Even though the use of Escrow Account funds to repay the Tigris debt was permitted by UNSCR 1409, the UN notification form and contractual documentation provided by AWB in relation to Contracts Nos A1670 and A1680 did not identify that aspect of those transactions. However, the deficiencies in these documents were at worst a technical failure to comply with the UN OFFP procedures, given that the use of the funds was permitted.

Knowledge of the UN and DFAT and concealment

The UN

106. In AWB's submission, the evidence supports a finding that the UN knew that AWB was obliged to pay the Fees under its contracts with the IGB and that the cost of doing so was included in the prices for wheat under those contracts. In any event, the evidence does not permit a finding to the opposite effect.

107. *The first four contracts.* Particularly in the first four relevant contracts between AWB and the IGB, AWB's obligation to pay the Fees and the inclusion of an amount for those fees in the contract price, was clearly disclosed.

108. In the short form versions of those contracts, being contracts nos. A4653, 4654, 4655 and A4822 (E-121, 122, 123, 159), the obligation to pay the Fees was expressed as follows:

> "The cargo will be discharged Free into Truck to all silos within all Governates of Iraq ... The discharge cost will be a maximum of USD12.00 and shall be paid by [AWB] to the nominated Maritime Agents in Iraq. This clause is subject to UN approval of the Iraq distribution plan."

109. That clause stated explicitly that AWB was obliged to pay the Fees. It also stated the amount to be paid. Further, attention was drawn to the clause by the statement that it was subject to UN approval of the Distribution Plan.

110. AWB's obligation to pay the Fees was also reflected in the description of the price for the wheat, being "[t]he CIF Free in Truck price per tonne". That description

made it clear that the contract price included an amount for the Fees AWB was obliged to pay.

111. Australia's UN Mission submitted these contracts, under cover of UN notification forms, to the UN. The first three Contracts were submitted on around 3 August 1999 and the fourth on around 1 November 1999 (E-139, 140, 141, 167). The Mission received a letter from the Chairman of the 661 Committee in respect of each Contract (E-143, 145, 147, 170). Those letters said that the 661 Committee had been duly notified of the intention to send the supplies of wheat for which the Contracts provided to Iraq and that:

> "[t]he exporter is eligible for payment from the Iraq account as the financing arrangements specified in your communication appear to be consistent with the procedures adopted by the [661 Committee] pursuant to [UNSCR 986]."

112. In addition, for the fourth contract there was a report from the OIP which had examined the notification and contract to establish whether the price and value were credible and whether all relevant details had been submitted. The OIP expressed no concern about the Contract and concluded that "[t]he item price and value ... appear reasonable and acceptable" (E-168).

113. While the contracts did not expressly state that the Fees would be paid to an Iraqi entity or entities, the OIP and 661 Committee could have been in no doubt about that. That is because the Iraqi government was responsible, both under the UN/Iraq MOU and under every Distribution Plan (including the Phase VI plan, which was the one under which the Contracts were made), for the distribution of foodstuffs to all but three northern governorates of Iraq.

114. *Letter of credit.* The initial draft letter of credit which AWB received for contract no. A4653 from Banque Nationale de Paris SA (***BNP***), which held the UN Escrow Account, expressly referred to the wheat being delivered by sea from Australia to Umm Qasr and then by trucks to silos in all Iraqi provinces and required AWB to present truck consignment notes in order to obtain payment in accordance with the letter of credit (C-507). In this way, the letter made clear AWB's responsibility for transportation costs. A request for a letter of credit in those terms must have been made by the Central Bank of Iraq to the UN Secretary-General pursuant to para 36 of the 661 Committee Procedures (C-130 at 137). Further, when AWB sought to

have those parts of the draft deleted because it could not control the issue of trucking consignment notes (C-513), the IGB responded that they had been included because the 661 Committee had approved the same wording in the relevant contract (C-530). Thus, the draft letter of credit was another document from which it should be inferred that the UN knew AWB was obliged to pay the Fees to an Iraqi entity.

115. *The later contracts.* In the short form versions of the later contracts (eg, E-250), AWB's obligation to pay for the Fees was expressed in an abridged version of the term set out above, which relevantly provided that "[t]he cargo will be discharged Free into Truck to all silos within all Governates of Iraq", and in the description of the price AWB was paid for the wheat, which remained as set out above. As noted above, the OIP and the 661 Committee knew that the Iraqi government was responsible for distribution of the wheat supplied throughout Iraq and so could not have failed to appreciate. All of these later contracts were approved with reports from the OIP and letters from the 661 Committee Chairman or the OIP in similar terms to those quoted above (eg, E-272, 278).

116. *Knowledge of commissions on humanitarian contracts.* In addition, all of the later contracts were approved by the UN after January 2000, by which time the OIP was aware of allegations that AWB had sold wheat to Iraq at an inflated price and paid a portion of that price ostensibly for trucking fees to a Jordanian company with connections to the Iraqi government (C-662). A number of the contracts were also approved after March 2001, by which time the 661 Committee was aware of allegations that the Iraqi government was demanding commissions on humanitarian contracts (C-1530 at 1533). Combined with this additional information, the references in the contracts to AWB's responsibility for the discharge and transportation of the wheat was sufficient to put the OIPs experts and/or members of the 661 Committee on notice of AWB's obligation to pay the Fees.

117. *Concealment.* Given that the UN must have known that AWB was obliged to pay the Fees or, at least, that the evidence does not support a finding that the UN did not know, the question of whether AWB sought to conceal its payment of the Fees from the UN is largely beside the point. However, in AWB's submission, the evidence referred to above, particularly the explicit contractual references to the wheat being discharged free in truck to all governorates in Iraq and the price being the CIF Free in Truck price per tonne, are inconsistent with AWB attempting to conceal the matters alleged. Moreover, viewed fairly, the evidence as a whole does not support

such a finding. That is an issue which will be addressed, if necessary, in greater detail once the evidence has concluded.

DFAT

118. In AWB's submission, as with the UN, the evidence supports a finding that DFAT knew that AWB was obliged to pay the Fees under its contracts with the IGB and that the cost of doing so was included in the prices for wheat under those contracts, or at least does not permit a finding to the opposite effect.

