



ASIC

Australian Securities & Investments Commission

**Senate inquiry into the
Australian Federal Police's
Oil for Food Taskforce**

**Submission by the
Australian Securities and
Investments Commission**

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A Purpose and scope

- 1 The Legal and Constitutional Affairs Reference Committee Inquiry into the Australian Federal Police's Oil for Food Taskforce has terms of reference that call upon the Committee to enquire and report on:
 - (a) the work undertaken by the Australian Federal Police's Oil for Food Taskforce;
 - (b) the level of resourcing that was provided and used by the Taskforce; and
 - (c) any other related matters.

- 2 The purpose of this submission is to provide information relating to the participation of the Australian Securities and Investments Commission (**ASIC**) in the AFP-led Taskforce and ASIC's independent investigation conducted under section 13 of the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**) in accordance with the invitation extended to ASIC by the Committee in its letter dated 14 July 2014.

B United Nations Inquiry into the Oil-for-Food Programme in Iraq

- 3 In April 2004 the United Nations Secretary General appointed an Independent Inquiry Committee (**IIC**), chaired by former U.S. Federal Reserve Chairman Paul Volcker, to investigate alleged corruption and fraud in relation to the United Nations Oil-for-Food Programme in Iraq.
- 4 Following the Secretary General's appointment of the IIC, the United Nations Security Council unanimously adopted Resolution 1538 on 21 April 2004 which expressed its willingness to see an investigation into the allegations that the Iraqi government had evaded the provisions of Resolution 661 (adopted in 1990) through bribery, kickbacks, surcharges on sales of oil and illicit payments in respect of purchases of humanitarian goods.
- 5 On 27 October 2005 the IIC issued its fifth and final report. In that report, the IIC presented its findings that, among other things, kickbacks were paid to Iraq in connection with contracts with 2,253 foreign companies in relation to the supply of humanitarian goods.
- 6 Among the companies identified by the IIC as having made payments to Iraq was AWB Limited (**AWB**), an Australian company listed on the Australian Securities Exchange. The IIC found that AWB, in connection with contracts for the supply of wheat, made payments totalling \$US221.7 million to Iraq under the guise of inland transportation costs and after sales service fees.

C Cole Inquiry and establishment of Oil-for-Food Taskforce

- 7 As a result of the IIC findings, the Australian Government established by letters patent dated 10 November 2005 an Inquiry into the activities of certain Australian companies in relation to the United Nations Oil-For-Food Programme by The Honourable Terence Cole AO RFD QC (**Cole Inquiry**).
- 8 The letters patent were amended by letters patent on 6 February 2006, 10 March 2006, 17 March 2006, 22 June 2006 and 21 September 2006.
- 9 Following the release of the final report of the IIC and the subsequent announcement of the Cole Inquiry, ASIC made a decision in January 2006 not to investigate matters concerning the involvement of AWB in the UN Oil-for-Food Programme while the Cole Inquiry was on foot. ASIC made this decision because it was concerned that any attempt to obtain relevant documents or to interview/examine witnesses might impinge on the domain of the Cole Inquiry.
- 10 By the end of the Cole Inquiry's hearings ASIC considered that findings of any breaches of the *Corporations Act 2001* (**Corporations Act**) would only be the subject of findings ancillary to those concerning serious fraud.
- 11 Save that ASIC was made aware shortly before the Cole Inquiry's report was handed down that Commissioner Cole proposed to recommend that ASIC form part of a task force to follow up on his findings, ASIC was not informed of the nature or content of Commissioner Cole's findings prior to him handing down his report.
- 12 On 24 November 2006 Commissioner Cole handed his five volume report (**Cole Report**) to the Governor-General. The Cole Report was tabled in the Australian Parliament on 27 November 2006.
- 13 The Cole Report included detailed consideration of AWB's involvement in the Oil-for-Food Programme and found that AWB and/or certain individuals may have contravened, among other things, various provisions under the *Crimes Act 1914*, the *Criminal Code 1995*, the *Corporations Act* and the *Crimes Act 1958* (Vic).
- 14 In his report Commissioner Cole recommended that:
- “...there be established a joint Task Force comprising the Australian Federal Police, Victoria Police, and the Australian Securities and Investments Commission to consider possible prosecutions in consultation with the Commonwealth Director of Public Prosecutions and the Victorian Director of Public Prosecutions. Administrative responsibility for the conduct of the Task Force should reside with the Commonwealth Attorney-General.”

