

Chapter 3

AWB Ltd in Iraq

3.1 This chapter describes AWB Ltd's involvement in the Oil-for-Food Programme (OFF program) and outlines the key events that took place between 1999 and 2003.

3.2 The Australian Wheat Board was established in 1939 as a government statutory authority to control the domestic and international marketing of Australian wheat. It was the sole marketer of wheat both domestically and internationally until the Wheat Marketing Act 1989 came into force, deregulating the domestic market. The Australian Wheat Board retained the sole right to export wheat from Australia and by 1 July 1999, when the Australian Wheat Board became AWB Ltd, an unlisted public company, it was the exclusive manager and marketer of all bulk wheat exports from Australia, conducted through a supply-pooling system known as the Single Desk. On 21 August 2001, AWB Ltd was placed on the Australian Stock Exchange, as a listed company limited by shares. The Single Desk was managed and operated by AWB (International) Ltd (AWBI), a wholly owned subsidiary of AWB Ltd.¹

3.3 Australia has been exporting wheat to Iraq since 1948. Over the life of the OFF program, the Australian Wheat Board, and then AWB Ltd, was the single largest provider of humanitarian goods to Iraq receiving a total of more than US\$2.3 billion in payments from the UN escrow account.² Between 1997 and 2005, the Australian Wheat Board's (and AWB Ltd's) wheat sales to Iraq constituted a substantial part of the company's overall annual wheat sales and these sales were highly profitable. The Iraqi market was considered a 'high risk, high return market'.³

The contracts between AWB Ltd and the IGB

3.4 The Australian Wheat Board, and then AWB Ltd, participated in all 13 phases of the OFF program. In a briefing note from AWB Ltd to the Wheat Export Authority, dated 14 November 2005, AWB Ltd stated that over the seven years of the OFF Program, the Australian Wheat Board and AWB Ltd entered into over 41

1 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 2, pp 1–2.

2 Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Final Report on Manipulation of the Oil-for-Food Programme by the Iraqi Regime*, 27 October 2005, p. 311.

3 *Australian Securities & Investments Commission v Ingleby [2012] VSC 339* Annexure, 'Statement of Agreed Facts and Joint Submission as to Penalty', paras 1–3, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2012/339.html?stem=0&synonyms=0&query=ingleby> (accessed 30 January 2015).

contracts with the Iraq Grain Board (IGB) to supply nearly 12 million metric tonnes of wheat through 285 shipments.⁴

3.5 As explained by the Cole inquiry report, all contracts made under the OFF program had to be approved by the UN in advance to qualify for payment from the UN escrow account. To get approval for its contracts, the supplier provided copies of short-form and long-form contracts together with a document called 'Notification or request to ship goods to Iraq' to the Department of Foreign Affairs and Trade (DFAT). DFAT verified that the contract was made for the supply of an authorised humanitarian good or service and passed the documents on to the UN for approval. The contracts were then scrutinised for price and value by UN customs experts to ensure that the contracts did not offend the sanctions resolutions. If the contracts were approved by the UN, DFAT issued an export permit under the *Customs (Prohibited Export) Regulations 1958* (Cth) authorising export of the product to Iraq.⁵

3.6 DFAT considered that it was only required to play a 'post box' role with respect to the contracts, that is, DFAT ensured that the contracts were for the provision of approved humanitarian goods or services and that the relevant documents adhered to the correct form, but then DFAT sent the documents on to the UN for scrutiny.⁶ As noted by Mr Paul Kelly, in an article in *The Australian*:

DFAT did not see itself as an investigatory agency and it possessed neither the systems nor procedures to investigate alleged breaches of sanctions. It lacked the commercial and price expertise to make such judgments and did not try.⁷

3.7 DFAT explained that if, after vetting a contract, the UN were concerned about a contract it would either block the contract or put the contract on hold, pending further investigations.⁸ All the AWB Ltd contracts were approved for payment from the escrow account by the UN.⁹

4 AWB Ltd, 'Briefing note to the Wheat Export Authority', Exhibit 481 to Commissioner Terence Cole's, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), [WEA.0001.0059].

5 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, pp xv–xvi.

6 See Ms Gillian Bird, DFAT, *Senate Foreign Affairs Defence and Trade Committee, Estimates Hansard*, 3 November 2005, p. 6.