119. *DFAT had the same information as the UN.* One reason for concluding that DFAT knew of the matters alleged is that it had the same information as the UN Committee. Having provided them to the UN, DFAT had copies of each of the contracts between AWB and the IGB. It should also be inferred that DFAT, like the UN, knew of the Iraqi government's responsibility for the distribution of humanitarian goods under the UN/Iraq MOU and each Distribution Plan. Like the UN, from early 2000, DFAT knew of the Canadian complaint and, from March 2001, it was aware of allegations that the Iraqi regime was demanding commissions on humanitarian contracts. For the reasons given above, it should be inferred that this material informed DFAT, as it did the UN, of the matters alleged.

120. *Additional document.* In the case of DFAT, an additional document indicates that it knew of the matters alleged.

121. On 7 May 2003, Ric Wells, First Assistant Secretary of DFAT's South Pacific, Middle East and Africa Division, sent a cable to a number of senior DFAT officials which said that AWB contracts with the IGB included "a component for land freight, for which AWB was paid under the OFF and from which AWB then made payments to Iraqi officials to organise freight" (C-2690). This does not appear to have been news within DFAT – it did not produce on subpoena any internal DFAT communications recording surprise or concern in relation to this statement. In any event, it certainly proves that DFAT knew of the matters alleged by the date of the cable.

122. *Concealment.* As with the UN, the question of concealment is of little significance given that DFAT must have known that AWB was obliged to pay the Fees or, at least, that the evidence does not support a finding that DFAT did not know. In any event, the evidence referred to above is inconsistent with AWB attempting to conceal the matters alleged and, viewed fairly, the evidence as a whole does not

support a finding to that effect. AWB will, if necessary, address the issue in greater detail once the evidence has concluded.

Could UN approvals not have been granted in accordance with the UN Sanctions?

123. For the reasons given above, AWB's payment of the Fees *via* Alia to the ISCWT was not contrary to the UN Sanctions and was something of which, it should be inferred, the UN knew. Similarly, increasing the price of wheat under contracts nos A1670 and A1680 so that the Tigris debt could be repaid with funds from the Escrow Account was not contrary to the UN Sanctions. Those matters make the question of whether, had it known of these matters, the UN could have approved the contracts and payments in relation to them out of the Escrow Account in accordance with the sanctions redundant.

124. However, even if it is arguable that payment of the Fees was contrary to the UN Sanctions and that the UN was not fully informed of the matters alleged, the evidence does not establish that, had the UN been fully informed, it could not (or would not) have approved the contracts and payments in relation to them out of the UN Escrow Account. (Nor, for completeness, does it establish these things in relation to facilitating the Tigris debt withdrawal.)

125. First, for the reasons given at paras 93-100 above, it was at least open to the 661 Committee or the UN Secretary-General to take the view that payment of the Fees was not contrary to the UN Sanctions and accordingly to determine that AWB was eligible for payment out of the Escrow Account in relation to the contracts. (Even if this is disputed, the UNSC could always have further amended the UN Sanctions to make the payments permissible.)

126. Secondly, the 661 Committee and the Secretary-General were concerned about the value of contracts for the supply of humanitarian goods to Iraq which were on hold and, accordingly, had no desire to put on hold additional contracts, such as AWB's, for the supply of basic foodstuffs. In particular, the Secretary-General repeatedly expressed grave concern about the high level of holds on humanitarian contracts (C-984, 1530 at 1531, E-544) and, as mentioned above, following the adoption of UNSCR 1284 from 17 December 1999, it was the UN Secretary-General, assisted by the OIP, rather than the 661 Committee who determined whether AWB was eligible for payment out of the Escrow Account under the Contracts (B-631, para 17).

127. Thirdly, the evidence suggests that, in order to ensure the UN OFFP continued to function, the 661 Committee took a pragmatic approach to payments by suppliers to the Iraqi government.

128. This is demonstrated, in particular, by the fact that although the 661 Committee was aware from at least March 2001 of allegations that the Iraqi regime was "demanding kickbacks and illegal commissions on contracts for humanitarian supplies" (C-1530 at 1533), it took no action over this. In early March 2001, Norway, whose Permanent Representative to the UN was Chairman of the 661 Committee, considered having a committee letter circulated to member States reminding them of the illegality of companies paying surcharges to Iraqi purchasers (C-1530 at 1533), but this did not occur. In late March 2001, the OIP said that the 661 Committee was giving increased attention to the issue and the UK and the US were working towards the 661 Committee agreeing formally that no payments of any sort can be made to any Iraqi authority or agency (C-1585 at 1586). No agreement of this kind was ever reached. The issue does not appear to have featured in any of the Annual Reports of Chairman of the 661 Committee on its work. It was mentioned in only one of the Chairman's 90-day and 180-day reports on the work of the 661 Committee during each Phase of the UN OFFP. That was a report of 4 September 2001, and noted only that discussion of the issue amongst 661 Committee members was still under way (C-1748 at 1753, para 25).

129. It is also demonstrated by at least two other matters. One is that the OIP and the 661 Committee took the view that USD payments to Iraqi authorities, such as port fees, were permissible if they were "subsumed in the contract" and so factored into the contract price, with payment being made out of the UN Escrow Account rather than separately (C-1585 at 1586, para 6). The other is that the UN/661 Committee did not prevent payments such as port fees provided they were not excessive (C-1595).

130. Fourthly, it is apparent that different members of the 661 Committee had different views about both the continuation of the UN Sanctions and payments by suppliers to the Iraqi government (C-608, 614, 1530 at 1532-3, C-1626). The 661 Committee's decisions had to be by consensus and where consensus could not be reached the Chairman was to undertake such consultations as he or she deemed appropriate to resolve the issue and to ensure the continued effective functioning of the Committee (C-145 at 175). As a result, it is simply unclear what conclusion any such process would have reached.

131. Fifthly, the evidence does not permit any finding to be made on the balance of probabilities as to what determination the UN Secretary-General would have made. There is little evidence of the Secretary-General's attitudes, save for his repeated expressions of grave concern about the value of holds on humanitarian contracts under the UN OFFP.

Could or would Ministerial Permissions not have been granted?

132. As with the question of UN approvals, the question of whether, had DFAT known of the Fees, Ministerial Permissions could not and/or would not have been granted is made redundant by the fact that, for the reasons given above, AWB's payment of the Fees was not contrary to the UN Sanctions and was something of which, it should be inferred, DFAT knew. The same it true in respect of the Tigris debt withdrawal because, for the reasons given above, it was not contrary to the UN Sanctions. Again, however, even if it is arguable that payment of the Fees and the Tigris debt withdrawal were contrary to the UN Sanctions and that the DFAT was not fully informed of the matters alleged, the evidence does not establish that, had DFAT been fully informed, Ministerial Permissions could not and/or would not have been granted.