- 15 In February 2007 the Commonwealth Attorney-General announced the terms of reference for an Oil-for-Food Taskforce to investigate the findings contained in the Cole Report. Those terms of reference stipulated that the Taskforce would be led by the Australian Federal Police (AFP), and would comprise operational staff from the AFP, Victoria Police and ASIC, to be overseen on an administrative level (but not on operational matters) by a Senior Coordination Group.
- 16 The terms of reference further stipulated that the Senior Coordination Group would be chaired by a representative of the Commonwealth Attorney-General's Department, and comprise representatives of the AFP, ASIC, Victoria Police, the Commonwealth Director of Public Prosecutions, the Department of the Prime Minister and Cabinet and the Department of Finance and Administration.
- 17 Between February and August 2007 ASIC allocated nine full-time operational staff to the Oil-for-Food Taskforce. Those operational staff consisted of one ASIC senior manager who led two lawyers, five investigators and one administrative support officer. In relation to Taskforce operational matters, the ASIC senior manager was led by and reported to the AFP Taskforce leader.
- 18 The AFP does not have power to investigate civil penalty breaches under the Corporations Act. While ASIC had power to investigate breaches of the Corporations Act, ASIC was not conducting its own investigation under which it normally would investigate those matters (which would involve use of ASIC's compulsory evidence gathering powers)—instead, ASIC contributed resources to the AFP-led Taskforce, which was focusing on investigating criminal offences identified in the Cole Report.

D ASIC Act investigation

- 19 In late August 2007 ASIC made a decision to withdraw its nine operational staff from the AFP-led Taskforce and commence a separate independent investigation under section 13 of the ASIC Act.
- 20 ASIC made the decision to withdraw its staff because it was concerned that the statutory limitation period for bringing civil penalty proceedings in respect of some of the conduct detailed in the Cole Report had expired or would expire in the near future.
- 21 In order to be in a position to determine whether civil proceedings ought to be commenced it was necessary to exercise ASIC's evidence gathering powers, including witness examination powers, which required the existence of a separate and independent ASIC Act investigation.
- 22 When the Cole Report was delivered in November 2006 the time limit for the commencement of civil penalty proceedings under the Corporations Act had expired in relation to the conduct associated with 20 of the 27 AWB wheat supply contracts that were examined by the Cole Inquiry. Further, the time limit in relation to two contracts had expired in February and June 2007 during the early activities of the Taskforce, leaving—by August 2007—civil penalty proceedings available in relation to only five wheat supply contracts.
- 23 At the time ASIC commenced its investigation the statutory time limit for the commencement of civil penalty proceedings in relation to two further wheat supply contracts was scheduled to expire on 20 December 2007.¹ Accordingly, a significant amount of investigative work needed to be completed by ASIC in a four month period (from late August to late December 2007) if civil penalty proceedings associated with those contracts were to be commenced before the expiry of the limitation period.
- 24 The scope of ASIC's investigation, as recorded in ASIC's statutory notices issued from 28 August 2007, was defined as:
- “...an investigation into suspected contraventions of sections 180, 181, 182, 184, 1307(1) and 1309 of the Corporations Act 2001, sections 135.1(7), 135.4(7) and 136.1 of the Criminal Code and sections 81, 82 and 321 of the Crimes Act 1958 (Vic) concerning the affairs of AWB Limited ACN 081 890 459 and AWB (International) Limited ACN 081 890 413 arising out of, or in connection with the supply of wheat to Iraq, in particular in relation to contracts for the supply of wheat numbered A1111, A1112, A1441, A1670 and A1680.”
- 25 Contemporaneously with the decision to commence its own investigation—and in order to expeditiously complete the investigative tasks necessary to be

¹ Under section 1317K of the Corporations Act proceedings for declaration of contravention, a pecuniary penalty order, or a compensation order, may be started no later than 6 years after the contravention.

in a position by December 2007 to determine whether proceedings should be issued (with that deadline driven by the looming statutory time limit referred to above)—ASIC increased the number of its staff working on the ASIC Act investigation from 9 to 20 staff.

- 26 In addition to the ASIC staff, the AFP briefly seconded three of its staff to ASIC to work on the ASIC Act investigation during September 2007.² Those staff returned to the AFP in late September 2007 prior to ASIC gathering evidence through the use of its powers under the ASIC Act.
- 27 ASIC also retained junior counsel from the Victorian Bar to assist in the preparation and conduct of certain witness examinations. Those barristers were in addition to the junior and senior counsel retained by ASIC to advise on prospects in relation to proceedings against any AWB officers, perform the necessary preparatory work to issue those proceedings and ultimately conduct the litigation.
- 28 During its investigation ASIC used its document gathering powers under Division 3 of Part 3 of the ASIC Act. ASIC also used its witness examination powers under section 19 of the ASIC Act.
- 29 In July 2008 ASIC narrowed its investigation to include only suspected contraventions of sections 180, 181, 182, 184, 1307(1) and 1309 of the Corporations Act, thereby removing from the scope of the ASIC Act investigation suspected contraventions of the *Criminal Code Act 1995*, the *Crimes Act 1914* and the *Crimes Act 1958 (Vic)*. ASIC made the decision to narrow the investigation in order to reduce the logistical problems arising from the overlap between ASIC's investigation and that of the AFP-led Taskforce.