7 Mr Paul Kelly, 'The real scandal', *The Australian*, 29 November 2006.

8 Mr Marc Innes-Brown, DFAT, *Senate Foreign Affairs Defence and Trade Committee, Estimates Hansard*, 3 November 2005, p. 12.

9 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 4, pp 115–116.

The trucking and service fees

3.8 As noted in the Independent Inquiry Committee (IIC) report, for the first five phases of the OFF program the Australian Wheat Board's contracts with the IGB required shipment to the point of entry in Iraq. However, in July 1999, the agreement was changed, requiring AWB Ltd to assume the cost of inland transportation to all points in Iraq (the trucking fee).¹⁰

3.9 The Cole inquiry report highlighted that all the short-form and long-form contracts after July 1999 between AWB Ltd and IGB specified that the price of the wheat would include 'discharge Free into Truck to silos within all Governates of Iraq'. However, only the short-form contracts entered into in the second half of 1999 mentioned that the 'discharge cost will be a maximum of US\$12.00 and shall be paid by the Sellers to the nominated Maritime Agents in Iraq'.¹¹

3.10 As noted by the IIC, contracts between AWB Ltd and the IGB after 1999 did not include a reference to a payment to 'Maritime Agents'. The contracts merely stated that 'the cargo will be discharged Free into Truck to all silos within all Governates of Iraq', without attributing an amount for transportation fees.¹²

3.11 The Statement of Agreed Facts and Joint Submission as to Penalty annexed to the case of *Australian Securities & Investments Commission v Ingleby* (Statement of facts in *ASIC v Ingleby*) noted that AWB Ltd paid the trucking fee, in internationally tradable currency, to a company incorporated in Jordan, Alia for Transportation (Alia). Between November 1999 and July 2000, AWB Ltd paid the trucking fee via third parties but after that period the fee was paid directly by AWB Ltd into Alia's Jordanian bank account. From November 2000 the trucking fee was increased and a new payment was included as part of the transportation fee, an after-sales service or handling fee (service fee) at 10% of the contract price. Between 1999 and 2003, under 21 separate contracts, the trucking and service fees were paid at a rate of between US\$12 to €55.40 per metric tonne of wheat, totalling over US\$220 million. The amount of the fee was incorporated into the contract price and therefore AWB Ltd was able to claim it back from the UN escrow account.¹³

3.12 In the Statement of facts in *ASIC v Ingleby* it was accepted that Alia did not provide actual transportation services in Iraq; rather, Alia simply remitted the fees to

10 Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Final Report on Manipulation of the Oil-for-Food Programme by the Iraqi Regime*, 27 October 2005, p. 311–312.

11 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, p. xvi.

12 Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Final Report on Manipulation of the Oil-for-Food Programme by the Iraqi Regime*, 27 October 2005, p. 314 and footnote 527.

13 *Australian Securities & Investments Commission v Ingleby* [2012] VSC 339 Annexure, 'Statement of Agreed Facts and Joint Submission as to Penalty', paras 11–16.

the government of Iraq, allowing Iraq to obtain internationally-traded currency contrary to the UN sanctions regime.¹⁴ This conclusion reiterated the findings of the Cole inquiry:

After deducting a commission of 0.25 per cent, Alia transferred the funds to the General Maritime Transportation Company, the Iraq Public Ports Company or the [Iraqi State Company for Water Transport (ISCWT)]. From there the funds were distributed to various Iraqi government ministries, with approximately two-thirds being paid to the Ministry of Finance, 18 per cent to 'land' (presumably being for land transportation), approximately 4 per cent to 'ports' and 1 per cent to 'water'.¹⁵

Investigations and complaints

The Canadian Complaint

3.13 According to Ms Felicity Johnston, the Chief Customs Officer with the UN Office of the Iraq Program (OIP) from 1999 to 2003, in late 1999 the Canadian Mission to the UN contacted the OIP. The representative of the mission explained that the Canadian Wheat Board was told by the IGB that if it wanted to supply wheat under a proposed contract it would have to deposit US\$700 000 into a Jordanian bank account to cover transport costs of the wheat within Iraq. Ms Johnston stated that she advised the Canadian Mission that such a payment would be contrary to the sanctions regime, to which they responded that they had been advised by the IGB that some Thai companies and AWB Ltd were already engaged in such an arrangement. Ms Johnston said that she approached Ms Moules, a DFAT official posted to the Australian Mission to the UN, asking her to 'diplomatically' ask AWB Ltd executives whether there was any substance to the Canadian claims.¹⁶