133. First, Ministerial Permissions could have been given provided the UN determined that AWB was eligible for payment in relation to the relevant contracts out of the UN Escrow Account. That is because, for the reasons given at paras 101-105 above, it was at least arguable that AWB's payment of the Fees and obtaining of funds for repayment of the Tigris debt was not contrary to the UN Sanctions. This fact, particularly when combined with a determination by the UN that AWB was eligible for payment out of the Escrow Account, would have provided a reasonable basis upon which the Minister could have been satisfied that permitting the exportation of wheat under the relevant contracts would not infringe Australia's international obligations. Since, for the reasons set out at paras 123-131 above, it cannot be said that the UN could not (or would not) have determined that AWB was eligible for payment out of the Escrow Account, it cannot be said that Ministerial Permissions could not have been given.

134. Secondly, Ministerial Permissions would have been given provided the UN determined that AWB was eligible for payment in relation to the relevant contracts out of the UN Escrow Account. That is because, as noted above, regardless of the precise content of Australia's international obligations, Ministerial Permissions were

as a matter of fact given once that UN made such a determination. Again, since it cannot be said what the UN would have done, it cannot be said that Ministerial Permissions would not have been given.

Material additional risk of the single desk being terminated or reviewed earlier than 2010?

135. The Watsons' case that throughout the Relevant Period there existed a material additional risk of the single desk being terminated or reviewed earlier than 2010 first requires the Watsons to prove that the other elements of the alleged Relevant Information existed. Since, for the reasons set out above, they did not, there was no material additional risk.

136. Even if the other elements of the alleged Relevant Information did exist, in AWB's submission, the evidence does not establish that this gave rise throughout the Relevant Period to any material additional risk in relation to the single desk. That is demonstrated by a number of matters.

137. First, there is no doubt that from May 2003, senior DFAT officers were aware that AWB had made payments to the Iraqi government for inland transportation of the wheat it supplied under the UN OFFP and recovered those payments from the Escrow Account (C-2690). The government took no action over this.

138. Secondly, in June 2003, AWB publicly stated that it had paid for on-ground distribution of the wheat it supplied to Iraq to all governorates of Iraq (C-2710). Again, there was no adverse response to this from the government or, for that matter, from shareholders (O'Brien 21.7.09, para 40). (The same is true in respect of newspaper articles published in late April 2004: see D-779, 782, 783, 786; O'Brien 21.7.09, paras 45, 71).

139. Thirdly, after the incursion into Iraq on 20 March 2003, while the UN Sanctions were still in force, DFAT proceeded on the basis that inland transport costs for a proposed humanitarian donation of wheat by the Commonwealth could be, and should be, reimbursed from the Escrow Account (C-2635, C-2639, C-2642, C-2644, C-2645, C-2647).

140. Fourthly, notwithstanding the publicly available facts set out in paragraphs 137 to 138 above, the review undertaken in 2004 of AWBI's operation of the single desk did not result in any conclusion or statement to suggest that these facts were a matter of any concern to the Commonwealth, or that they should give rise to any cause to

conclude that the single desk might be at risk or that it might be terminated or reviewed earlier than 2010.

141. Fifthly, had AWB disclosed the other elements of the alleged Relevant Information prior to the release of the final Volcker Report, rather than being tarred as a "sanction-breaker" it is more likely to have been praised as a whistleblower and spared any adverse consequences from its disclosure. This is even more likely to be the further back in time one goes. For example, had AWB made disclosure at the start of the Relevant Period, it would have done so while the UN OFFP was still underway and payments to the Iraq government were still being made.

Was the alleged Relevant Information "information" for the purposes of s 674?

142. In various parts of the 3FASOC, the Watsons appear to plead that AWB's mere belief in the elements of the alleged Relevant Information addressed above itself forms part of the Relevant Information (3FASOC, paras 22, 28). If that is the case they seek to make, then AWB submits, first, that it did not have such a belief and, secondly, that, in any event, for the reasons given at paras 81-87 above, its mere belief could not constitute "information" for the purposes of s 674 of the Corporations Act.

143. Similarly, AWB submits that any material additional risk of the single desk being terminated or reviewed prior to 2010 could not have been more than a matter of mere belief and too inherently speculative to constitute "information" for the purposes of s 674.

144. Subject to those issues, assuming the Relevant Information existed (which AWB disputes), it constituted "information" for the purposes of s 674.

Did AWB have actual knowledge or was it "aware" of the alleged Relevant Information during the Relevant Period?

145. For the reasons given at para 88 above, the only question of significance is whether AWB had actual knowledge of the alleged Relevant Information. While the question of whether AWB was "aware" of that information arises under LR 3.1, it is of no consequence if AWB did not have actual knowledge of the information as s 674(2)(b) requires. Nonetheless, for completeness, both issues are included here.

146. AWB submits that, during the Relevant Period, it did not have actual knowledge of, nor ought any of its directors or executive officers in the course of their duties

reasonably have come into possession of, the alleged Relevant Information (even if it existed) as set out at para 92 above. Comprehensive submissions on this issue can only be made once the evidence is complete, but a number of points can be made now.

147. First, in this case there is a significant gap between the times when many of the facts giving rise to the alleged Relevant Information occurred and when it is alleged AWB was obliged to inform the ASX of that information (ie, the Relevant Period). In particular, most of AWB's payments to Alia were made in 1999, 2000 and 2001, but the Relevant Period does not begin until 11 March 2002 (when s 674 of the Corporations Act came into effect). That is important because, in the intervening period, a number of relevant AWB employees resigned. For example: Nigel Officer, General Manager of the International Sales & Marketing Division (*ISM*), ceased employment with AWB in June 2000 (Compendium, para 27); Mark Emons, Regional Manager for the Middle East, resigned on about 28 June 2000 (Compendium, para 29); and Michael Watson, Chartering Manager, resigned in about December 2000 (Compendium, para 30). Because the Watsons must prove that AWB knew of the Relevant Information during the Relevant Period, it will not suffice for them to point to the knowledge of these individuals.