² Comprising two AFP investigators and one administrative support officer.

E Challenge by AWB to ASIC's use of its powers

- 30 On 28 August 2007, ASIC first served on AWB a notice to produce documents under section 30 of the ASIC Act. It sought a wide range of documents. The notice was subsequently withdrawn by ASIC on 4 September 2007 after AWB complained of the difficulty in complying.
- 31 On 27 September 2007 ASIC served a further notice to produce on AWB confined to only those documents that AWB had previously produced to the Cole Inquiry.
- 32 On 1 October 2007 AWB's solicitors sent a letter to ASIC expressing concerns about ASIC's exercise of power in serving the notice, however agreed to comply with it subject to reserving its rights. In this regard, AWB proposed an amended timetable for production to which ASIC consented. Under that arrangement, AWB produced a first tranche of documents via CD-Rom on 5 October 2007 and approximately 790 folders of material on 17 October 2007.
- 33 On 17 October 2007 ASIC served a further six notices to produce on AWB, with staggered compliance dates from 23 October 2007 to 24 November 2007. Those notices again sought a broader range of documents.
- 34 On 22 October 2007 AWB applied to the Federal Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977* for an order to review the issue of the six ASIC notices to produce. After a court ordered mediation the proceeding settled on 1 November 2007 and was dismissed by consent with no order as to costs. Under the settlement, ASIC withdrew the six notices and substituted a fresh notice seeking a more confined range of documents.

F Commencement of ASIC's civil penalty proceedings

- 35 On 19 December 2007 ASIC issued proceedings in the Supreme Court of Victoria against six former AWB officers alleging that they had contravened sections 180 and 181 of the Corporations Act arising from conduct associated with five contracts for the supply of wheat to Iraq entered into between 20 December 2001 and 11 December 2002 and which involved the payment of \$A126.3 million by AWB to Iraq.
- 36 The defendants to ASIC's proceedings were:
- (a) Trevor Flugge, former AWB Chairman;
 - (b) Andrew Lindberg, former AWB Managing Director;
 - (c) Paul Ingleby, former AWB Chief Financial Officer;
 - (d) Peter Geary, former AWB General Manager Trading;
 - (e) Charles Stott, former AWB General Manager International Sales and Marketing during the period 2000-2001; and
 - (f) Michael Long, former AWB General Manager International Sales and Marketing during the period 2001-2006.
- 37 Commissioner Cole made findings that each of Messrs Flugge, Ingleby, Geary, Stott and Long may have contravened various Australian laws, including sections 180 and 181.
- 38 Commissioner Cole did not find that Mr Lindberg may have breached any Australian law. In that regard, ASIC, on its review of the evidence that had been gathered, took a different view to Commissioner Cole and, accordingly, commenced proceedings against Mr Lindberg.
- 39 In November 2008 the Victorian Supreme Court ordered a stay of the proceedings against Messrs Flugge, Ingleby Geary, Stott and Long but not in relation to the proceeding against Mr Lindberg. Further detail in relation to the applications by each of the six defendants for a stay and the basis for the order is set out in the Appendix to this submission.
- 40 During 2009 ASIC took a number of steps to expand its case against Mr Lindberg and was ultimately permitted to do so following a successful appeal to the Court of Appeal of the Supreme Court of Victoria. Further detail in relation to those steps and associated interlocutory decisions is also set out in the Appendix to this submission.