3.14 The Cole inquiry report noted that AWB Ltd, through Mr McConville, its Government Relations Officer, emphatically denied the allegations, describing them as 'bullshit'. The Australian mission advised the OIP of the denial. However, Ms Johnston continued to harbour suspicions and so checked the AWB Ltd contracts to see if they disclosed any irregularity. She overlooked the clause quantifying the discharge cost but still decided to query Mr Nicholas, of Austrade in New York, about possible irregularities in AWB Ltd contracts or standard terms and conditions. AWB Ltd assured Austrade that there were no irregularities in its dealings with Iraq and, in April 2000, provided OIP with a copy of the standard terms and conditions to its contracts with the IGB. The Cole inquiry report went on to say:

AWB advised that the standard terms and conditions did not apply where they were contrary to 'UN policy to trade with Iraq'. That was the case with

14 *Australian Securities & Investments Commission v Ingleby [2012] VSC 339* Annexure, 'Statement of Agreed Facts and Joint Submission as to Penalty', para. 11.

15 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, p. lxii.

16 Ms Felicity Johnston interviewed by Mr Jonathan Holmes, *Four Corners*, ABC, 17 April 2006, <http://www.abc.net.au/4corners/content/2006/s1616143.htm>.

the 'demurrage/despatch' clause...The United Nations dropped any further consideration of the Canadian complaint. Ms Johnston said that was because she thought that, although contract A4822 contractually required payment of a US dollar 'discharge fee', because payment of such a fee would be contrary to 'UN policy to trade with Iraq' she assumed such payment was not being made. She thought her view was reinforced by AWB's earlier emphatic denial of any irregular payments.¹⁷

The Pacific Rim Shipping Enquiry

3.15 As noted in the Statement of facts in *ASIC v Ingleby*, on 15 March 2000, Mr Ingleby, the Chief Financial Officer of AWB Ltd, received a letter from Pacific Rim Shipping Pty Ltd, an agent of Atlantic and Orient Shipping Co and one of the third parties used to pay the trucking fee to Alia. The letter notified AWB Ltd that Atlantic and Orient Shipping Co had received an audit enquiry regarding the payment of trucking fees and the amount of trucking fees paid. The letter requested confirmation that all wheat contracts had been approved by the UN and the Australian government. The next day Mr Ingleby signed a letter of response that advised that the relevant contracts had been approved by both the UN and the Australian Government.¹⁸ The Cole inquiry report explained that the audit enquiry was instigated by the Singaporean monetary authorities and related to possible money laundering. The Singaporean enquiry caused the shipping company to withdraw from the arrangement with AWB Ltd and pushed AWB Ltd to approach another company, Ronly Holdings Ltd (Ronly), to act as an intermediary for the payments.¹⁹

3.16 The Cole inquiry found that the email of approach, sent by Mr Emons of AWB Ltd to Ronly, made clear that AWB Ltd:

- recognised that the payments of the trucking fee were in breach of UN sanctions;
- had agreed to Iraq's demands to pay the trucking fee to it;
- recognised that the trucking fees paid to the 'Jordanian trucking company' were paid in the knowledge that they were being passed to Iraq and were paid for that purpose;
- had sought to distance itself from the payments, to 'disguise' the payments by paying them through ship owners and avoid UN scrutiny of the true contractual terms between AWB [Ltd] and the IGB;
- set up the arrangement with Ronly in order to disguise the fee and the fact that AWB [Ltd] was paying a trucking fee to Iraq; and

17 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, pp xxiii–xxiv.

18 *Australian Securities & Investments Commission v Ingleby [2012] VSC 339* Annexure, 'Statement of Agreed Facts and Joint Submission as to Penalty', para. 30.

19 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, pp xx–xxi.