148. Secondly, the UN Sanctions were complicated and confusing, comprising a number of interrelated UNSCRs, which had to be read together with the UN/Iraq MOU and the 661 Committee's procedures. For the reasons given at paras 93-105 above, it was reasonably arguable that payment of the Fees was not contrary to the sanctions. In relation to the Tigris debt, the payments to AWB did not contravene the sanctions and, in any event, all but one of the payments were made after the end of the sanctions. In those circumstances, absent an actual determination by the 661 Committee, AWB could not have known, nor ought it have known, that by making the payments it was placing Australia in breach of the UN Sanctions. Much less could it have known what the UN or DFAT knew and what they could or would do if they possessed additional information about AWB's conduct.

149. Thirdly, IGB told AWB that the Fees, including the increase which occurred when the surcharge was introduced in December 2000, had UN approval (C-434 at 435, 530, 1067, 1069) and gave a credible reason for their introduction, saying that it wanted suppliers to meet the costs of transportation to avoid Iraq's Ministry of Finance having to put excessive amounts of Iraqi dinars into the market in meeting the costs itself (C-434 at 435).

150. Fourthly, as outlined at paras 107-115 above, the contracts between AWB and the IGB referred to the inland transportation of wheat to silos in all governorates of Iraq and made it clear that the costs of this were included in the price for wheat. As already noted, these contracts were invariably approved by the UN and the OIP's experts regularly determined the contract prices to be "reasonable and acceptable".

151. Fifthly, the alleged material additional risk to the single desk is of such an inherently speculative nature that it is not something a person could have knowledge of, as opposed to a belief about.

152. The Watsons contend in their opening that various documents, items of "circumstantial evidence" and AWB's conduct demonstrate that AWB knew the Fees were paid to Iraq, were not used wholly to meet transportation costs and were contrary to the UN Sanctions. Although, as accepted above, the first of these points is correct, AWB will submit that a fair reading of the whole of the evidence does not support the second and third points; that is, it does not support a conclusion that AWB knew that the Fees were not used wholly to meet transportation costs or that they were contrary to the sanctions.

Was the alleged Relevant Information material information during the Relevant Period?

153. In considering whether the alleged Relevant Information was information that a reasonable person would expect to have a material effect on the price or value of AWB securities, it is necessary to bear in mind that it comprises multiple elements.

154. First, AWB submits that none of the alleged Relevant Information (even if it existed) was disclosable material information throughout the Relevant Period. The reasons for this are essentially those given at paras 136-141 above in relation to the alleged risk to the single desk: from May 2003, senior DFAT officers knew that AWB had made payments to the Iraqi government for transport costs with funds obtained from the Escrow Account and no action was taken; in June 2003, AWB publicly announced that it had paid on-ground distribution costs in relation to the wheat it supplier to Iraq under the UN OFFP and the government took no action nor did shareholders respond negatively; in early 2003, DFAT sought payment of inland transport costs associated with a humanitarian wheat donation to Iraq from the Escrow Account; the 2004 review, notwithstanding the facts set out above, reached no conclusion adverse to AWB or its current or future control of the single desk; and

had AWB disclosed the alleged Relevant Information earlier, it would have been perceived as a whistleblower, rather than "sanction-breaker".

155. Secondly, all of the alleged Relevant Information, save for those elements concerning the Tigris debt, AWB's knowledge and concealment of its conduct and the risk to the single desk, was disclosed by the final Volcker report after the close of the ASX on 27 October 2005, and there was no decline in the price of AWB securities the following day. That report found that the Fees paid by AWB violated UN Sanctions and were in fact kickbacks received by the former Iraqi regime (C-3332, 3650-3652). It also found that, while the evidence was insufficient to conclude that AWB employees actually knew, those employees ought to have known that the regime stood to benefit illicitly from AWB's payment of the fees (C-3332, 3663). The price of AWB securities in fact rose on 28 October 2005 (O'Brien 14.8.09, paras 76-77), which was the first trading day following the release of the report after the close of the market on 27 October 2005. Further, while the Watsons' event study expert, Dr Dunbar, seeks to attribute a decline in the price of AWB securities on 27 October 2005 to the market anticipating the findings in the final Volcker report, unless the market is credited with perfect powers of anticipation, it must be necessary in such a case also to consider how the market reacted once the report was actually released. When this is done, it is apparent that the two-day return for AWB securities (on 27 and 28 October) was not statistically significant (O'Brien 14.8.09, para 77) and that over the two trading days following 27 October 2005 (28 and 31 October 2005) the price of AWB securities recovered in full from the decline of 27 October 2005 (O'Brien 14.9.09, para 68).

156. Thirdly, so far as the elements of the Relevant Information disclosed in the final Volcker report are said to have given rise to the alleged additional risk to the single desk, for the reasons given in the preceding paragraph that risk could not have constituted material information.

157. Fourthly, the elements of the alleged Relevant Information concerning the Tigris debt (save for those to do with AWB's knowledge and concealment) are unlikely to have been material information if the elements discussed above were not.

Was the alleged Relevant Information not generally available during the Relevant Period?

158. None of the alleged Relevant Information (assuming it existed) was generally available from the start of the Relevant Period, up until 6 June 2003.

159. However, following the publication of the AWB media release on that day (C-2710), information was generally available that the price in AWB's contracts with the IGB included amounts to cover on-ground transportation costs and that AWB paid those costs with funds from the UN Escrow Account.

160. From the publication of the final Volcker report after the close of the ASX on 27 October 2005, all of the alleged Relevant Information was generally available, save for those elements concerning the Tigris debt, AWB's knowledge and concealment of its conduct and the risk to the single desk.

161. Further, any additional risk to the single desk arising from the matters referred to in the preceding two paragraphs was generally available from the time information about those underlying matters became generally available.

162. Otherwise, AWB accepts that the alleged Relevant Information was not generally available during the Relevant Period.

Did AWB notify the ASX of the alleged Relevant Information?

163. On 6 June 2003, AWB notified the ASX that the price in AWB's contracts with the IGB included amounts to cover the costs of transportation and handling of the wheat in Iraq and that AWB paid for the costs of transportation and handling of the wheat in Iraq with funds from the UN Escrow Account.

164. Otherwise, AWB did not notify the ASX of the alleged Relevant Information.

Conclusion

165. In AWB's submission, the alleged Continuous Disclosure Contravention should fail because the alleged Relevant Information does not accord with the facts. Further, even if elements of the alleged information do accord with the facts, only those elements concerning AWB's knowledge and concealment of its conduct constituted material information and then only from 28 October 2005.