G Request from AFP to ASIC for information

- 41 Under section 127(1) of the ASIC Act, ASIC must take all reasonable measures to protect from unauthorised use or disclosure information:
- (a) given to it in confidence or in connection with the performance of its functions or the exercise of its powers under the corporations legislation (other than excluded provisions); or
 - (b) that is protected information.
- 42 Information gathered by ASIC through the use of its compulsory evidence gathering powers is subject to the restrictions contained in section 127(1).
- 43 Section 127(4) of the ASIC Act enables the ASIC Chairperson or his delegate to provide information otherwise protected by section 127(1) to certain other agencies, including the AFP, to assist them in the exercise of their functions or powers.
- 44 Consistent with the decision of the High Court in *Johns v Australian Securities Commission* (1993) 178 CLR 408, ASIC is generally required to give parties whose interest may be materially adversely affected by a release under section 127(4) of the Act the opportunity to make submissions on whether the information should be released and/or any conditions that ought to attach to such release. After such procedural fairness is provided, the ASIC Chairman or his delegate will typically make a decision on whether to release the information and, if so, the conditions of release.
- 45 In early 2008 ASIC received a request from the AFP for release of information under section 127(4) of the ASIC Act. The AFP's request largely related to transcripts of witness examinations conducted by ASIC under section 19 of the ASIC Act.
- 46 As a result of receiving the AFP's request, ASIC wrote to the various witnesses who had been examined or who had provided statements and provided them with an opportunity to be heard and to make submissions to ASIC in relation to a proposed release of information to the AFP. During the course of that process, AWB learned of the AFP's request.
- 47 On 2 September 2008 a delegate of the ASIC Chairman made a decision to authorise disclosure of information to the AFP under section 127(4) of the ASIC Act with certain conditions attached to the release.
- 48 One of the conditions attached to the disclosure was that the information could only be used by the AFP to enable or assist it to perform or exercise its functions for the purpose of its investigation into possible breaches of Australian law committed by AWB, AWB (International) Limited and

certain individuals involved in the matters canvassed during the Cole Inquiry.

- 49 On 11 September 2008, and prior to ASIC delivering the information to the AFP under the authority of the delegate of the ASIC Chairman, AWB commenced proceedings in the Federal Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977* and section 59B of the *Judiciary Act 1903* to challenge the delegate's decision to authorise release.
- 50 AWB's application was heard on 10 November 2008. On 11 December 2008 Gordon J delivered the court's judgment dismissing the application.³
- 51 Prior to ASIC delivering the information to the AFP, AWB filed an appeal with the Full Court of the Federal Court of Australia against the decision of Gordon J.
- 52 On 18 February 2009 AWB's appeal was heard by Ryan, Stone and Edmonds JJ with the decision reserved.
- 53 On 28 August 2009 the AFP Commissioner publicly announced that the AFP's investigation into matters arising from the Cole Inquiry had been discontinued. Given the discontinuance of the investigation, the decision by the ASIC's Chairman's delegate could have no operation and, therefore, the relevant information could not be provided to the AFP.
- 54 At the time of the AFP Commissioner's announcement, the decision of Ryan, Stone and Edmonds JJ was still reserved. The Full Court dismissed AWB's appeal by consent with no order as to costs on 30 November 2009.

³ *AWB Limited v Australian Securities and Investments Commission* (2008) 216 FCR 577; [2008] FCA 1877

H Successful prosecution of ASIC's civil penalty proceedings against Mr Lindberg

- 55 By September 2011 ASIC and Mr Lindberg reached an in-principle agreement under which:
- (a) Mr Lindberg admitted contravening section 180(1) of the Corporations Act;
 - (b) Mr Lindberg accepted a statement of facts in relation to his contravention;
 - (c) Mr Lindberg accepted that the appropriate penalty for his contravention was an aggregate pecuniary penalty of \$100,000 and an effective three year period of disqualification as a director.
- 56 On 30 May 2012 Robson J heard a joint submission by ASIC and Mr Lindberg in relation to the agreed contravention, facts and penalty.
- 57 On 9 August 2012 Robson J delivered judgment under which he made orders that largely mirrored the agreement reached between ASIC and Mr Lindberg, namely that he pay a pecuniary penalty of \$100,000 and that he be disqualified as a director until 14 September 2014 (being three years after the agreement was made between ASIC and Mr Lindberg).⁴

⁴ *Australian Securities and Investments Commission v Lindberg* (2012) 91 ACSR 640; [2012] VSC 332. His Honour noted at [192] of his reasons that “due to a combination of circumstances outside of the control of both ASIC and Mr Lindberg it [had] not been possible to arrange for the matter to be listed for hearing prior to 31 May 2012”—accordingly, the full 3-year disqualification period agreed with ASIC was not ordered.