- Ronly's role was to be limited to being a conduit for the payment of the trucking fees through the Jordanian trucking company to Iraq.²⁰

Claims of non-payment of trucking fees

3.17 In October 2000, Mr Stott sent an internal email to Mr Watson of the chartering desk. The email referred to his recent visit to Baghdad where the IGB made a claim that only 90 per cent of the transport fees had been paid. Mr Stott requested confirmation that, if the fees had not been paid, the matter be dealt with.²¹ Mr Watson responded by stating that all trucking fees had been paid in full directly to the trucking company nominated by the IGB suggesting that AWB Ltd should 'simply advise IGB of the above and have them check with their trucking company'.²² In a further email Mr Watson wrote that 'Trucking company has also confirmed they have received 100pct trucking fees and have paid IGB'.²³ The Cole inquiry report stated that such a statement made it plain that:

...AWB knew the inland transportation fees paid by AWB to Alia were in turn being remitted by Alia to the IGB and thus Iraq. It was widely known within AWB that these fees were paid to the IGB.²⁴

The Arthur Anderson Report

3.18 As noted in the Cole inquiry report, in April 2000, following the retirement of Mr Rogers, Mr Andrew Lindberg was appointed Chief Executive Officer of AWB Ltd. When he took up the position his main goals were to develop a strategic, commercial and diversified growth agenda for the company and to list it on the Australian Stock Exchange. With this in mind, he initiated a restructure of the

20 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 2, p. 319.

21 Charles Stott, 'Email to Michael Watson, Monday 23 October 2000 at 12:57 PM', Exhibit 444 to Commissioner Terence Cole's, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), [AWB.5009.0381] at <http://www.oilforfoodinquiry.gov.au/exhibits/images%5CAWB.5009.0381.pdf> (accessed 10 February 2015).

22 Michael Watson, 'Email to Charles Stott, Tuesday 24 October 2000 at 10:18 AM', Exhibit 444 to Commissioner Terence Cole's, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), [AWB.5009.0381].

23 Michael Watson, 'Email to Dominic Hogan, Thursday 26 October 2000 at 10:28 AM', Exhibit 299 to Commissioner Terence Cole's, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), [AWB.5010.0009] at <http://www.oilforfoodinquiry.gov.au/exhibits/images%5CAWB.5010.0009.pdf> (accessed 10 February 2015).

24 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 2, p. 385.

management team resulting in a number of redundancies in the international sales and marketing division and the appointment of Mr Charles Stott to the position of General Manager of that division, in June 2000. In late July 2000, Mr Stott ceased the practice of the payment of trucking fees through third parties, authorising the payment directly to Alia. Mr Stott feared that the payments made through third parties could have acted as a vehicle for AWB Ltd employees to misappropriate company funds, and he therefore retained Arthur Andersen to investigate any associated misconduct.²⁵ An internal email sent within the chartering division from Mr Cowan to Mr Ingleby tried to explain the use of Ronly by stating that:

Mark Emons & Nigel O. wanted to disguise AWB payments into Iraq for trucking fees[.] This was achieved by chartering taking a forwards contract with Ronly to combine the freight and the trucking payments. The new regime has not supported this agreement and Chartering have incurred the cost of buy out of the deal.²⁶

3.19 The Cole inquiry report noted that the final report of the Arthur Andersen investigation was discussed at meetings of the Executive Leadership Group (ELG) of AWB Ltd initially in December 2000 and again, in more detail, on 23 February 2001.²⁷ However, the report itself was not formally disseminated to members of the ELG, as explained by the Cole inquiry report:

The Arthur Andersen report drew senior management's attention to the risks associated with the payment of greatly increased inland trucking fees, and the possibility that some portion of fees may have been siphoned off to Iraq. The matter was left for further investigation by Mr Stott. He made no proper further inquiry regarding the nature or extent of such fees, although he told Mr Goodacre he had done so. AWB management failed properly to address the risks raised in the Arthur Andersen report.²⁸

Delays and demurrage

3.20 The Cole inquiry report noted that, from April 2000, the rate of discharge of wheat shipped into the port of Umm Qasr resulted in significant demurrage costs to AWB Ltd. In early April 2000, AWB Ltd tried to organise a meeting with the IGB to discuss this issue, but the IGB actively avoided a meeting. On 7 April 2000, in order

25 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 2, pp 294, 454.

26 Mr David Cowan, 'Email to Paul Ingleby dated 21 September 2000' quoted in *Australian Securities & Investments Commission v Ingleby [2012] VSC 339* Annexure, 'Statement of Agreed Facts and Joint Submission as to Penalty', para. 35.

27 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 2, pp 445, 452.