Part V: Alleged Express and Implied Representations Contraventions

166. The alleged Express and Implied Representations Contraventions add little or nothing to the Watsons' case.

167. For one, a number of the alleged representations were not made in the terms pleaded or at all. Most notably, each of the alleged Implied Representations is said to have

been made merely by virtue of the fact that AWB was subject to the continuous disclosure requirements of s 674(2) of the Corporations Act and LR 3.1 (3FASOC, paras 49, 50). The fact that a corporation is subject to an obligation hardly means that it has represented that it has complied with it (3FASOC, para 50(b)). Much less does it mean, as at least two of the alleged Implied Representations would have it (3FASOC, paras 50(a), 50(c)), that the corporation has represented that it has gone further than that obligation would require.

168. Secondly, the alleged representations are generally said to have been misleading or deceptive because AWB did not comply with its continuous disclosure obligations (eg, 3FASOC, paras 46(a), 46(c), 51(b)) or because it knowingly engaged in conduct which was contrary to the UN Sanctions (eg, 3FASOC, paras 46(b), 46(d), 46(e)). Whether those matters are the case or not will depend on the Court's findings in respect of the alleged Continuous Disclosure Contraventions.

169. Thirdly, there is no basis for concluding that the alleged representations, even if they were made and were misleading or deceptive, caused the Watsons any loss. There is no evidence that the Watsons relied on (at least) any of the alleged Express Representations prior to their purchases of AWB securities. Moreover, there is no evidence as to the effect of the alleged Express and Implied Representations on the value of AWB securities.

Part VI: Causation and loss

The Watsons' case

170. The Watsons appear to have both a primary case and an alternative case on causation and loss

171. The starting point of the Watsons' primary case on causation and loss is that, but for the alleged contraventions, they would not have purchased AWB securities at all. Although that allegation is unpleaded, it is made in para 3 of Schedule B containing particulars to para 59 of the 3FASOC.

172. Such a case must depend on the Watsons proving that they would not have decided to purchase AWB securities had they known of some or all of the alleged Relevant Information or that they relied on one or more of the alleged Express or Implied Representations in deciding to purchase AWB securities. No allegations of these kinds have been pleaded.

173. The next step in the Watsons' primary case is to allege, again by way of particulars, that if they had not invested funds in AWB, they would have invested the equivalent sum in CBA securities listed on the ASX (3FASOC, Sched B, para 5).

174. Accordingly, they claim to be entitled to recover damages or compensation of $20,369.43, plus the current value of 400 CBA securities which they claim they would still hold (3FASOC, Sched B, para 8). The amount of $20,369.43 comprises a loss of $1,208.02, which the Watsons made on the AWB securities they acquired, plus a profit of $19,089.41 which the Watsons claim they would have made had they bought CBA securities instead of AWB securities.

175. The Watsons' alternative case on causation and loss is that, by reason of the alleged contraventions, they purchased AWB securities at a market price which was materially greater than their true value. That allegation is made in paras 55 and 57 of the 3FASOC. In para 59, the Watsons allege that by reason of this they have suffered loss or damage resulting from the alleged contraventions.

176. As noted in relation to the Watsons' primary case, there is no pleaded allegation that the Watsons would not have purchased AWB securities had they known some or all of the alleged Relevant Information or that they relied on one or more of the Express or Implied Representations in deciding to purchase those securities. Instead, the Watsons' alternative case appears to proceed on the footing that causation can be proved simply by establishing that, when they purchased their AWB securities, the market price was materially greater than the true value of the securities by reason of the alleged contraventions (3FASOC, paras 55, 57). This is sometimes referred to as the "fraud on the market" or "indirect causation" theory. AWB submits that it is wrong.

177. It is clear from the particulars in Sched B to the 3FASOC that, on their alternative case, the Watsons claim to be entitled to recover damages or compensation of $1,208.02, being the amount of the loss they allegedly made trading on AWB securities. In relation to the Watsons, no account is taken of the alleged inflation. In the particulars to para 59, alternative calculations are referred to for the "other Group Members". No further particulars have been provided.

What must the Watsons prove to establish causation?

178. It is common ground that, on the Watsons' primary case, they must prove that, but for the alleged contraventions, they would not have decided to purchase AWB

securities. The issue between the parties on causation relates to the Watsons' alternative case.

179. On that case, AWB submits that the relevant statutory provisions require the Watsons to prove that the alleged contraventions were a cause of their decision to purchase AWB securities. In other words, it is necessary for them to prove that they would not have decided to purchase AWB securities had they known some or all of the Relevant Information or had AWB not made the alleged Express or Implied Representations.

180. The Watsons' fraud on the market theory should be rejected. It is insufficient to establish causation for the Watsons to prove that the alleged contraventions caused the price they paid for AWB securities to be inflated, without also establishing that one or more of the alleged contraventions was a cause of their decision to purchase those securities.

181. AWB's submission is supported by the relevant statutory provisions and the authorities.

Statutory provisions

182. The principal statutory provisions on which the Watsons rely are s 1317HA of the Corporations Act (for the alleged Continuous Disclosure Contraventions) and s 1041I of the Corporations Act, s 12GF of the ASIC Act, s 82 of the TP Act and s 159 of the FT Act (for the alleged Express and Implied Representation Contraventions).[9] Each provides for compensation to a person who suffers loss or damage "by" (s 1041I, Corporations Act, s 12GF, ASIC Act, s 82, TP Act), "because of" (s 159, FT Act) or where damage "resulted from" (s 1317HA, Corporations Act) a contravention.

183. There is no material difference between these provisions so far as causation is concerned. For example, in *Adler v ASIC* (2003) 179 FLR 1 at [709], the NSW Court of Appeal held that s 1317H of the Corporations Act, which was in relevantly the same terms as s 1317HA, imposed the same requirement for causation as s 82 of the TP Act. All of the provisions require proof of a causal connection between contravention and damage. The causal connection required by each provision must be understood by reference to the subject, scope and purpose of the legislation in

[9] The Watsons also rely on various ancillary provisions, but they are not more favourable to them on the issue of causation that these principal provisions.

question (*Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at [29]-[30], [45]-[46], [49]; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at [54], [99]).