I Successful prosecution of ASIC's proceedings against Mr Ingleby

- 58 By June 2012 ASIC and Mr Ingleby reached agreement under which:
- (a) Mr Ingleby admitted contravening section 180(1) of the Corporations Act;
 - (b) Mr Ingleby accepted a statement of facts in relation to his contravention; and
 - (c) Mr Ingleby accepted that the appropriate penalty for his contravention was a pecuniary penalty of \$40,000 and a 15 month period of disqualification as a director.
- 59 On 13 June 2012 Robson J heard a joint submission by ASIC and Mr Ingleby in relation to the agreed contravention, facts and penalty.
- 60 On 10 August 2012 Robson J delivered his judgment ordered that Mr Ingleby pay a pecuniary penalty of \$10,000 and that he be disqualified as a director “*until the end of 2012*” (representing a disqualification period of slightly less than 5 months).⁵ Those orders departed from the agreement reached by the parties, which called for a pecuniary penalty of \$40,000 and a 15 month period of disqualification.
- 61 ASIC filed an appeal in the Court of Appeal of the Supreme Court of Victorian against the penalties ordered by Robson J, with the appeal heard on 22 November 2012 (Mr Ingleby played no part in the appeal).
- 62 On 19 March 2013 the Court of Appeal delivered its decision under which it ordered that a pecuniary penalty of \$40,000 and a period of disqualification of 15 months be imposed against Mr Ingleby.⁶

⁵ *Australian Securities and Investments Commission v Ingleby* (2012) 91 ACSR 66; [2012] VSC 339

⁶ *Australian Securities and Investments Commission v Ingleby* (2013) 275 FLR 171; [2013] VSCA 49

J Discontinuance of ASIC proceedings against Messrs Stott and Long

63 On 23 December 2013 ASIC discontinued its proceedings against Messrs Stott and Long on the basis that ASIC considered it no longer in the public interest to pursue those claims. The proceedings were discontinued by consent on terms that the parties bear their own costs of and incidental to the proceedings.

K Status of ASIC's proceedings against Messrs Flugge and Geary

64 ASIC proceedings against Messrs Flugge and Geary remain afoot, with the matters scheduled for a directions hearing before Robson J on 1 August 2014.

L Findings of the Cole Inquiry and prosecutorial outcomes

- 65 Commissions of Inquiry established under letters patent sometimes find that criminal offences may have occurred and refer such matters to investigative agencies, however, in arriving at these findings such Commissions generally do not have to base their findings on evidence admissible in a Court. Of course, that issue receives intense consideration by investigative agencies and/or the courts.
- 66 The Cole Inquiry found that criminal offences may have occurred as a result of certain alleged conduct associated with AWB's participation in the Oil-For-Food Programme. In this regard, no criminal prosecution followed the Cole Inquiry, either as a result of the AFP-led Taskforce or ASIC's investigation under the ASIC Act.
- 67 Conversely, the Cole Inquiry made no adverse findings against Mr Lindberg in relation to any criminal offences or civil penalty contraventions under the Corporations Act. In this regard, ASIC reached a different view to Commissioner Cole and the ASIC Act investigation led to ASIC's successful prosecution of civil penalty proceedings against Mr Lindberg, resulting in the imposition on him of a penalty of \$100,000 and a period of disqualification as a director.
- 68 In the event that ASIC considered that the evidence gathered during its investigation supported a successful criminal prosecution of any person associated with AWB's supply of wheat to Iraq, ASIC would have adopted that course instead of embarking upon—or continuing with—civil penalty proceedings against that person.
- 69 From July 2008 ASIC's investigation solely focused on whether persons may have breached certain criminal and civil penalty provisions of the Corporations Act in connection with AWB's supply of wheat to Iraq. By May 2010 ASIC concluded that the evidence available did not support the laying of criminal charges under the Corporations Act and, accordingly, ASIC continued with its prosecution of its civil penalty cases.

Appendix 1: Stay of ASIC's civil penalty proceedings against Messrs Flugge, Ingleby, Geary, Stott and Long

- 70 In late April and early May 2008 each of the defendants to ASIC's proceedings made applications to the Victorian Supreme Court to stay the proceedings on the basis that there was an ongoing investigation into suspected criminal contraventions associated with the conduct that was the subject of ASIC's civil penalty proceedings. Those applications were heard by Robson J on 28, 30 & 31 July 2008 and 16 October 2008.
- 71 On 12 November 2008 Robson J ordered the stay of ASIC's proceedings against Messrs Flugge, Ingleby, Geary, Stott and Long as follows:
- “In each of the applications by Mr Flugge, Mr Ingleby, Mr Stott, Mr Geary and Mr Long, I stay the civil penalty proceedings herein until and unless ASIC, the Oil-for-Food Task Force or the DPP of the Commonwealth advise the defendant that no criminal proceeding will be instituted against him that relies on conduct of the defendant that is substantially the same as that alleged by ASIC herein, or until further order.”⁷
- 72 Robson J dismissed Mr Lindberg's application for a stay of ASIC's proceedings.⁸
- 73 In delivering judgment Robson J, after considering the findings contained in the Cole Report, said:
- “In my view, there is such a risk in the case of each defendant, other than Mr Lindberg. In each case, the criminal proceedings are “on the cards.” If the civil proceedings have not been heard and determined, at trial and on appeal (if any), the result of the criminal proceedings starting will be to stay the civil penalty proceedings. The defendants may have expended not insignificant resources to defend themselves from pecuniary penalties which probably will be wasted. I expect that the defendants do not have unlimited resources. I do not consider it either fair or just that a defendant should have to waste resources, that could be used in defending the criminal proceedings, in defending civil penalty proceedings that are likely to be terminated in consequence of a decision of the plaintiff, or another arm of the State, to institute criminal proceedings for an offence that is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention alleged in the civil penalty proceedings. I do not consider it fair or just that the defendant may have to unnecessarily duplicate the defence of his actions. The matter is not made any fairer by the fact that if the State fails in the criminal proceedings, it can continue to pursue the civil penalty proceedings.”⁹