28 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 2, p. 453.

to force the IGB to agree to a meeting, AWB Ltd wrote to the IGB threatening disclosure of the trucking arrangements to the UN. The letter stated:

We had hoped to discuss at our meeting the issue of the payment of the trucking fee. You will be aware of the restrictions that the UN has placed on such payments and as you are aware this now means that we must halt further payments. We have endeavoured to meet the requirements of the IGB but without direct consultation we are now restricted to the accepted methods of payment to be used. We had hoped that we could discuss personally with your good selves this issue due to the sensitivity however if you would prefer we can discuss with the UN as to the appropriate method of paying for the trucking fee? Please respond by Monday 10th April so an alternative action can be undertaken that does not result in the delay of vessels.²⁹

3.21 The Cole inquiry report explained that further correspondence and meetings examined the possibility of withholding the payment of all or part of the trucking fee to ensure expeditious discharge, but this option was strongly rejected by the Iraqi regime. In August 2000, AWB Ltd approached DFAT about the possibility of amending the contractual terms to establish a trust account to which funds would be paid to create an incentive to Iraq in ensuring that discharge of wheat from ships was done more expeditiously. The response of DFAT explained that the trust account proposal would violate the UN sanctions regime, effectively putting AWB Ltd on notice that payment of money to Iraq would violate sanctions.³⁰

3.22 Evidence to the Cole inquiry included a letter dated 30 October 2000 from Mr Stott to DFAT which asserted that delays in discharge could be attributed to a lack of trucks available at the port for discharge. The letter went on claim that Jordan-based trucking companies were responsible for arranging trucks at the port and requested permission to enter into discussions with the Jordan-based companies with a view to coming to a commercial arrangement to increase the number of trucks at the port. The response, signed by Ms Drake-Brockman of DFAT and dated 2 November 2000, stated that the proposal would not be in breach of the UN sanctions regime and, from an international legal perspective, there would be no reason for not proceeding with the proposed course of action.³¹

29 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, p. xxviii.

30 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, pp xxix–xxx.

31 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, pp xxvii, xxxiii–xxxiv.

3.23 The Cole inquiry found that, given that no negotiations were entered into, the principle motive of Mr Stott in writing the letter was to obtain correspondence from DFAT that would justify the trucking-fee mechanism that was already in place.³²

The introduction of the service fee and the attempt to introduce a port fee

3.24 As noted in the Cole inquiry report, on 1 November 2000, Mr Dominic Hogan, of the international sales and marketing division of AWB Ltd received a bid for wheat from the IGB which included a US\$25 per metric tonne trucking fee and a 10 per cent handling fee. This bid was accepted and a contract was finalised on 2 November 2000 incorporating the fees. The contract was approved by the OIP on 2 January 2001.³³ Between 31 January and 2 February 2001 Mr Hogan and Mr Borlase travelled to Iraq to meet with the Director-General of the IGB. Mr Borlase drafted a trip report and attached it to an email which he sent to numerous addresses including the entire international sales and Marketing division of AWB Ltd. The trip report included the statement:

We believe the increase in trucking fee and addition of the service charge is a mechanism of extracting more dollars from the escrow account.³⁴

3.25 The Cole inquiry also noted that, in March 2001, the Iraqi State Company for Water Transport (ISCWT) sought to impose a fee of US\$0.50 per metric tonne on AWB Ltd for expenses related to and services provided to vessels. Mr Hogan opined that 'this charge contravenes the UN sanctions on Iraq as nobody is meant to be able to transfer US dollars into or out of Iraq without UN approval' and asked the US office of AWB Ltd to check the legality of the proposed port fee. The US office looked to the Australian mission to the UN for advice. The mission consulted the OIP and then advised AWB Ltd that the best answer it could get was that 'such fees are not inconsistent with the sanctions regime provided they were reasonable in amount and paid in Iraqi dinars, not US dollars'. AWB Ltd refused to pay the port fee on grounds that it was illegal.³⁵

32 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, pp xxxiv-xxxv.

33 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 2, pp 431, 433, 436.

34 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 3, p. 6.

35 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, pp xlii-xliii.