184. The subject, scope and purpose of the legislation in question here supports AWB's submission that the Watsons must prove that the alleged contraventions were a cause of their decision to purchase AWB securities.

185. In this respect, a number of points may be made about the continuous disclosure provisions in the Corporations Act.

186. First, the purpose of those provisions is "to enable informed decisions to be made about the allocation of investment funds" (Explanatory Memorandum, Corporate Law Reform Bill 1993 (Cth), para 4). In other words, that purpose is to protect investors from making investment decisions on the basis of incomplete or incorrect information. It is consistent with this purpose that compensation under s 1317HA be limited to persons whose decisions to purchase securities were caused by breaches of the continuous disclosure provisions. The purpose of the regime certainly does not require that investors whose decisions to invest were not affected by breaches of the continuous disclosure provisions be entitled to compensation. Indeed, this would be counterproductive to the creation of an informed market because, if investors could recover damages for contraventions of the continuous disclosure provisions without have paid any attention to ASX announcements, there would be little incentive to read them.

187. Secondly, it is no part of the continuous disclosure regime to provide a form of insurance for persons who trade on the ASX without regard to information disclosed pursuant to its provisions. Broader objectives, such as ensuring efficient markets, can be advanced through the powers conferred on ASIC to prosecute breaches of the provisions and the imposition of criminal sanctions in relation to some breaches.

188. Thirdly, when having regard to the legislative purpose behind s 1317HA it must be borne in mind that, although compensation paid under that section is paid by the entity in breach of the relevant financial services penalty provision, the effect of any payment of compensation is, where that entity is a public company, borne by the present shareholders. Those shareholders may have bought securities in that entity without any knowledge, or any way of ascertaining knowledge, of its exposure to claims for compensation. To compensate past shareholders at the expense of

present shareholders in the absence of a causal connection of the sort for which AWB contends would be to engender uncertainty and erode confidence in the market.

189. Similar remarks may be made in relation to provisions of the various Acts proscribing misleading or deceptive conduct. The purpose of those provisions is plainly enough to protect consumers or investors from the provision of incorrect or misleading information. Such a purpose does not warrant compensating investors regardless of the effect on their decision-making of the incorrect or misleading information provided. (See also the September 2007 discussion paper of the Corporations and Markets Advisory Committee, paras 3.2.2, 3.2.3, 9.2 and 9.3.)

The authorities

190. AWB's submission is also supported by the authorities. These show that, where an applicant claims to have entered into a commercial transaction and suffered loss as a result, it is necessary, in order to establish the requisite causal link between the loss and the respondent's unlawful conduct, to prove that this conduct was a cause of the decision to enter into the transaction.

191. In *Digi-Tech (Australia) Ltd v Brand* (2004) 62 IPR 184, the appellants sought to recover damages against Digi-Tech, under s 82 of the TP Act, on the footing that: Digi-Tech had produced misleading forecasts concerning revenue and gross margin in relation to certain products; this had led a third party to produce a valuation which supported a particular price for the rights to the products; absent that valuation the scheme by which the appellants invested in the products would not have been proposed; and the appellants would not have suffered loss The argument was described as the "indirect causation theory".

192. The NSW Court of Appeal held as follows (at [158], emphasis added):

> "On the assumption that Digi-Tech's forecasts as to the revenue and gross margin of the products were misleading and deceptive, that misleading and deceptive conduct resulted in Deloitte producing, in essence, a misleading and deceptive valuation to support the price of $72.5m. That valuation enabled the investment scheme to be put together and proposed by Urwin to the appellants. *But to complete the chain of causation, there must be something linking the appellants' loss to their entry into the investment scheme. That link is the inducement of the appellants and their consequential*

act of entering into the transaction to their prejudice. Without that link, there is no proof that the misleading conduct caused the loss "

193. The emphasized words are apposite in the present context. The Court continued (at [159]):

> "Persons who claim damages under s 82(1) on the ground that they entered into transactions induced by the misrepresentations of other persons must prove that they relied on such misrepresentations and, therefore, "by" that conduct, they suffered loss or damage. As Mr Sheahan pointed out, were it otherwise, representees could succeed even though they knew the truth, or were indifferent to the subject matter of the representation"

194. More recently, *Digi-Tech* has been applied in *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 73 NSWLR 653. In *Ingot*, the plaintiffs invested in a convertible note issue by a company, which ultimately went into liquidation. Before the note issue, a due diligence committee, consisting of a number of the defendants, had reviewed the proposed prospectus. The committee told the company's board that they were not aware of any material misstatement or omission in the prospectus. The plaintiffs alleged that this was misleading conduct, contrary to s 995 of the Corporations Law and that, but for this, the board of the company would not have issued the notes. The plaintiffs sued under s 1005 of the Corporations Law, which was in similar terms to s 82 of the TP Act. A majority of the Court held that the claim was bad in law, applying *Digi-Tech* (*Ingot* (2008) 73 NSWLR 653 at [5]-[22] per Giles JA, at [618] per Ipp JA).

195. The whole of the reasoning of Giles JA at paras 5-22 of *Ingot* is of assistance. In particular, at para 12, his Honour said:

> "... The distinction drawn in *Digi-Tech* is between cases where conduct on the part of the plaintiff 'forms a link in the causation chain; (at [156]) and where it does not. Where it does, there must be reliance on the misleading conduct in the manner next explained. Where it does not, there may be recovery if the act of the innocent party induced by the misleading conduct 'by its very nature, causes the plaintiff's loss' (at [155]), but that is where the plaintiff passively suffers loss from another's act (as in *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 at 529-30 ; 109 ALR 638 at

641-2 (*Janssen-Cilag*), where consumers were led by the misleading conduct to buy less of the plaintiff's product)."

196. Later, at paras 20-22, his Honour said:

> "The purpose of ss 995 and 1005 is achieved by proscription of engaging in misleading conduct and provision of compensation. In *Henville* Gleeson CJ referred at [18] to the purpose of the broadly equivalent provisions of the Trade Practices Act as 'establish[ing] a standard of behaviour in business by proscribing misleading and deceptive conduct, whether or not the misleading or deception is deliberate, and by providing a remedy in damages', and McHugh J said at [96] that a court 'should strive to apply s 82 in a way that promotes competition and fair trading and protects consumers'.
>
> Section 1005 should be applied in a way that promotes provision of correct information to investors and protects them in making investment decisions. But this does not warrant compensating investors regardless of the effect on their decision-making of the misleading conduct. Once provided with correct information, the investors must make their investment decisions. ...
>
> As was pointed out in *Digi-Tech* at [159], ss 995 and 1005 should not be given a scope whereby an investor entering into a transaction could recover even if it knew the truth of the underlying misrepresentation, or was indifferent to its truth, and proceed nonetheless. In my respectful opinion *Digi-Tech* was correctly decided on its facts, and its reasoning holds good. ..."