⁷ *Re AWB Limited* (2008) 21 VR 252; [2008] VSC 473 at [105]

⁸ *ibid.*, [106]

⁹ *Ibid.*, [100]

- 74 On 21 November 2008, Justice Robson made orders setting down a timetable for the further hearing of the proceeding against Mr Lindberg, including orders that:
- (a) Mr Lindberg file and serve his defence by 12 December 2008;
 - (b) ASIC provide discovery to Mr Lindberg by 28 February 2009;
 - (c) any other applications (for instance for discovery, subpoenae etc) be made by 27 March 2009; and
 - (d) the proceeding be listed for trial on 13 July 2009.

Expansion of ASIC's civil penalty case against Mr Lindberg

- 75 From the beginning of its investigation in August 2007, ASIC focused on investigating matters that had been identified in the Cole Report as potential breaches of the Corporations Act and related breaches of other laws.
- 76 However, ASIC's initial reliance on the Cole Report in shaping the ASIC Act investigation did not mean that ASIC could not and would not consider and investigate other potential breaches that came to light during the investigation merely because those matters did not reflect the findings of Commissioner Cole.
- 77 During the course of its investigation in the period December 2008 to February 2009 ASIC identified evidence that it considered could give rise to further causes of action to be pleaded in the civil penalty proceedings against Mr Lindberg.
- 78 By February 2009 ASIC formed the view that this evidence gave rise to additional contraventions by Mr Lindberg relating to the conduct of AWB's internal investigation into its participation in the Oil-for-Food Programme and the failure of Mr Lindberg to keep the board of AWB properly informed. As a result of this, in March 2009 ASIC drafted a further amended statement of claim (**FASOC**) containing the new contraventions in anticipation of making an application to the Court for leave to file.¹⁰
- 79 On 27 March 2009 ASIC filed and served on Mr Lindberg and AWB a summons giving notice that, on 24 April 2009, ASIC intended to apply to the court for non-party discovery against AWB. ASIC required such non-party discovery of documents from AWB for the prosecution of the case against Mr Lindberg.

¹⁰ An amended statement of claim in relation to case against Mr Lindberg (and the cases against Messrs Flugge, Ingleby, Geary, Stott and Long) had been filed on 18 April 2008 to correct certain errors. Accordingly, leave was required to file any further amended statement of claim.

- 80 On 22 April 2009 ASIC informed Mr Lindberg that it would seek orders to file and serve a FASOC and to vacate the current timetable for the proceeding. The need to vacate the trial timetable arose from the time likely to be required for AWB to provide non-party discovery and the effect this would have on the timetable for the subsequent interlocutory steps.
- 81 At the return date of the summons on 24 April 2009, the matter was adjourned for further hearing until 7 May 2009, with Robson J directing that ASIC file an application to file and serve the FASOC upon Mr Lindberg by 1 May 2009.
- 82 On 1 May 2009 ASIC filed and served its application and supporting affidavit material for leave to file and serve the FASOC and vacate the current timetable.
- 83 On 7 May 2009 ASIC's application to file and serve the FASOC and vacate the timetable was heard and determined by Robson J, who refused ASIC's application with reasons to follow.
- 84 On 14 May 2009 ASIC sought to adjourn the further hearing of its non-party discovery application pending further discussion between the parties. Robson J reserved his decision and allowed ASIC to file further submissions by 19 May 2009.
- 85 On 28 May 2009 Robson J delivered his reasons for judgment for refusing ASIC's application to file a FASOC (*Re AWB Limited* (No 3) [2009] VSC 209). In his reasons His Honour indicated that his refusal of ASIC's application to file a FASOC on 7 May 2009 was primarily to avoid the trial date being vacated, which he considered would be required due to the nature of the new allegations in the proposed FASOC.¹¹ However, His Honour adjourned ASIC's application for non-party discovery and stated that if a renewed application by ASIC to vacate the trial date were successful he would then entertain an application by ASIC to file a FASOC.¹²
- 86 On 4 June 2009 Robson J granted ASIC's application for non-party discovery against AWB and, as a consequence, vacated the trial date. His Honour further granted leave to ASIC to file a FASOC subject to any objections by Mr Lindberg to the form of the pleading.¹³
- 87 Mr Lindberg did raise objections to the pleading of the FASOC, which was heard and determined by Justice Robson. On 17 July 2009 his Honour granted leave to ASIC to file a FASOC by 24 July 2009, however he disallowed many of the proposed amendments, including all of the new contraventions, principally on the grounds that they breached the technical