3.26 In May 2001, after AWB Ltd had refused to pay the port fee, Mr Hogan travelled to Iraq with two colleagues. In a statutory declaration, Mr Hogan noted that he had received an explanation about how wheat was discharged from ships and then transported around Iraq. Mr Hogan stated:

My understanding of the transport arrangements as set out in my diary note was that 75% of the trucks were from the Iraqi Ministry of Trade. My understanding was that the IGB controlled those trucks. I do not know who controlled the other 25% of the trucks but was told that Alia had no influence on the trucks. I had made these enquiries as to how the transport arrangements worked because AWB was concerned about the excessive demurrage costs and delays at the port. I believe that this was the first time that I became aware that Alia had no influence over the trucking arrangements.³⁶

The iron filings complaint and loading contracts to recover the Tigris debt

3.27 In an article published in *The Sydney Morning Herald*, Mr David Marr and Ms Marian Wilkinson described the reaction of the Iraqi government to a press briefing made in June 2002 by the then Minister for Defence, Senator the Hon Robert Hill, when he announced that Australia would support a pre-emptive strike on Iraq to enforce UN Sanctions. In response, the Iraqi Minister for Trade announced that Iraq would cut its next Australian wheat order by half, from one million tonnes to 500 000 metric tonnes.³⁷ Then, as noted in the Cole inquiry report, in July 2002, the IGB sent an email to AWB Ltd which asserted that wheat discharged in Iraq had been contaminated by traces of iron powder. A delegation from AWB Ltd travelled to Iraq in August 2002 to investigate the 'iron filings' dispute. The delegation accepted that the previous six shipments had been contaminated and agreed to compensate the IGB by approximately \$2 million.³⁸

3.28 As noted by Mr John Agius SC who acted as Counsel assisting the Cole inquiry, AWB Ltd sought advice from DFAT as to how the iron filings debt should be paid and DFAT, after consulting with the UN, suggested that AWB Ltd could either

36 Mr Dominic Hogan, 'Unsigned Statutory Declaration', para. 128, Exhibit 142 to Commissioner Terence Cole's, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), [WST.0005.0001]

<http://www.oilforfoodinquiry.gov.au/exhibits/images%5CWST.0005.0001.pdf> (accessed 10 February 2015).

37 David Marr and Marian Wilkinson, 'Deceit by the Truckload' *The Sydney Morning Herald*, 15 April 2006, <http://www.smh.com.au/news/national/deceit-by-the-truckload/2006/04/14/1144521506851.html?page=fullpage#contentSwap1> (accessed 11 February 2015).

38 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 3, p. 76.

pay the debt into the UN escrow account or give the IGB a discount on future wheat sales.³⁹

3.29 Mr Aguis also noted that, in 1996, BHP Ltd had paid for a shipment of wheat to Iraq as a donation, but had assigned to Tigris Petroleum Corporation Limited (Tigris) any rights to payment for the wheat in return for 25% of whatever was recovered from Iraq.⁴⁰ This was done even though AWB Ltd received advice from DFAT on 6 November 1995 that:

Proposals whereby Iraq agrees to repay debts against the promise of future oil sales are not acceptable to the Sanctions Committee nor are transactions involving the payment for humanitarian goods by third parties.⁴¹

3.30 Despite the earlier advice, as explained by Mr Agius, in 2001 and 2002 AWB Ltd assisted Tigris by negotiating with Iraq for the debt to be repaid together with simple interest, calculated to be US\$8.3 million. At about the same time as the iron filings agreement, an agreement was reached between AWB Ltd and the IGB for the future contract price of wheat to be inflated to cover the repayment of the Tigris debt.⁴²

3.31 Mr Agius explained that, in late October 2002, concern had been expressed within AWB about how the agreement could be put into effect as it would have been too obvious for the repayment to be concealed within only one contract. It was thought that it was best to spread the loading up over two or more contracts and this proposal was reported widely to senior executives of AWB Ltd.⁴³

3.32 The Cole inquiry report indicated that on 12 December 2002, AWB Ltd concluded two contracts (A1670 and A1680) for the sale of a total of one million tonnes of wheat to Iraq. Contrary to the DFAT advice, although not specified in the

39 Mr John Agius SC, *A blight on the crop—the Australian Wheat Board case*, p. 4, presented at the Corruption Prevention Network, CPN 2011 Annual Forum, <http://www.corruptionprevention.net/assets/Uploads/Documents/Forum-Papers/2011/ABlightOnTheCropTheAustralianWheatBoardCase.pdf> (accessed 10 February 2015).

40 Mr John Agius SC, *A blight on the crop—the Australian Wheat Board case*, p. 3, presented at the Corruption Prevention Network, CPN 2011 Annual Forum.