197. As this case concerns national legislation, *Digi-Tech* and *Ingot* should be followed unless they are plainly wrong, which they are not (*Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151 [135]; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board*(2009) 84 ALJR 1 at 14 [51], 17 [63] (HCA)).

Does the evidence establish causation?

198. It follows from the preceding section that, in order to establish causation on either their primary or their alternative case, the Watsons must prove that they would not have decided to purchase AWB securities had they known some or all of the

Relevant Information or that they relied on one or more of the alleged Express and Implied Representations in deciding to purchase AWB securities. Whether these matters have been established can only be assessed once the evidence is complete. However, a number of observations can be made now.

199. The Watsons' relevant trading history in AWB securities was as follows:

(a) on 7 June 2005, they bought 2,000 AWB securities at $4.32 for $8,706.53 (including brokerage and GST);

(b) On 10 June 2005, they bought 5,000 AWB securities at $4.23 for $21,336.12 (including brokerage and GST);

(c) on 21 June 2005, they bought 3,000 AWB securities at $4.39 for $13,271.41 (including brokerage and GST);

(d) on 7 February 2006, they sold 5,000 AWB securities at $4.55 for $22,624.87 (net of brokerage), making a modest profit;

(e) on 12 September 2006, they sold 2,000 AWB securities at $3.35 for $4,641.04 (net of brokerage), making a modest loss; and

(f) on 18 September 2006, they sold their remaining 3,000 AWB securities at $3.48 for $10,348.31 (net of brokerage), also making a modest loss.

200. The Watsons' case on causation comes down to whether or not, had some or all of the alleged Relevant Information been disclosed prior to their purchase of AWB securities, they would not have purchased them.

201. In that regard, the following matters are of potential significance:

(a) first, the Watsons did not sell any of their AWB securities following the release of the final Volcker report which said that AWB had made substantial payments to the Iraqi government which were contrary to the UN Sanctions and that at least some of its employees ought to have known this. Had they sold all their AWB securities at the lowest price on 28 October 2005, the trading day after the release of the final Volcker report, they would have made a profit of around $8,100.00;

(b) secondly, the Watsons did not sell any of their AWB securities following the opening of counsel assisting the Cole Royal Commission on 16 January 2006,

even though in the opening it was said that AWB had knowingly made payments to the Iraqi government which were contrary to the UN Sanctions and concealed this fact from the UN. Had the Watsons sold all their AWB securities at the lowest price on 17 January 2006, they would have made a profit of around $16,000.00;

(c) thirdly, when the Watsons first sold some of their AWB securities, on 7 February 2006, they only sold half of them. On those, as noted above, they still made a modest profit. They would have made a greater profit had they sold all their AWB securities at that time;

(d) fourthly, the Watsons did not sell the balance of their AWB securities until October 2006.

202. Accordingly, although Mr Watson gives highly generalised evidence in paras 107 and 124 of his first affidavit that he would not have purchased AWB shares had he known of the information disclosed during the Cole Royal Commission, that evidence appears difficult to reconcile with the Watsons' subsequent conduct.

203. Lastly, for present purposes, it is sufficient to note that the Watsons case that they would have invested in CBA securities rather than AWB securities depends on speculative "counterfactual" evidence about what securities they would have bought and sold and when, which requires careful scrutiny.

Price inflation?

204. Although the Watsons particularise their loss without reference to it, their written opening identifies as the "first measure" of damages "price less true value ascertained by reference to price inflation". The question here is what was the real value of AWB securities on 7, 10 and 21 June 2005. The Watsons seek to answer that question (to some extent) by saying, through the evidence of Dr Dunbar, what the market price of AWB securities would have been on those dates if all of the alleged Relevant Information had been disclosed at the start of the Relevant Period.

205. Dr Dunbar uses two alternative methods in seeking to estimate what the market price of AWB securities would have been had the alleged Relevant Information been disclosed at the start of the Relevant Period. The primary method is the "event study" method. The other is described as a "DCF analysis", but simply involves

averaging adjustments made by analysts to their discounted cash flow valuations of AWB after the start of the Cole Royal Commission.

206. The common objective, in using both methods, is to determine how much the market price of AWB securities or analysts' DCF valuations of AWB fell in response to disclosures of the Relevant Information which the Watsons contend occurred with the release of the final Volcker report and during the course of the Cole Royal Commission. The amount of that decline is said to represent the "inflation" in the price of AWB securities which was caused by AWB's non-disclosure of the Relevant Information.

207. Using the event study method, Dr Dunbar estimates that the price of AWB securities declined by $2.15 in response to disclosures of the Relevant Information. Accordingly, he concludes that this was the amount of inflation in the price of AWB securities as a result of the non-disclosure of the Relevant Information. Because he was instructed to assume that all of the Relevant Information existed at the start of the Relevant Period, he estimates that, had the Relevant Information been disclosed, the price of AWB securities as at the start of that period would have been $2.15 lower than it in fact was.[10]

208. Further, because on the Watsons' case there was no disclosure of the alleged Relevant Information prior to 7, 10 or 21 June 2005, according to Dr Dunbar, the market price of AWB securities on those dates was still $2.19 higher than it would have been had the Relevant Information been disclosed at the start of the Relevant Period. Accordingly, the Watsons say that the real value of AWB securities on the dates they purchased them was $2.15 per security less than what they actually paid.

209. AWB has answered the evidence of Dr Dunbar with that of Dr O'Brien, who critiques Dr Dunbar's reports and also seeks to estimate the effect of disclosures of the alleged Relevant Information on the price of AWB securities using an event study. The level of inflation which Dr O'Brien calculated is $0.19 as against Dr Dunbar's $2.15.

210. The deficiencies in Dr Dunbar's evidence will only be able to be set out comprehensively once it has been tested in cross-examination. However, some of them can be identified now.