¹¹ *Re AWB Limited* (No 3) [2009] VSC 209 at [2], [42]-[43]

¹² *Ibid* at [80].

¹³ *Re AWB Limited* (No 4) [2009] VSC 315

- rules of pleading.¹⁴ ASIC filed a FASOC in conformity with His Honour's judgment on 24 July 2009.
- 88 On 6 August 2009 ASIC filed an application for leave to file a second further amended statement of claim (**SFASOC**) incorporating the new contraventions, but re-pleaded to take account of the Court's concerns as set out in *Re AWB Limited (No 5)*.
- 89 On 28 August 2009 Robson J indicated the orders he proposed to make on ASIC's application to amend and gave preliminary reasons. His Honour indicated he would allow ASIC to file and serve a SFASOC substantially in the form annexed to the application of 6 August 2009, save for certain amendments which he disallowed.
- 90 On 18 September 2009 Robson J delivered his full judgment on ASIC's application to file a SFASOC. That judgment disallowed any amendments which sought to introduce into the proceedings the events that followed the fall of the Government of Iraq in 2003.¹⁵
- 91 On 9 October 2009 the Court of Appeal of the Supreme Court of Victoria refused ASIC leave to appeal from the decisions of Robson J delivered on 17 July 2009 and 18 September 2009.¹⁶ ASIC's application for leave to appeal primarily concerned Robson J's decisions not to permit the new contraventions to be introduced into pleadings in the current proceeding. During the hearing of the application for leave to appeal, ASIC indicated that it may issue a separate proceeding in relation to the disallowed amendments.
- 92 On 16 October 2009 ASIC wrote to Mr Lindberg to inform him that ASIC intended to file a new proceeding in relation to the matters that ASIC had not been allowed to introduce into the current proceeding.
- 93 The trial of Mr Lindberg was listed to commence on 19 October 2009. At the commencement of the trial Mr Lindberg asked the Court to require ASIC to commence any additional proceeding as soon as possible. In this regard, Robson J directed ASIC to file its new proceeding at the conclusion of its opening of the current trial and indicated that he would then give directions in relation to Mr Lindberg's application to stay the new proceeding as an abuse of the court's process. His Honour would adjourn the hearing of the trial until after the stay application was heard.
- 94 On 6 November 2009 ASIC filed the new proceeding against Mr Lindberg.

¹⁴ *Re AWB Limited (No 5)* [2009] VSC 258

¹⁵ *Re AWB Limited (No 7)* [2009] VSC 413

¹⁶ *ASIC v Lindberg* [2009] VSCA 235

- 95 On 11 November 2009 Mr Lindberg applied to stay the second proceeding and, on 18 November 2009, applied to strike out parts of the SFASOC in the first proceeding which had previously been allowed.
- 96 On 9 December 2009 Robson J acceded to Mr Lindberg's stay application and ordered a permanent stay of ASIC's second proceeding as an abuse of process.¹⁷ His Honour also delivered judgment refusing Mr Lindberg's application to strike out parts of the SFASOC.¹⁸
- 97 On 16 December 2009 ASIC applied for leave to appeal from the decision of Justice Robson J that was delivered on 9 December 2009 and which permanently stayed ASIC's second proceeding.
- 98 On 19 February 2010 the Court of Appeal of the Supreme Court of Victoria allowed ASIC's appeal, finding that there was sufficient distinction between the two proceedings and that ASIC's actions were reasonable on the facts. The Court of Appeal found that, in arriving at the conclusion that the second proceeding constituted an abuse of the Court's process, Robson J had mistaken the facts in important respects and failed to take into account material considerations.¹⁹
- 99 In relation to ASIC's conduct in instituting the second proceeding the Court said:
- “An important element in the decision to stay the second proceeding was his Honour's finding that ASIC acted unreasonably in failing to incorporate in the first proceeding the allegations made in the second proceeding. He said, ‘ASIC had all the material evidence that it now relies on to support the second claim as early as December 2007’ for ‘all the material evidence was disclosed in the Cole Report.’
- With respect, this conclusion of fault overlooked three matters. First, the evidence which Commissioner Cole received and set out in his report for the most part was not in the form that could establish a case in court. Secondly, Commissioner Cole's opinion was that the testimony he had heard was not sufficient to establish wrongdoing on the part of the respondent.
- Thirdly, his Honour did not direct attention to evidence which demonstrated that ASIC had properly employed its limited resources in establishing the existence of evidence to enable it to launch the first proceeding before it was barred by the effluxion of time. The evidence was given in a detailed affidavit by.... a senior manager employed by ASIC.”²⁰
- 100 The Court went on to say:
- “[The ASIC Senior Manager] made emphatically clear, both in his affidavit and under cross-examination, the explanation was quite different.