41 Mr Malcolm Skelly, DFAT, 'Letter to Mr Charles Stott of AWB dated 6 November 1995', Exhibit 0204 to Commissioner Terence Cole's, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), [AWB.0106.0018] <http://www.oilforfoodinquiry.gov.au/exhibits/images/AWB.0106.0018.pdf> (accessed 11 February 2015).

42 Mr John Agius SC, *A blight on the crop—the Australian Wheat Board case*, p. 3, presented at the Corruption Prevention Network, CPN 2011 Annual Forum.

43 Mr John Agius SC, *A blight on the crop—the Australian Wheat Board case*, pp 3–4, presented at the Corruption Prevention Network, CPN 2011 Annual Forum. See also, Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, pp li–lii.

contract, AWB Ltd added to the cost of wheat, under the inland transport fee, US\$2.017 per metric tonne to cover the iron filings debt and €8.40 per metric tonne to cover the Tigris debt.⁴⁴

The Invasion and the US Wheat Associates complaint

3.33 As noted in the Statement of Facts in *ASIC v Ingleby*, in March 2003, a vessel named the *Pearl of Fujairah* was directed away from Iraq as a result of the US-led invasion. As AWB Ltd had pre-paid €2.468 million in trucking and service fees for that ship's cargo, AWB Ltd requested Alia to provide a refund of that payment. In response, Alia advised AWB Ltd that it no longer held the payment, as the money had already been transferred into another bank account, and therefore AWB Ltd should send a letter reserving its rights and requesting the return of the payment. Further correspondence implied that the money had been lodged into the account of the Director General of the IGB.⁴⁵

3.34 The Statement of Facts in *ASIC v Ingleby* also noted that, in June 2003 following the US-led invasion of Iraq, AWB Ltd was informed of a complaint lodged by US Wheat Associates that AWB Ltd had inflated wheat prices under the OFF Program and paid kickbacks to the Hussain Regime in Iraq. This complaint coincided with the release of a *Memorandum of instruction to Ministry advisors* dated 10 June 2003, drafted by Captain Blake Pluckett of the Coalition Provisional Authority (CPA). The memorandum indicated that work was being undertaken to determine which contracts under the OFF Program had included a 'kickback or surcharge (often 10%)'.⁴⁶

3.35 Mr Agius stated that AWB Ltd strenuously denied the complaint lodged by US Wheat Associates, and asked the Australian government to support them in their denials.⁴⁷ As Mr David Marr and Ms Marian Wilkinson noted, the Australian government asked its ambassador to Washington, Mr Michael Thawley, to 'raise the matter at a senior level with the US Administration, noting our concern that AWB Ltd's international reputation would be damaged by the unfounded claims'.⁴⁸

Project Rose

3.36 The Cole inquiry report specified that in response to the US Wheat Associates complaint AWB Ltd established an internal investigation that became known as

44 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, p. lv.

45 *Australian Securities & Investments Commission v Ingleby [2012] VSC 339* Annexure, 'Statement of Agreed Facts and Joint Submission as to Penalty', para. 45.

46 *Australian Securities & Investments Commission v Ingleby [2012] VSC 339* Annexure, 'Statement of Agreed Facts and Joint Submission as to Penalty', paras 46, 48.

47 Mr John Agius SC, *A blight on the crop—the Australian Wheat Board case*, p. 5, presented at the Corruption Prevention Network, CPN 2011 Annual Forum.

48 Mr David Marr and Ms Marian Wilkinson, 'Deceit by the Truckload' *The Sydney Morning Herald*, 15 April 2006.

Project Rose. The investigation was headed by Mr Cooper, AWB's corporate counsel, who engaged the firm Blake Dawson Waldron to conduct the investigation.⁴⁹ David Marr and Marian Wilkinson argued that, through the application of legal professional privilege, the outsourcing of the investigation had the effect of shielding the findings of the investigation from external investigation. Furthermore:

Project Rose became the source of all the briefings and talking points senior AWB executives used to maintain their blanket denials of wrong-doing. In turn they supplied this material to the Howard Government. The lawyers of Project Rose were not only fashioning the tactics of AWB but directing Downer's and Vaile's response to the looming scandal.⁵⁰

49 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, p. lvx.i

50 Mr David Marr and Ms Marian Wilkinson, 'Deceit by the Truckload' *The Sydney Morning Herald*, 15 April 2006.