[10] Using the DCF analysis, Dr Dunbar estimates that analysts' DCF valuations of AWB securities declined by $1.55 (including analysts' estimates of legal costs and potential fines) in response to disclosures of the Relevant Information and that, therefore, this was the amount of inflation in AWB's securities. But he says that the event study is more reliable than his DCF analysis.

Event study

211. The principal deficiencies in Dr Dunbar's event study evidence are as follows.

212. First, Dr Dunbar's event study estimates the effect on the price of AWB securities of a number of supposed disclosures of alleged Relevant Information *after* 16 January 2006. As noted above, this is inconsistent with the Watsons' pleaded case. On that case, the alleged Continuous Disclosure Contravention only continued up to the end of the Relevant Period, on 13 January 2006. It is implicit in this that all the alleged Relevant Information had been disclosed by the end of the next trading day (16 January 2006) – if it had not been, then the Continuous Disclosure Contravention would have continued until it had. The lion's share ($1.73) of Dr Dunbar's $2.15 of inflation is attributable to disclosures of information after 16 January 2006.

213. Secondly, whatever the limitations of the 3FASOC, many of the disclosures of information which are the subject of Dr Dunbar's event study are not disclosures of the alleged Relevant Information. For example, Dr Dunbar includes in his $2.15 inflation what he estimates to be the effect on the price of AWB securities of statements during the Cole Royal Commission that AWB executives seriously misled the Volcker inquiry (Dunbar 1, Fig 5, 17.1.06). However, misleading the Volcker inquiry forms no part of the alleged Relevant Information. Dr Dunbar also includes in his $2.15 inflation the estimated negative effects on the price of AWB securities of statements during the Cole Royal Commission that the Australian government was complicit in AWB's conduct (O'Brien 1, para 165). This is actually inconsistent with the alleged Relevant Information.

214. Thirdly, Dr Dunbar includes in his estimate of inflation in the price of AWB securities the negative effects on the price of AWB securities of statements made by politicians during the course of the Cole Royal Commission about the future of the single desk. For example, Dr Dunbar adds to his estimate of inflation the effect of Prime Minister Howard's statement on 20 January 2006 that whether AWB should continue as a monopoly wheat exporter was "something that should be looked at" (Dunbar 1, Fig 5, 20.1.06). This gives rise to the problem referred to in the preceding paragraph because such statements are not part of the alleged Relevant Information. Further, taking the effects of such statements into account cannot be justified on the basis that they would have been made whenever the alleged Relevant Information was disclosed. For example, in AWB's submission, it is unlikely that such statements would have been made had the alleged Relevant

Information had been disclosed voluntarily by AWB rather than through a quasi-judicial inquiry, such as the Cole Royal Commission with its attendant publicity.

215. Fourthly, Dr Dunbar's event study does not distinguish between new disclosures of the alleged Relevant Information and repetition of elements of the alleged Relevant Information which have already been disclosed. This is significant because it is common ground between Dr Dunbar and Dr O'Brien that information only effects the price of a security the first time it is disclosed to the market; it has no effect if it is repeated later because by then it has already been factored into the price of the security. The consequence of Dr Dunbar's failure to distinguish between new disclosures of the alleged Relevant Information and repetition of it is that he incorrectly attributes declines in the price of AWB securities to repetition of the alleged Relevant Information and includes this in his $2.15 inflation. In AWB's submission, the alleged Relevant Information was fully disclosed during the opening address of counsel assisting the Cole Royal Commission and so any alleged Relevant Information disclosed after that day was merely being repeated.

216. A final problem with Dr Dunbar's event study evidence is his failure to take into account the higher dividends earned by AWB shareholders due to the non-disclosure of the Relevant Information. That dividends would have been lower had the Relevant Information been disclosed appears to be common ground as evidence to that effect is given for the Watsons' by Mr Woolley (Woolley, para 444). A total of $1.04 in dividends per AWB security was issued during the Relevant Period. Using the amount by which dividends have in fact been lower since January 2006, Dr O'Brien calculates that dividends during the Relevant Period would have been $0.62 per security less in total (O'Brien 1, para 220). When the benefits of franking credits are taken into account, this comes to $0.88 per security (O'Brien 1, para 223). If Dr Dunbar's inflation of $2.15 is adjusted for this, it reduces to $1.31 per share. To do otherwise than to take these higher dividends into account is to allow the Watsons and other group members to have their cake and eat it too. They get the compensated on the footing that, if the Relevant Information had been known, they would have paid less for their AWB securities, but they get to retain the higher dividends which, on their own evidence, would not have been issued had that information been known.

Discounted Cashflow Analysis

217. Dr Dunbar's DCF analysis has many of the same deficiencies as his event study, as well as some additional problems. The principal deficiencies are set out below.

218. For one, the DCF analysis includes analysts' DCF valuations which were done well after 16 January 2006 and which necessarily took into account events which occurred after that date. As indicated above, that is inconsistent with the Watsons' pleaded case and must involve taking into account analysts' reactions to matters other than disclosures of the alleged Relevant Information. Indeed, the DCF analysis is even worse than the event study in this respect. The event study, at least, does not take into account events after 7 February 2006. The DCF analysis makes use of changes in analysts' DCF valuations which were made much later than that.

219. Secondly, and more generally, the DCF analysis does not isolate changes made by analysts' to their DCF valuations on the basis of disclosures of the alleged Relevant Information from changes made in response to the Cole Royal Commission generally and the media and political commentary surrounding it.

220. Thirdly, so far as changes in the analysts' DCF valuations related to disclosures of the alleged Relevant Information are concerned, the DCF analysis assumes that the same changes would have been made had the Relevant Information been disclosed on 11 March 2002. For the reasons already mentioned (eg, para ## above), that assumption is unsound.

221. Fourthly, there are difficulties with the analysts' DCF valuations used by Dr Dunbar. For instance: Dr Dunbar does not identify or check the reliability of the assumptions underlying those valuations; there are significant differences between the reports in terms of the value they attribute to AWB; and Dr Dunbar uses the valuations of only five analysts, two of whose valuations were prepared on a limited basis in any event.

222. Fifthly, again, Dr Dunbar fails to take into account the higher dividends received by shareholders during the Relevant Period as a result of the non-disclosure of the alleged Relevant Information.

223. Sixthly, both Dr Dunbar and Dr O'Brien agree that the event study is a more appropriate method to use than the DCF analysis.

Part VII: Relief

224. AWB submits that the proceeding should be dismissed with costs.

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