¹⁷ *Re AWB Limited (No 10)* (2009) 76 ACSR 181; [2009] VSC 566

¹⁸ *Re AWB Ltd (No 11)* [2009] VSC 567

¹⁹ *ASIC v Lindberg (No 2)* (2010) 26 VR 355; [2010] VSCA 19

²⁰ *Ibid* at [28] – [30]

It rested on the administrative imperative which ASIC faced – as do other regulatory authorities – to make decisions about investigative priorities and about the effective deployment of limited investigative resources. Nothing emerged in the course of the evidence to suggest that the decisions which ASIC took were other than reasonable in the circumstances. The account given by [the ASIC Senior Manager] afforded, in our view, an entirely reasonable explanation for the decisions which ASIC took, and for the sequence of events which occurred, between August 2007 and April 2009.

It is clearly in the public interest, and wholly consistent with ASIC's statutory obligations, that decisions about the institution of civil penalty proceedings be made with care. Although ASIC is not subject to a duty of fairness akin to prosecutorial fairness as such, it is obliged to discharge the duty of fairness of all Commonwealth agencies in civil proceedings, and to act in that regard as a 'model litigant'. It must not be forgotten that ASIC is acting, in some respects, in a role analogous to that of a prosecutor when it commences a civil penalty proceeding. In the circumstances which obtained at December 2007 it would have been quite improper for ASIC to have included the post-war allegations in its pleading. As [the ASIC Senior Manager] said, ASIC would not, and could not, do so until it had satisfied itself – by proper investigation – that such a case could be made out on admissible evidence.

There can, in our view, be no criticism of ASIC's decision in August 2007 to focus resources on those potential claims against the respondent (and the others) in relation to which the expiry of limitation periods was looming. Nor of the decision in the first part of 2008, to change the focus of the investigative work to possible criminal charges. Given what subsequently occurred – with the staying of five of the six civil penalty proceedings pending the outcome of criminal proceedings – this would seem to have been an entirely appropriate setting of priorities.²¹

- 101 On 24 February 2010 Robson J made orders that the first and second proceedings be consolidated.
- 102 On 24 March 2010 ASIC filed a Consolidated Statement of Claim (**CSOC**) in accordance with the Court's orders of 24 February 2010.
- 103 On 28 April 2010 Mr Lindberg notified ASIC of objections to various parts of the CSOC. Some of those objections were subsequently resolved (in principle) by correspondence between the parties.
- 104 On 20 July 2010 ASIC applied to file an amended CSOC (**ACSOC**), reflecting the changes proposed to meet Mr Lindberg's objections.
- 105 On 28 July 2010 Mr Lindberg applied to strike out key paragraphs of the CSOC, and resisted parts of ASIC's amendment application.

²¹ Ibid at [50] – [52].

- 106 On 8 October 2010 Robson J delivered judgment on both applications. ASIC was granted leave to file the ACSOC and Mr Lindberg's application to strike out was refused.²²
- 107 On 12 October 2010 ASIC filed the final form of the pleading, the ACSOC.

Stay of ASIC civil penalty proceedings lifted

- 108 On 26 May 2010 ASIC, based on its consideration of the evidence it had gathered, terminated its investigation into suspected contraventions of criminal provisions under the Corporations Act (namely, sections 184, 1307(1) and 1309). Following that decision—and given the AFP had announced that it had discontinued its investigation in August 2009—it was open to ASIC to make an application to the Court to lift the orders staying ASIC's civil penalty proceedings against Messrs Flugge, Ingleby, Geary, Stott and Long.
- 109 On 2 August 2010 Robson J, upon an application by ASIC, lifted the order staying the civil penalty proceedings against Messrs Flugge, Ingleby, Geary, Stott and Long and made associated interlocutory orders.

²² *Re AWB Limited (No 12)* [2010] VSC 453